Case Number: **1308977/2022**

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr A Foster	**v**	**Site Vision Surveys Limited**

Heard at: **Birmingham** On: **17, 18, 19, 20 and 21 June 2024**

Before: **Employment Judge Kenward**
Mr R Virdee
Ms L Wilkinson

Appearances
For the Claimant: **in person**
For the Respondent **Mr G Ridgeway, Advocate**

WRITTEN REASONS

JUDGMENT and oral reasons having been given at the hearing on 21 June 2024, with Judgment having been sent to the parties on 25 June 2024, and written reasons having been requested by the Claimant on 8 July 2024, the following reasons are provided.

Judgment

1. The Judgment of the Tribunal was as set out below.

   (1) The complaints of direct disability discrimination contrary to Equality Act 2010 section 13 are not well-founded and are dismissed.

   (2) The complaints of discrimination arising from disability contrary to Equality Act 2010 section 15 are not well-founded and are dismissed.

   (3) The complaint of breaches of the duty to make reasonable adjustments victimisation contrary to Equality Act 2010 sections 20 and 21 are not well-founded and are dismissed.

   (4) The complaint of harassment (related to disability) contrary to Equality Act 2010 sections 26 is not well-founded and is dismissed.

Introduction

2. This is a case where the Claimant's case originally appeared to be that his resignation amounted to a constructive dismissal which would have involved

establishing that his resignation had been brought about by his employer's breach of contract. However, the alleged treatment which the Claimant appeared to be relying upon for the purposes of bringing such a case had occurred after he had handed in his notice of resignation. By the time that the case came to trial, the Claimant was relying, instead, upon this alleged treatment over the course of his notice period of three months, as having amounted to disability discrimination, for which purposes the Claimant relied upon his condition of depression, low mood and anxiety as amounting to a relevant disability. The case theory set out in his Statement of Evidence was that his relationship with his employer had deteriorated as a result of his employer having been influenced by the "*fantasy of me creating a rival company*", and that this "*festered and created a highly toxic and unsafe atmosphere for me at work*" in which his employer, with awareness of his "*previous and ongoing mental health issues*", acted "*in the manner they did*" knowing that "*this would impact me mentally*".

3. The final hearing in this case took place on five days commencing on Monday 17 June 2024. The Judgment dismissing the Claim was announced at the end of the final hearing. Detailed oral reasons were also given. The written Judgment was dated 21 June 2024 and sent to the parties on 25 June 2024. Written Reasons were requested by the Claimant on 8 July 2024. I apologise for the subsequent delay in providing the Written Reasons of the Tribunal which has been caused by pressure of work.

Background and proceedings

4. On 20 July 2022, the Claimant gave three months' notice of his resignation from his employment by the Respondent as a Utility Survey Manager. His resignation took effect on 20 October 2022.

5. Early conciliation had already been commenced through notification being given to ACAS on 1 October 2022. The early conciliation certificate was issued on 3 October 2022. The ET1 Form of Claim was received by the Tribunal on 10 November 2022.

6. The only box ticked by the Claimant at section 8.1 of the ET1 Form of Claim was that in respect of unfair dismissal including constructive dismissal. No reference to discrimination was made in setting out the details of the Claim at section 8.2 other than stating that the Claimant's mental health had been adversely affected by his treatment by the Respondent.

7. On 16 November 2022, the Tribunal listed the case for a two-day final hearing of the complaint of constructive unfair dismissal and sent out standard directions which included requiring the Claimant to serve a Schedule of Loss by 26 December 2022.

8. On 17 November 2022, following receipt of the letter acknowledging his Claim, the Claimant e-mailed the Tribunal asking if it was just a case of waiting for the Respondent to file its Response. He made reference to an ongoing grievance investigation and raised queries regarding evidence. The final paragraph said that "*I feel my best way forward is to claim for injury to feelings as I had nine weeks of subtle abuse, comments, meetings with offers of payoffs, constant abuse of my work schedule, job role change with no explanation and then building up to the eruption of violence on my final day before gardening leave*".

9. The Claimant's Schedule of Loss was e-mailed to the Tribunal on 19 December 2022 and sought to include heads of claim in respect of injury to feelings caused by victimisation, harassment or discrimination.

10. Following receipt of the Response and initial consideration under rule 26 of the Employment Tribunals Rules of Procedure 2013, the Tribunal wrote to the Claimant on 2 February 2023, referring to the previous correspondence from 17 November 2022 and stating that the Claimant "*should submit an application to amend the Claim if he wants to pursue a discrimination complaint*".

11. The Claimant e-mailed an application to amend his Claim on 2 February 2023. He claimed that this was simply a relabelling of the facts set out in the ET1 Form of Claim. He stated that he wanted to "*include a discrimination complaint due to the injury to feeling ... Throughout my final months of employment*". He sought to explain that, on the ET1 Form of Claim, "*I didn't see any other option to suit my Claim apart from the constructive dismissal box*" (although, in fact, there is a separate box for claiming discrimination, including disability discrimination). He sought to explain the delay in making the application to amend his Claim on the basis that he had only received the ET3 Form of Response on 23 January 2023 and only received the letter from the Tribunal responding to his e-mail of 17 November 2022 on 2 February 2023. He also pointed out that he was still waiting to hear the outcome of his grievance.

12. The Respondent e-mailed the Tribunal on 3 April 2023 indicating that it did not object to the Claimant's application to amend his Claim. However, the Respondent was seeking further particulars, essentially to understand the basis upon which disability discrimination was being claimed.

13. The Claimant set out a list of the incidents being relied upon on 4 April 2023. He stated that he was seeking to amend his claim to claim for "*discrimination due to injury to feelings*".

14. On 5 April 2023, the Tribunal wrote to the Claimant on the direction of Senior Legal Officer Metcalf, stating that the "*types of discrimination … set out in the Equality Act 2010 do not include*" discrimination due to injury to feelings and the Claimant would need to identify the protected characteristic upon which

he was relying. The Claimant's reply made clear that he was relying upon the protected characteristic of disability.

15. In the absence of having heard from the Tribunal regarding the application to amend, and following a change of case handler, the Respondent wrote to the Tribunal on 1 June 2023 seeking to convert the final hearing, which had been listed for 19 and 20 June 2023, to a case management hearing, given the lack of clarity as to the complaints which were being pursued. The Respondent also now attached, filed as a precautionary measure, its Response to the proposed amendment of the Claim, and now suggested that it was objecting to the proposed amendment. This resulted in the Tribunal directing that the final hearing listed to commence on 19 June 2023 should be vacated and replaced by a case management preliminary hearing.

16. The preliminary hearing on 19 June 2023 resulted in the Case Management Orders made by Employment Judge Meichen which granted the Claimant permission to amend his Claim to include the complaints of disability discrimination and identified the complaints of disability discrimination which he was satisfied should proceed by formulating a List of Issues. The conditions being relied upon by the Claimant is causing him to have a relevant disability were identified as being those of depression, low mood and anxiety Employment Judge Meichen made it plain that permission to amend the Claim had been granted on the basis that any issues as to time limits would be dealt with at the final hearing. Moreover, he also made it plain and ruled that, in considering the Claimant's application to amend, he had considered the Claimant's e-mail of 17 November 2022 and determined that this could not be seen as an amendment application, so that the Claimant should be treated as having applied to amend following the Legal Officer's correspondence of 2 February 2023. In fact, the application to amend, on this basis, had been made on the same date.

17. The Case Management Orders of Employment Judge Meichen also identified that the constructive dismissal complaint being made by the Claimant was arguably misconceived in that the actions relied upon by the Claimant as giving rise to a constructive dismissal were all acts or omissions which had taken place after he had given notice. He directed that the Claimant should provide further particulars, by way of a chronological list of all of the matters which he was relying upon as having caused him to resign. Employment Judge Meichen listed the case for a five-day hearing to commence on 17 June 2024.

18. The Claimant complied with the directions in respect of his complaint of constructive dismissal with a document which referred to his Claim having been amended from a constructive dismissal complaint to a disability discrimination complaint with the result that he no longer wished to pursue the constructive dismissal complaint and only pursued the disability discrimination

complaints. A Judgment was subsequently issued dismissing the complaint of constructive dismissal on withdrawal by the Claimant.

19. On 14 July 2023, the Claimant e-mailed a revised Schedule of Loss. This e-mail also contained a disability timeline and information in relation to the medication and treatments he had been receiving for his alleged disability.

20. On 2 August 2023, the Respondent duly filed an amended Defence dealing with the complaints of disability discrimination.

21. On 8 September 2023, the Respondent indicated that it did not concede, based on the evidence provided, that the Claimant's condition amounted to a disability. Very fairly, this e-mail set out the respects in which it was considered that the evidence of the Claimant was lacking as to the issue of any relevant disability. This resulted in the Claimant, on 8 December 2023, e-mailing with more information in support of his disability.

Complaints to be determined

22. The List of Issues formulated by Employment Judge Meichen identified that the final hearing would need to determine complaints of direct disability discrimination contrary to Equality Act 2010 section 13 on the basis of the alleged treatment set out below.

"*5.1.1 Following the Claimant's resignation on 20 July 2022 changed his entire job role without explanation, in particular by moving the claimant from being office based to site based.*

5.1.2 Following the Claimant's resignation on 20 July 2022 forcing the claimant to work unsafely, in particular by requiring him to undertake long car journeys alone and to work alone on dangerous sites.

5.1.3 Following the Claimant's resignation on 20 July 2022 isolating him by forbidding colleagues from talking to him.

5.1.4 Following the Claimant's resignation on 20 July 2022 director Paul Cox shouted at him, called him names in front of the office and threatened to smash his face in".

23. The List of Issues also identified that it needed to be determined whether the same alleged treatment as that set out at paragraphs 5.1.1 to 5.1.4 of the List of Issues amounted to discrimination arising from disability contrary to Equality Act 2010 section 15.

24. The complaints of breaches of any duty to make reasonable adjustments contrary to Equality Act 2010 sections 20 and 21 were formulated in the List of Issues on the basis of identifying the provision, criterion or practice ("PCP") which the Respondent had which it was claimed caused the Claimant to be at a substantial disadvantage compared to someone without the Claimant's

disability. For these purposes, the List of Issues identified that the Tribunal had to decide whether the Respondent had the PCPs set out below.

"*7.2.1 Following the Claimant's resignation on 20 July 2022 changed his entire job role without explanation, in particular by moving the claimant from being office based to site based.*

7.2.2 Following the Claimant's resignation on 20 July 2022 forcing the claimant to work unsafely, in particular by requiring him to undertake long car journeys alone and to work alone on dangerous sites.

7.2.3 Following the Claimant's resignation on 20 July 2022 isolating him by forbidding colleagues from talking to him".

25. The List of Issues identified that the substantial disadvantage being relied upon was that it was the Claimant's case that these PCPs put him at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant "*found it more difficult to cope, he was stressed, could not sleep and was constantly tired*".

26. The List of Issues identified the adjustments which it was being claimed should reasonably have been made by the Respondent and which the Respondent allegedly failed to make as being the adjustments of "*not changing his job role, not requiring him to work on site, not requiring him to work unsafely, not requiring him to drive alone on long journeys and work at dangerous sites alone*".

27. The List of Issues also identified a complaint of harassment related to disability which needed to be determined at the final hearing with this complaint being that the Respondent subjected the claimant to harassment related to disability in that, "(f)*ollowing the Claimant's resignation on 20 July 2022 director Paul Cox shouted at him, called him names in front of the office and threatened to smash his face in with no provocation, in particular on or around 30 September 2022*".

Legal principles

Time limits in discrimination cases

28. In relation to discrimination complaints, section 123(1)(a) of the Equality Act 2010 provides that "*a complaint … may not be brought after the end*" of … "*the period of 3 months starting with the date of the act to which the complaint relates*" or "*such other period as the employment Tribunal thinks just and equitable*". Equality Act 2010 section 123(3)(a) provides that "*conduct extending over a period is to be treated as done at the end of the period*" and section 123(3)(b) provides that "*failure to do something is to be treated as occurring when the person in question decided on it*".

29. In *Bexley Community Centre v Robertson [2003] IRLR 434, CA*, the Court of Appeal provided the guidance set out below.

"*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*" (Auld LJ at paragraph 25).

30. In relation to the above guidance, in *Chief Constable of Lincolnshire v Caston [2010] IRLR 327, CA*, Sedley LJ gave the further guidance set out below.

"*In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised …. and Auld LJ is not to be read as having said in* ***Robertson*** *that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Thus, the burden of proof is on a Claimant to satisfy the Tribunal that any complaint was either made within the applicable time limit for doing so, or that it would be just and equitable to extend time*" (paragraph 31).

31. In *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA*, the Court of Appeal dealt with the argument that, in the absence of an explanation from the Claimant as to the reasons for not bringing a Claim in time and an evidential basis for that explanation, the Employment Tribunal could not properly conclude that it was just and equitable to extend time. The argument was rejected, as set out below.

"*I cannot accept that argument. As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard*" (paragraph 25).

32. In *British Coal Corporation v Keeble [1997] IRLR 336*, the Employment Appeal Tribunal suggested that the factors listed in Limitation Act 1980 section 33 might serve as a checklist of potentially relevant factors to take account in considering whether to exercise the discretion to extend time in

discrimination cases, with the position as to the applicability of Limitation Act 1980 section 33 being summarised below.

"*That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had co-operated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action".

33. The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "*customarily*" relevant in such cases (see *DCA v Jones [2007] IRLR 128*, paragraph 44).

34. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5*, Underhill LJ indicated concern that Tribunals had tended to use the factors relevant in dealing with any discretion to extend time in personal injury cases, as set out in Limitation Act 1980 section 33 as a checklist and advised that they should not do so. He went on to give the guidance set out below.

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

35. The fact that a Claimant has awaited the outcome of his or her employer's internal procedures before making a Claim is just one matter to be taken into account by an Employment Tribunal in considering whether to extend the time limit for making a Claim (see *Apelogun-Gabriels v London Borough of Lambeth [2002] ICR 713, CA*).

Disability

36. "Guidance on matters to be taken into account in determining questions relating to the definition of disability" has been issued under Equality Act 2010 section 6(5) of the Equality Act 2010. Where relevant, this Guidance (the "Equality Act 2010 Guidance") is to be taken into account by adjudicating bodies, including Employment Tribunals, in determining whether a person is a disabled person. The guidance gives illustrative examples.

37. A person is disabled within the meaning of Equality Act 2010 section 6(1) if he or she has "*a physical or mental impairment*" which has a "*substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities*".

38. Substantial is defined as meaning "*more than minor or trivial*" in Equality Act 2010 section 212(1).

39. In conducting the assessment as to whether the effect is "*substantial*", regard should be had the cumulative effect of this impairment (see Equality Act 2010 Guidance, paragraph B4) and the focus should be on what the Claimant "*cannot do or can only do with difficulty, rather than on the things that* (the Claimant) *can do*" (see *Goodwin v The Patent Office [1999] IRLR 4*, at paragraph 35 and Equality Act 2010 guidance paragraph B9).

40. Equality Act 2010 Schedule 1 paragraph 5 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect.

41. Equality Act 2010 Schedule 1 paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted or is likely to last for at least twelve months or is likely to last for the rest of the life of the person affected.

42. Paragraph 2(2) of Schedule 1 to the Equality Act 2010 provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is "*likely to recur*". In this legal context, "*likely to recur*" means that "*it could well happen*" (see paragraph C3 of the Equality Act 2010 Guidance and see also *Boyle v SCA Packaging Limited [2009] ICR 1056, HL*).

43. In the case of *Cruickshank v VAW Motorcast Limited [2002] ICR 729, EAT*, the Employment Appeal Tribunal held that the time at which to assess the issue of disability (whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act.

44. Moreover, the case of *All Answers Limited v W [2021] EWCA Civ 606, CA*, confirms that the date of the discriminatory act is also the material time when

determining whether the impairment has or is likely to have a long-term effect. Paragraph C4 of the Equality Act 2010 Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant.

45. The burden of proof is on a Claimant to satisfy the Tribunal that he or she has a relevant disability for the purposes of the Equality Act 2010.

Knowledge of disability

46. Under Equality Act 2010 section 15(2) an employer (A) cannot be liable for discrimination arising from disability if "*A shows that A did not know, and could not reasonably have been expected to know, that B had the disability*".

47. Equality Act 2010 Schedule 8 paragraph 20 provides that the duty to make adjustments does not arise if the employer "*does not know, and could not reasonably be expected to know*" that the employee has a relevant disability and "*is likely to be placed*" at the disadvantage in issue.

48. In *Pnaiser v NHS England [2016] IRLR 170, EAT*, it was explained that, in respect of knowledge of disability, these provisions "*do not require knowledge (whether actual or constructive) of the precise diagnosis of the disability in question*" but do "*require knowledge (actual or constructive) of the facts constituting the disability*" namely that "*the individual is suffering from a physical or mental impairment which has substantial and long-term adverse effects on his or her ability to carry out normal day-to-day activities*", and the "*question what a Respondent knew or should reasonably have been expected to know is one for the factual assessment of a Tribunal*".

49. Paragraph 5.15 of the Equality and Human Rights Commission's statutory Code of Practice on Employment states that employers must "*do all they can reasonably be expected to do*" to find out whether a Claimant has a disability. What is reasonable will depend on the circumstances. However, this is an objective assessment.

Burden of proof in discrimination cases

50. *Equality Act 2010 section 136* provides for a shifting burden of proof, as set out below.

"*(2) If there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

51. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong [2005] ICR 931*. This guidance has subsequently been approved by the Court of Appeal in *Madarassy v Nomura International plc [2007] ICR 867*, and

by the Supreme Court in *Hewage v Grampian Health Board [2012] ICR 1054* (at paragraphs 25-32). In *Efobi v Royal Mail Group Limited [2021] ICR 1263*, at paragraph 26, Lord Leggatt made it clear that *Equality Act 2010 section 136* had not made any substantive change to the previous law.

52. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of any other explanation, that the treatment was at least in part the result of the Claimant's relevant protected characteristic. At the first stage, when considering what inferences can be drawn from the primary facts, the Tribunal must ignore any explanation for those facts given by the Respondent and assume that there is no explanation for them. It can, however, take into account evidence adduced by the Respondent insofar as it is relevant in deciding whether the burden of proof has moved to the Respondent. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the impugned decisions or treatment.

53. The mere fact that the Claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy the first stage of the shifting burden of proof. It may be that the employer has treated the Claimant unreasonably. That is a frequent occurrence quite irrespective of the race or age or other protected characteristics of the employee and will not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society [2004] IRLR 799*, and *Zafar v Glasgow City Council [1998] IRLR 36*).

54. In *Madarassy v Nomura International plc [2007] ICR 867*, the Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the Respondent. Mummery LJ gave the guidance set out below.

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*".

55. *Madarassy v Nomura International plc [2007]* was approved by the Supreme Court in *Hewage v Grampian Health Board [2012] ICR 1054*, where Lord Hope stated that it was important not to make too much of the role of the burden of proof provisions as set out below.

"*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*" (paragraph 32).

56. It is not necessary in every case for a Tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the shifting burden of proof (see *Brown v Croydon LBC [2007] IRLR 259, CA*, at paragraphs 28 to 39).

Direct discrimination

57. Equality Act 2010 section 13 provides that a "*person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

58. Thus, direct discrimination takes place where a Claimant is treated less favourably, because of the relevant protected characteristic, than the employer treats or would treat others. This can involve comparing the treatment of a Claimant with that received by an actual comparator, or comparing the Claimant's treatment with that which would have been received by a hypothetical comparator.

59. Section 23(1) of the Equality Act 2010 provides that on a comparison for the purpose of establishing direct discrimination there must be "*no material difference between the circumstances relating to each case*". In the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL*, Lord Scott explained that this means that "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class*".

60. It is not a requirement that the situations have to be precisely the same. The existence of a different decision maker does not prevent the comparison being a valid one (see *Olalekan v Serco Limited [2019] IRLR 314*).

61. In *JP Morgan Limited v Chweidan [2012] ICR 268*, Elias LJ gave the guidance (at paragraph 5) set out below.

"*In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment*".

62. In every case the Tribunal has to determine the reason for the Claimant having been treated as he or she was. In *Nagarajan v London Regional Transport [1999] IRLR 572*, Lord Nicholls observed that "*this is the crucial question*". He also observed that in most cases this will call for some

consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

63. In *Gould v St John's Downshire Hill [2021] ICR 1, EAT*, Linden J made it clear that the Tribunal must consider the reason for the actions of the alleged discriminator, as set out below.

"The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious".

64. The focus is on the mental processes of the person who took the impugned decisions. In a direct discrimination claim, the Tribunal should consider whether that person was influenced consciously or unconsciously to a significant extent by the Claimant's relevant protected characteristic. The decision makers' motives are irrelevant.

65. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial (see *Nagarajan v London Regional Transport [1999]* and *Igen v Wong [2005] ICR 931, CA*).

Discrimination arising from disability (Equality Act 2010 section 15)

66. Discrimination arising from disability is defined by EA 2010 section 15(1) on the basis that "*person (A) discriminates against another (B) if, A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim*".

67. Accordingly, the Claimant must have been treated unfavourably. Moreover, the unfavourable treatment must also be "*because of something arising as a consequence of*" the Claimant's disability.

68. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, EAT*, Langstaff P explained that this involved considering causation at two different stages, as set out below.

"*The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" — and*

second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B".

69. In *Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT*, Simler P gave guidance as to the approach to EA 2010 section 15 as set out below.

"*In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence*".

70. In *Hall v Chief Constable Yorkshire Police [2015] IRLR 893, EAT*, the Employment Appeal Tribunal made it clear that an inquiry into 'motivation' is not the relevant question. The language of Equality Act 2010 section 15 does not require disability to be the cause of the treatment. The EAT held (at paragraph 42) that it is sufficient for disability to be "*a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment*".

71. In the case of *Pnaiser v NHS England [2016] IRLR 170, EAT*, which was a case where an employee had a significant amount of disability-related sickness absence and was seeking to link the treatment complained of to that absence, Mrs Justice Simler, president of the EAT, gave further guidance as to the correct approach to such a case. She explained that the expression "*arising in consequence of*" could describe a range of causal links. The statutory purpose of section 15 of the Equality Act 2010 was to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, subject to the availability of a justification defence. It will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

72. In *Charlesworth v Dransfields Engineering Services Limited [2017] UKEAT 0197/16*, Simler J made it clear that any connection that is not an operative cause or influence on the mind of the putative discriminator will not be sufficient to satisfy the causation test. Thus, it would not be sufficient where absence caused by a disability was merely part of the context and not an effective cause of the unfavourable treatment.

Duty to make reasonable adjustments (Equality Act 2010 sections 20 and 21)

73. Equality Act 2010 section 20 sets out the duty to make adjustments in the terms set out below.

> "*(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

74. Equality Act 2010 section 21 provides simply that a failure to comply with the above requirements is a failure to comply with the duty to make reasonable adjustments, and that a failure to comply with the duty gives rise to discrimination against the disabled person.

75. Guidance was provided by Employment Appeal Tribunal (Elias P) in *Project Management Institute v Latif [2007[IRLR 579, EAT*, as set out below.

76. "*The … Claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the Claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the Respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not*".

77. Further guidance was given by the Employment Appeal Tribunal in *Royal Bank of Scotland v Ashton [2011] ICR 632, EAT*, as set out below.

> "*It is not — and it is an error — for the focus to be upon the process of reasoning by which a possible adjustment was considered… [I]t is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.' This essentially brings us back to the fact that the duty to make reasonable adjustments is cast in terms of 'steps' that would have an efficacious practical benefit in terms of relieving the substantial disadvantage to which the Claimant is subjected by the PCP*".

Harassment

78. Equality Act 2010 section 26 includes the provisions set out below.

"*(1) A person (A) harasses another (B) if—*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect".

79. The Equality and Human Rights Commission: Code of Practice on Employment (2011) provides the guidance set out below.

"*7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.*

7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment".

80. Guidance as to the approach to be adopted by the Tribunal in considering whether the conduct complained of was related to the relevant protected characteristic was provided by the Employment Appeal Tribunal in the case of *Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT*, at paragraphs 24 and 25, as below.

"*However … the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question….*

Nevertheless, there must … still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the

Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be".

81. The Tribunal also notes the commentary in '*Harvey on Industrial Relations and Employment Law*' at paragraph L426.01 as set out below.

"*Even under the broader definition of 'related to', misbehaviour at work - even when it might properly be described as brutal or malicious - will not necessarily fall into the camp of unlawful harassment; it must still be 'related to' a relevant protected characteristic. Ultimately, the protection is against harassment that is, itself, a form of discrimination. Bullying is, of itself, not discrimination, except in the unhelpful sense that involves treating some individuals differently to others. The intention of the legislation is to give effect to the principle of equality. It is no part of the principle of equality that antisocial behaviour in the workplace per se should be punished, however unacceptable that behaviour might be in itself*".

Evidence

82. In terms of documentary evidence, the Tribunal was provided with a Bundle of 566 pages and a Supplemental Bundle of 32 pages.

83. In terms of witness evidence, the Tribunal had a Statement of Evidence from the Claimant who also gave evidence orally.

84. The Claimant also relied upon written Statements of Evidence from two former colleagues, namely John Sherlock and Steven Freeman.

85. The Respondent relied upon Statements of Evidence from three witnesses who all gave oral evidence, namely Paul Cox, a Director of the Respondent, Simon Bailey, another director of the Respondent, and Dawn Stringer, the Respondent's HR / account manager.

Findings of fact and conclusions as to disability and knowledge

86. The first issue that we had to decide was whether the Claimant had a relevant disability, within the definition of disability in the Equality Act 2010 section 6 at the time of the matters in issue proceedings.

87. In relation to the issue of disability, this was not a clear-cut case. One of the problems was the relative lack of medical evidence which partly reflected the fact that, for significant periods of time, the Claimant had not been seeking or obtaining medical treatment.

88. For the periods of time when we know that the Claimant did receive medical treatment, such as cognitive behavioural therapy in 2017, or when he was referred to BUPA in 2020, or when he apparently saw his GP in 2020, the Tribunal does not have evidence, in the form of any medical notes or discharge reports, as to what was established as a result of those appointments.

89. However, the Tribunal does have GP attendance notes from August 2017. The Claimant had a telephone consultation with his GP on 18 August 2017 in which he reported that he had been feeling low for two months because of a gambling addiction and stress at home. This resulted in an appointment being booked with a GP later that day. The history given was that he had been feeling low for three months having got into debt with gambling. He had managed to quit the gambling and was sorting out the debt. The consultation note refers to poor sleep and poor appetite and commented that the Claimant was keen to try antidepressants and psychological therapies. He was prescribed Fluoxetine and was due to be reviewed after three weeks if not sooner. There does not seem to be any evidence regarding a follow-up appointment. However, the cognitive behavioural therapy involved approximately ten sessions and would have taken place over a period of approximately four to five months, so it seems likely that any mental health condition certainly lasted for much of 2017.

90. The Claimant also told the Respondent in an e-mail sent to Paul Cox and Simon Bailey on 1 June 2020 that his mental health problems had first started in 2016. That e-mail sent in 2020 was clearly being sent by someone who was seeking to be open about his mental health condition, rather than somebody who was seeking to put any gloss or spin on the situation. He described himself as having been diagnosed with depression. We have not seen a formal diagnosis to this effect but, as stated, he had previously been prescribed antidepressants.

91. The Claimant certainly had a mental health impairment with symptoms suggestive of depression. The Claimant's e-mail said that he had been struggling for the last three years to get out of bed. This suggested that the Claimant's mental health condition had been causing significant issues as far as his day-to-day life was concerned going back to at least 2017. The Claimant's way of coping with his mental health issues, as was made clear in the e-mail, was through gambling. It was clear, reading the e-mail, that the gambling had not caused the mental health issues in the first place, but was a release used by the Claimant because of his depression, which may then have made the depression worse. However, it is also to be noted that the contemporaneous documentation in 2017 and 2020 was not suggesting that the Claimant's mental health condition had been caused or aggravated by work-related issues. Indeed, in the Claimant's e-mail of 1 June 2020, he had

specifically stated that "*I still feel fine to work and it's a welcome distraction and some routine and don't need any special treatment at all*".

92. The Respondent's way of thinking, as was indicated by the evidence of Simon Bailey, was to the effect that the e-mail simply alerted the Respondent to a gambling problem. This was a flawed way of thinking. Based on the information which the Tribunal has, as summarised above, the Tribunal was satisfied that the Claimant had a relevant disability in 2020.

93. However, we also had to be satisfied that the Claimant had a relevant disability in 2022. In this regard, there is again a paucity of evidence. However, we do have the Claimant's disability impact statement which is described as a disability timeline and which suggests that his mental health issues were having a significant impact on his day-to-day activities. His written evidence was to the effect that the impact on day-to-day activities had continued since 2020 and was still continuing in 2022. The Claimant described "*day-to-day struggles*" in terms of restlessness, lack of sleep, irritability, low confidence, low self-esteem, low self-worth and "*major anxiety (through leaving the house or major changes to routine)*". He described "*daily battles (mentally) to ensure I carry out family duties with my daughter and work duties*". He also described his memory being adversely impacted in that "*during conversations my trail of thought would disappear*". Although this is described in fairly general terms, there is some rather limited contemporaneous corroboration of this picture of mental health difficulties in the e-mails sent by the Claimant to Dawn Stringer where the Claimant makes reference to mental health issues, although he does not describe the issues in terms of impact on day-to-day activities.

94. The decision that we had to make was whether or not we accepted this evidence. Ultimately, on the balance of probabilities, based on our assessment of the Claimant as a witness, the Tribunal was prepared to accept the evidence in his written Statement to the effect that there was a substantial adverse effect on the Claimant's ability to carry out day-to-day activities and this impact had continued from 2020 and was still continuing in 2022.

95. The next issue we considered was that as to the Respondent's knowledge of any disability. The main source of any knowledge was the e-mail sent in 2020. This was to the effect that the Claimant had been having mental health issues for three to four years. He suggested that mental health issues had been identified as depression. He suggested that the mental health issues were having a significant impact on his day-to-day activities. There was no reason for the Respondent to doubt information in this e-mail for the reasons previously given regarding the Claimant's intentions in sending the e-mail. It is clear that the Respondent did not seek to doubt any of the matters being raised by the Claimant's e-mail, although it did seek, as appears from the evidence of Simon Bailey, to focus on the gambling issues. The Respondent

did nevertheless send the Claimant off to receive treatment from BUPA. We are satisfied that the Respondent had sufficient knowledge based on the content of the e-mail communications in 2020 and any subsequent discussion regarding those communications to have had actual knowledge that the Claimant had a disability in 2020.

96. The Respondent had very little information subsequently as to the position in respect of any disability, other than possibly through the e-mails that the Claimant sent to Dawn Stringer in September 2022. However, the Respondent already had enough information in 2020 to know that this was a long-term and ongoing condition. They had no information subsequently to the effect that this had ceased to be the case. Moreover, and alternatively, we were satisfied that the Respondent had constructive knowledge in that they had sufficient knowledge between 2020 and 2022 for it to have been reasonable for the Respondent to have made enquiries to satisfy itself as to whether the Claimant still had a disability when it knew in 2020 that the Claimant had a mental health impairment which at times caused him to struggle to get out of bed. That had resulted in him being referred to BUPA for treatment. There was no follow-up in relation to whether any treatment from BUPA had bought the condition under control. Even if any treatment had brought the condition under control, this would not necessarily mean that the Claimant did not still have a disability. Even if he was living with the condition, without treatment, this would not necessarily mean that it did not amount to a disability.

97. The Respondent's witnesses were asked during the course of the hearing whether or not they had considered making an occupational health referral, and it was clear that the possibility of doing so had simply not occurred to them, perhaps because the Respondent does not have arrangements already in place for making such referrals, or alternatively perhaps because the focus of the Respondent was on the gambling. The Tribunal has already suggested that this was a flawed approach. The Tribunal is satisfied that, based on what the Respondent knew in 2020 and subsequently, the Respondent had actual or constructive knowledge to the effect that the Claimant had a disability in 2022 in that, this was likely to be the case and, had the Respondent made such further enquiries, as it would have been reasonably for it to do, then it would have been likely that this would have confirmed that he did have a disability in 2022.

Findings of fact as to liability

98. The Respondent is a surveying company which employed the Claimant between 19th June 2005 and 20th October 2022.

99. The Claimant was employed as a Utility Survey Manager and subsequently as the Respondent's Managing Principal Surveyor (Utilities). The Claimant's

contract of employment for this post made it clear that the Claimant could be required to carry out any other duties considered within his skillset and to assist the smooth running of the business. The contract of employment also made it plain that other policies and procedures, including those in respect of confidential information and non-solicitation, were all contained in the company handbook and formed part of the contract of employment .

100. The Claimant's job involved being expected to travel to different client sites to conduct surveying services. When not on site, he would work in the Respondent's office.

101. By letter dated 20 July 2022, addressed to Simon Bailey and Paul Cox, the Claimant resigned with three months' notice. The letter gave no reason for the resignation but was in friendly terms, stating that "*I'd like to take this opportunity to thank you for all the years of support you've given me*" and "*I wish you both and Site Vision Surveys the best in the future*".

102. The Claimant had decided to submit his resignation on his last day before a period of annual leave. However, a suitable opportunity did not present itself to give his resignation letter to Simon Bailey. As a result, at the end of the day, the Claimant simply left his letter of resignation on the desk of Simon Bailey, who was not in the office at the time. However, on leaving the office, as a courtesy, the Claimant called Paul Cox, who was absent from work due to sickness, to tell Paul Cox that he was leaving. He informed Paul Cox that he would not be joining a competitor or going into a role that had a direct impact on the Respondent but at the time was unable to disclose the new role.

103. The Respondent accepted the Claimant's resignation on 22 July 2022, confirming that his final date of employment would be the 20 October 2022.

104. The Claimant was away on annual leave until Wednesday 3 August 2022 and also for the week of 8 August 2022. On his return to work, the Claimant found that he was scheduled, in the Respondent's work calendar, to work an increasing number of days working on site rather than in the office.

105. It does seem that the Claimant was undertaking more visits to clients than previously. A breakdown of the Claimant's work over the course of his notice period of three months shows that he attended site on 24 occasions. However, in the course of a subsequent grievance meeting on 12 October 2022, the Claimant accepted that "*a number of other staff had left*" and "*there was higher demand*". He agreed that he had no issue with being asked to do site work because he appreciated "*there was demand*" although his perception was that "*the demand could have been shared out*" more.

106. The Tribunal accepted the explanation of the Respondent that there was an uptake in work around this time which meant that the Respondent and its employees were extremely busy. This was compounded, over the period

concerned, according to the statement of Simon Bailey, by the sickness absence of Paul Cox and low surveyor numbers in terms of availability.

107. In the circumstances, the Respondent was entitled to assign the Claimant to duties which involved him traveling to client sites as this was a major part of his role. The Claimant had clearly become aggrieved about the situation and the uncertainty in terms of the short notice as to where he might need to travel for work, and the long distances which might be involved. However, the Claimant had also suggested that the office was full of "*snakes*" or "*back stabbers*" (there is a dispute over the exact word used but, either way, the meaning was clear) and that maybe he was safer away from them.

108. The Claimant was also aggrieved about the lack of notice, in circumstances where he no longer had access to the calendar so that he would, for example (as described in the subsequent grievance appeal meeting) find out on a Friday afternoon "*that on Monday you are on an overnight - when you have a young family this is difficult as it messes with family schedules*".

109. One of the trips away from the office was a job in Holyhead which was due to commence on all 15 August 2022 with the Claimant being aggrieved as to the arrangements for this trip. However, developments in relation to this job also seem to have been a factor which contributed to the distrust of the Claimant on the part of the Respondent in that the job was postponed on the first day without Simon Bailey being aware of this having happened until the Claimant posted a photograph of himself on Mount Snowdon, so that the Statement of Paul Cox complains that the Claimant did not inform anyone that the job had been postponed and didn't complete any work on a paid workday.

110. In or around mid-August 2022, the Respondent had become aware that the Claimant had seemingly set up his own surveying business, called Verification Surveys Limited, in June 2022. Paragraph 29(2) of the Employee Handbook contained provisions in respect of non-solicitation, non-competition and non-dealing.

111. Simon Bailey and Paul Cox had a discussion with the Claimant concerning this new business. During this discussion, the Claimant advised that it was not his business, that his wife had set it up and that the business was not active. It seems clear that Simon Bailey and Mr Paul Cox did not really accept this explanation as the Claimant was named as a Director of Verification Surveys Limited on Companies House and as having significant control of the company. The degree of distrust was amplified by the fact that the Claimant would still not say where he was going to work once his employment with the Respondent ended and Simon Bailey and Paul Cox seem to have further suspected that the name of the new company, Verification Surveys Limited, which would abbreviate to "VS", had been deliberately chosen so as to be similar to Site Vision Surveys, which was known in the industry as "SVS".

112. In fact, the Claimant's explanation would appear to have been inconsistent with that given in the grievance investigation meeting on 12 October 2022, where he stated that the new company "*was a flash in the pan idea when I was thinking about my future moves, then a job came up*". As part of the Claimant's grievance appeal, he sought to rely upon this new company as being dormant, although the subsequent grievance appeal decision letter pointed out that, at that time, the information on Companies House did not show the company has dormant.

113. Notwithstanding these misgivings, the Respondent decided not to pursue this matter further with the Claimant as he was currently in his notice period. The Tribunal concluded that this situation gave rise to a degree of distrust of the Claimant on the part of Simon Bailey and Paul Cox which was to infect their working relationship with the Claimant.

114. In or around early September 2022, it came to the attention of Simon Bailey and Paul Cox that the Claimant had been making various comments on social media about the Respondent. A number of employees had apparently approached Simon Bailey and Paul Cox advising that the Claimant had made a number of derogatory posts on Snapchat about Simon Bailey and Paul Cox, complaining that they were forcing him to travel to various client sites every day. One of the principal features of Snapchat is that pictures and messages, known as "snaps", are usually available for only a short time before they become inaccessible to their recipients. Thus, the subsequent grievance appeal decision confirmed that it had not been possible to investigate the extent of such social media posts beyond confirming "*that the media chats were relayed to our directors*". It followed that the Tribunal also had no evidence of these social media posts beyond the Claimant's acceptance that he had posted a picture on Snapchat with a caption to the effect that he was off to the seaside.

115. However, the point was that, whether accurately reported or not, Simon Bailey and Paul Cox had formed the impression, which was correct, that they were dealing with a significantly disaffected and aggrieved employee, and were concerned that this might have adverse implications within the workplace.

116. Simon Bailey and Paul Cox had a conversation with the Claimant, in or around early September 2022, as a result of being notified of these social media posts. During this meeting, Simon Bailey and Paul Cox asked the Claimant whether he was happy with work. In these circumstances, the Claimant was asked whether he would prefer to be paid in lieu of notice instead of working his notice period. During this conversation, the Claimant advised that he was fine and that he would rather be out on site than stuck in an office with "*backstabbers*". Simon Bailey and Paul Cox also suggested that the Claimant take a day off work to calm down.

117. This meeting seems to have resulted in the Claimant sending an e-mail to Dawn Stringer on 8 September 2022 in which he requested her presence at future meetings on the basis that he was "*concerned at what road these conversations are going down*". His e-mail referred to office of a "*pay off*" and of "*finding a resolution at an exit strategy*", with the Claimant suggesting that this was "*getting to the point of constructive dismissal*". However, the Tribunal was satisfied that all that had been referred to was the possibility of the Claimant not been required to work his notice, which would have involved a payment in lieu of notice. As the subsequent grievance appeal decision letter suggested, the Claimant appears to have misunderstood the proposal that was being made in that he was not being offered a payoff, rather what was simply being offered was what he was owed without the need to continue working until his notice expired. There would have been no obvious need for the Respondent to make any payment beyond this given that it was the Claimant who was resigning and his resignation letter had not sought to suggest that his resignation gave rise to any basis for complaint against the Respondent. The Claimant's e-mail also referred to the Claimant having "*now been told by both directors to keep away from the office tomorrow and have the day off*" with there being no explanation "*other than they have no job for me on site*". The Claimant ended the e-mail by asking "*has my job title / role changed*". Again, the Tribunal considered that it was likely that the Respondent's directors were getting cold feet about having the Claimant in the office when they had understandably come to be uneasy about any plans which he might have for when he had left the Respondent.

118. Dawn Stringer replied to the e-mail by stating that she was happy to attend any further discussion or meetings but could not otherwise comment on the Claimant's e-mail "*as I was not present or aware of the meetings*".

119. The Claimant was further aggrieved over being scheduled to carry out a job in Bournemouth and then London as when he requested to stay overnight this was denied as he was needed to collect another colleague (who could not drive) for the London job. The Claimant was concerned about the amount of driving hours that this would involve him having to do and telephoned Dawn Stringer to let her know that he did not want to have to do drive back to Rugby to pick up the other individual. Dawn Stringer took the Claimant's concerns to Simon Bailey who changed the schedule for the Claimant to be near to home for his job the following day so that he did not have to drive a long distance. As a result of Dawn Stringer's concerns over the issues as to possible tiredness, the tracking device for his vehicle was checked within his contracted hours and it came to light that his vehicle was, in fact, travelling towards Bradford and not home. Effectively, it seemed that the Claimant had used the opportunity, after he had finished in Bournemouth, to drive up to Bradford to carry out a personal errand. In his grievance investigation interview, the Claimant accepted that this was a personal errand in connection

with the seeking to purchase a campervan. It is difficult not to see the Claimant's issues with the amount of travelling that he was having to do for his job given the context that the Claimant himself chose, on a working day, apparently after he had completed his job for that day, to make a journey by car from Bournemouth to Bradford for reasons which do not seem to have been shared with his employer at the time.

120. In the circumstances, the Tribunal concluded that the Claimant's issue with the travelling that he was doing as part of his job was not really about the effect of the travelling on his mental health but was more about his perception that he was being treated unfairly in terms of his colleagues being treated more favourably in relation to the allocation of work. In his grievance appeal letter, the Claimant suggested that he had seen a similar thing happened to another employee (Liam Neil) in the period that he had worked up to his scheduled leaving date.

121. On 26 September 2022, the Claimant sent a further e-mail to Dawn Stringer, again asking if his job role changed on the basis that he was now working the vast majority of time on site, where it had been less than 20% of the time before he put in his notice. The e-mail further stated that other employees had been acting negatively towards him. The penultimate paragraph of the e-mail was in the terms set out below.

"*This negative attitude towards myself is having a massive effect on my mental ability to carry out works. The stress of not knowing where I'm going, long drives, big jobs etc with zero overtime are putting undue stress on me to try and get jobs done rushed*".

122. He concluded the e-mail by stating that "*a massive part of me is feeling victimised just because I'm leaving*".

123. Dawn Stringer replied on 27 September 2022 asking if the Claimant wanted her formally to investigate his concerns and, if so, suggested that he should come in to see her regarding his e-mail in order "*to give me some understanding of its contents before I start the process*".

124. The Claimant replied later that day in an e-mail which stated "*not so bad today, just very angry with the entire situation right now*". He said that "*I'll pop in for a chat tomorrow to talk through a few bits*".

125. The Claimant did attend the office on the following day which prompted an e-mail from Dawn Stringer to Paul Cox and Simon Bailey in the terms set out below.

"*AF has been in the office picked his job up and left without seeing, I have spoken to him and he said he could not stay as he was so angry about being put on a petrol station* (lone) *working, he said this is a safety issue and his comments were "I am sure they want to get me run over". I obviously have*

calmed him down and told him that this would never be the case and his safety was paramount, I asked him if I could change it and get him an assistant, but he said no they have to have special training??? AF also stated he is so tired that never sleeps in as he did this morning (maybe driving to Bradford had a role in this). I did not mention this to him, I just listened".

126. Shortly afterwards, Dawn Stringer e-mailed the Claimant in the terms set out below.

"*I would like to confirm that you will be attending a meeting with me tomorrow, that you requested today but felt you could not attend, I'm available all day. I'm concerned about your welfare, if you would like another member of staff to attend with you, please let me know and I will ensure they are available*".

127. The Claimant replied, twelve minutes later, saying "*I'll be there tomorrow*" and that he was sorry "*about today*".

128. On the following day, 29 September 2022, at 7.55 am, the Claimant e-mailed the Respondent about the problems which he had encountered on site. His e-mail was suggesting that there were some works that he could do and other works and he could not do. Fraser Line, the Respondent's Operations Manager, replied suggesting that the Claimant complete "*what you can, we will inform the client … of the onsite issues*".

129. The Claimant replied to Fraser Line, five minutes later, saying "*I've walked off site as I'm deeming it unsafe as public and contractors are all over the site*".

130. The Claimant subsequently raised a complaint with Dawn Stringer, on 29 September 2022, stating that he believed that he had been sent to work alone at a petrol station site and that, because he was alone, he was not able safely to direct traffic and was worried that he would be injured. He further advised that due to works on the site, he was not able to conduct a full survey.

131. Following the Claimant's e-mail on 29 September 2022, Dawn Stringer telephoned the Claimant to ask whether he would like to be placed on garden leave from 3 October 2022 for the remainder of his notice period as there were concerns about his happiness at work. The Claimant advised during this conversation that he was more than happy to take garden leave and would attend the office on 30 September 2022 to hand in his keys.

132. On 30 September 2022, the Claimant attended the office to hand in his work keys and to discuss arrangements for the start of his garden leave with Dawn Stringer.

133. It was not straightforward establishing precisely what happened on 30 September 2022, not least because the subsequent internal investigations into the Claimant's grievance and appeal did not involve interviewing most of those who were witnesses to various parts of the incident. Moreover, the

Statements of Evidence prepared for the Tribunal hearing largely did not deal with the detail of events, although on the Respondent's side this appeared to be on the basis that it was an accepted fact that an unacceptable incident occurred, so that it was best saying as little as possible about the incident. However, there was not a lot of dispute about much of the chain of events on the day. A fairly detailed description of events on 30 September 2022 was provided by Dawn Stringer in her grievance investigation interview on 8 November 2022 and in her oral evidence to the Tribunal. The Tribunal formed the view that, of the witnesses from whom the Tribunal had heard oral evidence, Dawn Stringer's recollection of events was likely to be the most accurate. Indeed, the Claimant, in his grievance interview, stated that "*Dawn is one person I could trust, right or wrong*" and she "*didn't seem to have allegiances*".

134. The relevant events began with the Claimant speaking, in the car park, for a few minutes, to two other employees who were having a cigarette break, one of whom was Sam Maddison, who had just got married. This had prompted Paul Cox, from a window, to summons Sam Maddison inside and tell him that he should not be having conversations with the Claimant in the carpark. This was as described by Dawn Stringer, in her grievance investigation interview. She explained that the issue of members of staff talking and having cigarette breaks in the car park, which was overlooked by the office, was an issue which was getting out of hand and with which Paul Cox had previously made clear his unhappiness.

135. Dawn Stringer had gone back to her office, only to find that the computers were not working, which caused her to go to the Claimant's office to check the server. When she did so, the Claimant, who was back in his office, asked her "*why Sam isn't allowed to speak to me*". Dawn Stringer stated that the Claimant "*said if this keeps happening then he will leave, and I can let Paul know*". In her oral evidence, when cross-examined by the Claimant, Dawn Stringer replied to the Claimant that "*you asked me to go and say to Paul Cox that you would down tools if any more telling employees not to talk to you*". Indeed, in answer to questions from the Tribunal, Dawn Stringer made it clear that she had said to the Claimant at this point "*do you really want me to*", with the Claimant replying "*yes as otherwise I am leaving*". Dawn Stringer then went to tell Paul Cox what had been said by the Claimant. This clearly caused Paul Cox to become very angry with the Claimant in that he told Dawn Stringer that it was "*all lies*" and went straight to the Claimant's office. He was followed by Simon Bailey, supposedly "*to make sure the situation was ok*". The Claimant described them appearing in his office as a "*herd of elephants come charging down*". Dawn Stringer was not present for the initial verbal exchanges. When asked, in the grievance investigation interview, as to what was said, the Claimant stated that he "*could not recall exactly*". He described lots of "*words being said in a short period of time, raised voices, I only*

remember bits and bobs that lots of it was you're lying, you're a gossip", to which the Claimant clearly responded ("*give me some facts*"). It seems that, having lost his temper, Paul Cox had a go at the Claimant in relation his belief that the Claimant had gone on a lengthy personal errand (the trip to Bradford) on a work day, during working time (whereas the Claimant's position was that it was after his working day had finished). The Claimant conceded, in his grievance investigation interview, that "*Simon to be fair didn't say a word, he stood and watched*". The Claimant further suggested, in the same interview, that maybe "*it was just Paul unloading of pent-up tensions or frustrations he has had for last how many weeks*". It was not a long argument and it all happened very quickly in that, by the time the Dawn Stringer arrived on the scene, Simon Bailey, who had not really contributed to the argument himself, had diffused the situation and Paul Cox was leaving. However, at this point, she heard Paul Cox saying to Simon Bailey (rather than the Claimant himself) "*I am close to punching his lights out*". Although not said directly to the Claimant, the Claimant had heard this being said and shouted to Dawn Stringer "*are you hearing this*". The incident had effectively ended by this stage with Paul Cox and Simon Bailey leaving the scene. Having got back to his office, Paul Cox called his wife and asked her to come and collect him from the office, which she did. In her grievance investigation interview, Dawn Stringer had added that "*in PC defence, he is very poorly … and is not himself*". The Claimant took some time to calm down in his room, then went to see Dawn Stringer. She said to the Claimant that she "*needed to know what you want to do about this*". By this time, she had already been in touch with the external HR consultants, Citation, saying that she needed advice. At some point, according to Dawn Stringer, Simon Bailey had apologised to everybody in the office and said that "*this is not the norm*" and anyone affected could have time off work.

136. At 16.24 pm on 30 September 2022 the Claimant e-mailed Dawn Stringer in the terms set out below.

"*Obviously, the last few days / weeks have been far from ideal and today just blew up through no fault of my own other than challenging something that really isn't allowed or acceptable in my opinion. The remarks made about me, being shouted at, called a gossip (when I speak to about 3 people at work!) Being called a liar repeatedly along with many other names is far from ok. The threats of violence towards me (in front of around 10 members of staff) really tops it off. I understand frustrations, assumptions have been made to my future plans which are so wide of the mark it's beyond belief ….*

I've carried out all duties put by way during the notice period until I feel I need to push back against the victimisation over travel, job types and lack of help when I raise health and safety concerns. Only to be told I'm causing trouble.

Really didn't envisage me wanting to leave a job for the good of my health and the good of my family would cause so much trouble. I'm sorry you've been caught in the crossfire and I'm grateful for all your help recently and over the years"

137. A large part of the e-mail related to the Claimant's concern over the use of trackers installed on vehicles amounting to a breach of privacy. Although the Claimant referred to "*wanting to leave a job for the good of my health*", and to victimisation, the complaints of disability discrimination which he was to make subsequently by way of amending his Claim were not made.

138. This e-mail was followed by an e-mail to Dawn Stringer which was described as a formal grievance regarding allegations that:

(1) on 30 September 2022, Paul Cox shouted at the Claimant, made slanderous comments about the Claimant, threatened the Claimant with violence and called the Claimant a gossip and a liar;

(2) that the Claimant had been a victim of abuse over the last nine weeks "*whether … verbal to me, about me to colleagues or my work schedule*" with the "*breaking point*" being reached through "*giving other employees that happened to be my friends ultimatums that they are forbidden from speaking to me*";

(3) that the Respondent had shown "*complete disregard for my physical and mental well-being by forcing me to lone work and work hundreds of miles away with less time than other surveyors to complete work*"

139. The e-mail suggested that "*this anger towards me has come from a place in fantasyland quite frankly*".

140. In making a complaint about the conduct of Paul Cox on 30 September 2022, the Claimant's e-mail referred to the names of eight witnesses of events from that day.

141. On 5 October 2022, Simon Bailey wrote to the Claimant and invited him to attend a grievance meeting on 12 October 2022 to discuss his complaints. The Claimant was advised that, in the interests of impartiality and objectivity, the Respondent had asked an independent consultant to facilitate and conduct the meeting, Simon Bailey would also be attending the meeting and, following the meeting, would make a decision on the matter which would be provided in writing.

142. The Claimant attended the meeting on 12 October 2022 as arranged. At the end of the meeting, the Claimant was told by the consultant that he would "*go away and investigate some of the things you have raised and will come back to you with a decision … made by Simon*".

143. A grievance investigation meeting did also take place with Dawn Stringer on 8 November 2022. However, it does not seem that anyone else was interviewed, such as Paul Cox, or anyone else in attendance on 30 September 2022. Indeed, Simon Bailey himself was clearly a witness to much of the events from that day about which complaint was being made.

144. On 21 December 2022 Simon Bailey wrote to the Claimant stating that he was "*writing to confirm the outcome of the grievance meeting held … on 12th October 2022*" and to apologise for the delay in doing so. Simon Bailey stated that he had attended the meeting as the decision-maker, although the meeting had been conducted by the external consultant.

145. The letter sought to deal with the various concerns raised. In relation to the concerns regarding the conduct of Paul Cox on 30 September 2022, the conclusions set out in the letter were as below.

"*I agree that the conduct of Paul Cox on Friday, 30 September 2022 was below par and far from the levels of professionalism I would expect from my colleagues. I did address this with him at the time. I do feel he allowed issues during the notice period to fester, and this frustration came out on this date*.

These issues included comments made by other colleagues to us that you were discussing your concerns about work / travel and management, including on social media platforms and of course you setting up your own business, potentially in competition.

This matter should have been formally addressed rather than put aside, as you were in your notice period".

146. In relation to the Claimant's belief that he had been "*victimised over travel, job types and lack of help when raising health and safety issues*", the conclusions included those set out below.

"*You are aware that we are a nationwide company and employees are required to travel substantial distances including yourself whilst employed. In the example you gave about travelling to Bournemouth, back to Rugby and then to London the following day, we felt that was reasonable bearing in mind the workload we had. However, we considered your well-being concerns and change to workload accordingly"*.

"*It was frustrating to learn that during this time, you also travelled to Bradford from Bournemouth, on a personal errand which would negate your concern about your well-being due to long distance travel*"

"*I appreciate that you had to do more site work during the notice period due to staff shortages and workload, which you acknowledged you accepted. You also made comment to me that you want to be on site to be away from the office environment. As part of your management role, you were expected to*

be on site and this requirement has never changed. Our expectations of you did not change during the notice period and I do not accept you were victimised in terms of job types".

147. The outcome of the grievance was stated to be that "*your grievance has been partially upheld in relation to Paul Cox's conduct on Friday 30th September 2022 however, I am unable to uphold the other elements of your grievance*".

148. On 3 January 2023, the Claimant sent a detailed e-mail seeking to appeal against the grievance outcome.

149. On 11 January 2023, Dawn Stringer wrote to the Claimant making arrangements for an appeal meeting to take place. The arrangements involved a different consultant facilitating and conducting the meeting so as "*to ensure that this matter is dealt with as objectively as possible*", although Dawn Stringer stated that "*I will also attend this hearing and following this hearing, will make a decision in this matter, which I will provide to you in writing*".

150. Obviously, it was rather less than ideal that the appeal decision was to be made by an employee who seems to have been the only witness interviewed as a result of the earlier grievance investigation. Moreover, it is also less than ideal that the decision-maker was an employee who was at a lower level of seniority (albeit, the Accounts / HR manager) within the Respondent company than the Director who had made the decision.

151. The grievance appeal meeting duly took place on 19 January 2023. On 9 February 2023, Dawn Stringer wrote to the Claimant with the outcome of his grievance appeal.

152. The only part of the Claimant's grievance appeal which was upheld was in relation to the incident on 30 September 2023, in that Dawn Stringer stated that she upheld "*the point of your original grievance relating to Paul Cox's outburst*". In relation to this incident, Dawn Stringer referred to there being mitigating circumstances in relation to the conduct of Paul Cox, but stated that "*I've spoken to Paul Cox he acknowledges his outburst occurred, agrees that should never have happened and assured me that this will never happen again*". It was confirmed that "Paul apologises to you and the company for his outburst".

Conclusions as to liability

Duty to make adjustments

153. The Tribunal turns to the complaints themselves, beginning with the complaints of breaches of the duty to make reasonable adjustments. These complaints depend on identifying a provision, criterion or practice (or "PCP")

which placed the Claimant at a substantial disadvantage compared to someone without the Claimant's disability.

154. The List of Issues identifies the various alleged circumstances, or PCPs, relied upon by the Claimant as having placed him at such a substantial disadvantage. These PCPs relate to the period after the Claimant had given notice on 20 July 2022.

155. The first PCP is based on the Claimant's entire job role having changed without explanation so as to move from being office-based to being site-based. Ultimately, we were not satisfied that there was such a PCP which had such an effect. It appeared that, to some extent, both working in the office and working on site, were a requirement of the Claimant's job, both before his promotion in March 2022, and after, and before he gave notice in July 2022, and after. Certainly, based on a percentage analysis of the position before and after July 2022, the Claimant appeared to be spending more time working on site than before, but this could not be said to have changed his entire job role. Part of his job role continued to be office-based. The Respondent's case was that whether the Claimant was office-based or site-based on a particular day was based on its business needs. The Claimant did not satisfy us to the contrary. Thus, it cannot be said that there was a PCP which essentially involved him being site-based to the extent that this constituted his entire job role having changed.

156. The second PCP relied upon was that of being forced to work unsafely through being required to undertake long car journeys alone and / or being required to work on dangerous sites, The Tribunal was not satisfied that there was a PCP to such effect. Firstly, it was not the case that the Claimant was being forced to undertake unsafe work. Whilst he was certainly required contractually to undertake the work which was assigned to him, it was part of his job, if he found any part of that work to be unsafe, to bring that to the attention of his employer. The Tribunal is satisfied that, in those circumstances, the position of the Respondent was that it was entirely open to him to 'down tools' and not proceed with the project concerned or to take steps such as making it safe to proceed with the project. Indeed, the Claimant was responsible for risk assessing sites himself, and such a responsibility inevitably involved not continuing with work if the risks had been assessed as being such as could not be appropriately managed or controlled.

157. As far as long car journeys were concerned, the Claimant lived in the Midlands, and there were various examples of journeys to places such as Holyhead or Bournemouth or Swaffham. However, these are the sort of journeys which drivers undertake in the course of their employment on a regular basis, whether alone or otherwise. There was no suggestion that it was not possible to take breaks during these journeys. As such, it could not be said that the Claimant was being forced to undertake unsafe long car

journeys. Indeed, the Claimant himself was not averse to taking long car journeys where he considered it necessary to do so, in that the Tribunal had the evidence of the Claimant deciding to drive from Bournemouth to Bradford, and the Claimant presumably would not have done so had he considered it unsafe to do so.

158. As far as the third PCP is concerned, this related to it being suggested that there was a PCP of isolating the Claimant by forbidding colleagues from talking to him. The Tribunal accepted that the Claimant may have genuinely believed this to be the case. Indeed, this seems to have been the misunderstanding at the heart of the incident on 30 September 2022 in that Paul Cox seems to have got the impression that the Claimant was suggesting that colleagues, or at least Sam Maddison, had been told not to talk to him. However, the only evidence that the Tribunal really has is that, based on our findings of fact, the colleague concerned was told that he should not be conducting a conversation with the Claimant in the car park. Moreover, it seemed that this reflected a general approach on the part of the Directors, or at least Paul Cox, which was to discourage employees from having private conversations during work time in the car park, whether for the purposes of having a cigarette or so as to escape the scrutiny of an office which was clearly fairly crowded. The Tribunal could not be satisfied that, beyond this limited extent, any employees had been forbidden from talking to the Claimant. Moreover, the Tribunal was not satisfied that this was a practice that was in place so as to isolate the Claimant. It is fair to say that the Claimant complains about having experienced some hostility. However, in relation to any evidence as to hostility from some colleagues, the Tribunal did not really have any evidence from which to draw any conclusions as to the cause of any hostility, still less that it was orchestrated, or part of any PCP, or was for the purpose of isolating the Claimant.

159. It follows that, having found that none of the three PCPs which are in issue in this case were actually in place, the issue of whether the Claimant was substantially disadvantaged by the PCPs in issue does not arise, still less the issue of whether the Respondent knew of any such specific disadvantage. It further follows that no duty to make adjustments arose in terms of the adjustments set out in the list of issues.

160. However, for completeness, based on the findings of fact previously set out, the Tribunal would not have been satisfied that these further elements of the cause of action of breach of any duty in respect of making adjustments had been satisfied.

161. Based upon the previously set out findings of fact, the Tribunal would not have been satisfied that the arrangements which the Respondent had in place, or the circumstances which existed, in relation to the Claimant's job, however those might be described by way of a PCP, caused the Claimant to be placed

at a substantial disadvantage in comparison to someone without his disability. The disadvantage relied upon, which was claimed to be substantial, was said to arise from the Claimant finding it difficult to cope, being stressed, not sleeping and being constantly tired. The Claimant's mental health condition had clearly flared up in August 2017 and June 2020. However, on both of those occasions, the contemporaneous documentation suggests that this was not work-related, but was caused by factors outside the Claimant's job. In fact, the position appeared to be quite the reverse to being work-related in that the Claimant's e-mail of 1 June 2020, had specifically stated that "*I still feel fine to work and it's a welcome distraction and some routine and don't need any special treatment at all*". The Claimant's evidence as to disability effectively relied upon there being an impact on his day-to-day activities caused by his mental health condition, including the effect of restlessness and lack of sleep, dating back at least to 2020, so that any such impact or symptoms pre-dated any issues in respect of the Claimant's working environment in August and September 2022. There were no relevant medical attendances in July and August 2020; still less any medical evidence to the effect that any ongoing symptoms from which the Claimant was suffering were work-related or exacerbated by workplace issues. The Tribunal was not really satisfied that the Claimant was finding it difficult to cope in that he was, by this time, extremely experienced and well used to carrying out the sort of jobs on site which he was carrying out in August and September 2022. The Tribunal considered that the main issue had become the Claimant's perception and deep sense of grievance to the effect that he was being unfairly treated. This resulted in a mindset where the Claimant made complaints: about the length of travelling involved, notwithstanding the fact that he was content to make lengthy personal journeys on the top of his working day when it suited him; and in relation to on-site issues such as safety, notwithstanding the fact that he had the necessary level of responsibility, seniority and experience not to have to proceed with jobs where it was inappropriate or unsafe to do so.

162. The same reasoning would also have been relevant to the issue of knowledge of any disadvantage, had it still arisen. Clearly, establishing knowledge on the part of the Respondent of any substantial disadvantage would involve establishing substantial disadvantage in the first place. The communications which were taking place between the Respondent and the Claimant certainly established that the Claimant was disaffected, although the root cause of this seems to have been his perception that he was being unfairly treated, with this also being in the context of an employee who had announced his impending departure and in a context where the issue of the Claimant's post-termination plans had caused the working relationship between the parties to become an increasingly uneasy one. The extent of any knowledge of any disadvantage connected with the Claimant's mental health condition was limited. Certainly, Dawn Stringer had been concerned about the issue of

tiredness in relation to the Claimant's complaints about being expected to go from Bournemouth to London via Rugby, but this was not an issue which appeared to be specifically connected to the Claimant's mental health condition, but was more in relation to the unreasonable amount of travelling involved. The issues about which the Claimant was complaining were then more specifically linked with the Claimant's mental health condition in his e-mail of 26 September 2022 which complained about the issues giving rise to stress, although the focus of the complaint continued to be on the deteriorating working relationship and the Claimant's belief that "*a massive part of me is feeling victimised just because I'm leaving*". However, the simple point is that, on the conclusions arrived at by the Tribunal, it could not be said that the requirement was met in respect of the Respondent having knowledge that the alleged PCPs in issue were causing the Claimant to be placed at the alleged substantial disadvantage relied upon by the Claimant.

163. Finally, for the sake of completeness, the Tribunal would not have been satisfied that any duty to make adjustments had arisen or been breached. The broad thrust of the findings of fact, as previously set out above, is that the Respondent had acted reasonably both with regard to the working arrangements put in place for the Claimant, and in relation to adjusting those arrangements when the possible need arose. Thus, for example, in relation to the issue of the amount of driving involved in having to go to a job in London from Bournemouth via Rugby, the Respondent effectively removed this requirement. The Claimant's e-mail of 26 September 2022 was responded to by Dawn Stringer in a sympathetic way by seeking to communicate further with the Claimant so as to get to the bottom of the situation, with this ultimately leading to the adjustment of placing the Claimant on garden leave, which would have had the effect that any relevant PCPs in relation to his working arrangements would have ceased to be in place or causing any disadvantage. Indeed, a similar such solution, which would have had the same effect, had been proposed by Simon Bailey and Paul Cox in early September 2022, when they had proposed that the Claimant could accept a payment in lieu of notice which would obviously have also meant that he would not have been subject to any of the PCPs in place for the remainder of his notice period.

Direct discrimination and discrimination arising from disability

164. The Tribunal turns to the complaints of direct discrimination and discrimination arising from disability. The first complaint alleges that the Claimant was treated unfavourably or less favourably through his entire job role having been changed without explanation and, in particular, through being moved from being office-based to site-based. The Tribunal has already set out its conclusions to the effect that it cannot be said that his entire job role had changed in this way, although it would certainly seem to be the case that, over the period in time after he had given his notice to the Respondent, the

Claimant did work significantly more on site-based tasks rather than office-based tasks. However, equally, the Respondent's case was that this was driven by its business needs, which the Tribunal accepted. Thus, on the evidence before us, the Respondent was simply assigning the Claimant work, as it was entitled to do, in accordance with his contract of employment, and his job role, which potentially involved both doing office-based work and site-based work, and was doing so in accordance with its business needs. As such it cannot be said that this was detrimental treatment. Further or alternatively, the Tribunal was not satisfied that there was evidence from which it could conclude that there was less favourable treatment on the grounds of the Claimant's disability. It is not meaningfully disputed by the Claimant that, over the period in question, the level of demand which the Respondent was seeking to meet and the level of availability of its surveyors was such that there was more site-based work than usual which needed to be fulfilled. Thus, the Tribunal was satisfied that it was inevitable that the Claimant was required to do more site-based work during this period. Rather, the Claimant's complaint was that site-based work was unfairly distributed. This was a fairly generalised complaint in relation to which neither side really embarked upon the sort of analysis which would have enabled it to have been established that such a perception was well-founded. In any event, even if, for the sake of argument, the Claimant was doing more site-based work than colleagues, a purely numerical analysis of the allocation of work potentially ignored the potentially relevant factors which would have been behind each work allocation decision, with those factors potentially varying from one work allocation decision to the next. Still further, the Tribunal was not satisfied that there was the material before the Tribunal from which it could conclude that any such alleged less favourable work allocation was on the grounds of the Claimant's disability. This was his case theory, namely that he was effectively being victimised by being given more site-based work because of his disability in the sense that the Respondent allegedly acted on the basis that giving the Claimant such work would adversely impact his mental health. The Tribunal was not satisfied that the claimant had satisfied the initial burden of proof in that the Tribunal was not satisfied that there was evidence from which the Tribunal could infer that there was less favourable treatment on the grounds of disability. Further or alternatively, the Tribunal accepted the thrust of the Respondent's evidence to the effect that, insofar as there was any numerically disproportionate allocation of site-based work to the Claimant, such decisions were driven by business need. It is certainly possible that, in making allocation decisions based on its business need, the Respondent was influenced by the fact that the Claimant was an employee who was leaving soon, whose loyalty was considered to be in issue, and who had at one point expressed an aversion to the office environment. Against such a background, having the Claimant on site, rather than in the office, may have been a convenient

solution to the concerns that existed, but the Tribunal was satisfied that it was not because of his disability.

165. Moreover, if, for the sake of argument, there was unfavourable treatment through allocating site-based work to the Claimant, the Tribunal was not satisfied that this was treatment which arose from his disability. The Claimant's case, as set out in the List of Issues, was that the "*something*" which arose from his disability, for the purposes of the complaint of discrimination arising from disability, was that he could not cope with the stress and so resigned on 20 July 2022. In the first place, the Tribunal was not satisfied that the evidence established that the Claimant had resigned on 20 July 2022 because of not being able to cope with any stress. Indeed, on the findings of fact and conclusions set out elsewhere above, the Tribunal was not satisfied that the position was that the Claimant could not cope with the stress after 20 July 2022. In so far as the claimant's case, as set out in the List of Issues, invited the Tribunal to conclude that any unfavourable treatment involved in the allocation of work was because the Claimant could not cope with stress, the Tribunal was not satisfied that this was the position at all. The treatment involved in any allocation of work was not because of any stress or inability to cope on the part of the Claimant. In so far as there may have been the connection between the Claimant's resignation and the subsequent allocation of work, the Tribunal was not satisfied, based on our findings of fact, that the Claimant's resignation arose from his disability.

166. The second complaint of direct discrimination or discrimination arising from disability relates to the Claimant allegedly been forced to work unsafely through being required to undertake long car journeys alone and work alone on dangerous sites. We have already set out our conclusions in relation to whether there was any such requirement or whether the Claimant was forced to do this, in the context of dealing with the complaint of a breach of the duty to make reasonable adjustments. The same conclusions apply in relation to whether he was being treated in this way. It follows that the Tribunal was not satisfied that any driving involved in the Claimant's job or working on particular sites, whether alone or otherwise, amounted to subjecting him to a detriment. It was work that he could contractually be required to do. If the work was unsafe in any way, then, given his senior position, he was in a position not to do the work, or to put in place the arrangements by which the work could be made safe. There was also evidence that, in relation to concerns about driving and tiredness, the Respondent did change the Claimant's arrangements when those concerns were brought to its attention, such as regarding the original arrangements which involved him having to do work in Bournemouth and then London. Consequently, the Tribunal was not satisfied that it could be said that the Claimant was treated less favourably in this regard than a non-disabled employee would have been or that any treatment was treatment which arose from his disability.

167. The Tribunal then considered the complaints of direct discrimination and discrimination arising from disability in relation to the allegation that the Claimant was isolated through colleagues being forbidden from talking to him. Again, our previous conclusions as to whether there was a provision, criterion or practice to such an effect are also relevant to these complaints. However, the Tribunal also considered this issue by looking at the position of the colleague who was certainly told by Paul Cox that he should not be talking to the Claimant in the car park, with the Claimant having understood, genuinely no doubt, that the instruction went beyond this, albeit the Tribunal was not satisfied that the instruction did go beyond that. In so far as this was less favourable or unfavourable treatment, the Tribunal could not be satisfied that a hypothetical non-disabled comparator would have been treated any differently. The Tribunal looked at somebody who was in the same position as the Claimant but not disabled. In other words, somebody who had given in his notice, set up a company which the Respondent was concerned might be a potential competitor, and who had been thought to be saying disrespectful and non-complimentary things about the Respondent on social media. The Tribunal thinks it is likely that such a hypothetical comparator would have been treated in exactly the same way, particularly if Paul Cox was somebody who, in any event, had an issue with employees having private conversations, or appearing to do so, in the car park during working time. Similarly, telling the employee in question that he should not be talking to the Claimant in the car park probably arose as a result of the relationship difficulties between Paul Cox and the Claimant, which were caused by the Claimant having given notice, having set up a company, and having taken to social media in the way alleged, and so was not treatment arising from the Claimant's disability. Alternatively, in so far as any instruction given by Paul Cox was as a result Paul Cox not wanting employees spending working time having private conversations in the car park, the Tribunal was not satisfied that any treatment of the Claimant in this regard could be said to have arisen from his disability.

168. In relation to the 30 September 2022 incident, which is the final complaint of direct discrimination or discrimination arising from disability, and is also a complaint of disability-related harassment, the List of Issues puts the complaint on the basis that Paul Cox shouted at the Claimant, called him names in front of the office, and threatened to smash in his face, with no provocation. The Tribunal was satisfied that this description of events was, broadly speaking, accurate, although the Tribunal was also satisfied that, in so far as Paul Cox made reference to smashing the Claimant's face in, this was not said as a serious threat, but as he was being ushered away from the Claimant because of the argument which had been taken place. It certainly involved Paul Cox talking to the Claimant with a raised voice and making various accusations and allegations about the Claimant.

169. Whilst the exercise of comparison is a rather artificial one, the Tribunal concluded that a non-disabled hypothetical comparator, otherwise in the same circumstances as the Claimant, would not have been treated differently, in that all of the factors which had given rise to the incident would have been in play. Indeed, put another way, the Tribunal concluded that there was no basis for thinking that the incident would have unfolded in any different way, had the Claimant not had a disability. More fundamentally, the Tribunal was satisfied that the treatment of the Claimant by Paul Cox was not on the grounds of the Claimant's disability. Moreover, the treatment was not because of something arising from the Claimant's disability, whether as identified in the List of Issues or otherwise. Even if, for the sake of argument, any treatment could be said to have stemmed from the Claimant's resignation, the Tribunal was not satisfied that the Claimant's resignation had arisen from his disability or any inability to cope with stress.

Harassment

170. If one looks at the statutory language in the Equality Act 2010 definition of harassment, the conduct of Paul Cox on 30 September 2022 was undoubtedly unwanted. It clearly had the effect of violating the Claimant's dignity and creating an intimidating, hostile, degrading and / or humiliating environment for him, However, there was nothing in the various descriptions of what happened, whether coming from the Claimant, or coming from the Respondent, or in the documentation, which would provide any basis for the Tribunal concluding that the conduct of Paul Cox, was related to the Claimant's disability.

171. The Tribunal was satisfied that Paul Cox lost his temper, in circumstances where he had, perhaps unwisely, returned to work, while still recovering from treatment for ill health, and his loss of temper was as result of the fractured relationship which existed between him and the Claimant, largely as a result of the perception of Paul Cox to the effect that the Claimant had set up a company which was a potential competitor to the Respondent, and had not been transparent about this, in that he had not told the Respondent about his future intentions, and had been reported to have been less than complimentary about the Respondent on social media, with the last straw then being that Paul Cox clearly believed that the Claimant had deliberately misinterpreted what Paul Cox had said to Sam Maddison regarding not speaking to the Claimant in the car park.

Overview

172. We should add that the Claimant's case, as has perhaps become clearer since the List of Issues was originally drafted, is that he believes that he was subjected to detrimental treatment by the Respondent in order to victimise him for having sought to leave the Respondent in the circumstances in which

he did. He believes that the way of victimising him which was deliberately adopted by the Respondent was to treat him in such a way as the Respondent knew would adversely impact upon his mental health, given the information that it had regarding his mental health issues. Whilst the Tribunal can understand how the Claimant came to perceive that he was being subjected to unfair or detrimental treatment by the Respondent, the Tribunal was not ultimately satisfied that any of the treatment about which he complains was on the grounds of his disability or arose from his disability or was related to his disability. The Tribunal certainly concluded that, by the end of his employment, the Claimant had an employer who was not favourably disposed towards him. Although there seemed to be some inconsistency between the written evidence of the Respondent's witnesses and the oral evidence of the Respondent's witnesses, the Tribunal ultimately concluded that the situation was one in which the relationship between the Respondent and the Claimant was in the course of breaking down with the main cause of this being the Respondent's adverse perception of the Claimant's actions in being, as it saw it, less than transparent about his intentions on leaving the company, and in particular with regard to his involvement in the company which he had incorporated with his partner, which had been further fuelled by reports which made their way back to the Respondent's Directors regarding the Claimant's social media activities with this then further fuelled by the Claimant giving the impression of being disaffected with his employment situation as a result of his perception that he was being unfairly treated.

Time limits

173. Finally, for the sake of completeness, the Tribunal deals with the issue of time limits. The Tribunal reminds itself that the burden is on the Claimant to satisfy the Tribunal that the applicable time limit should be extended where a complaint is out of time on the basis that it is just and equitable to do so.

174. The Tribunal takes account of the relevant factors to be considered by reference to the cases of *British Coal Corporation v Keeble* (see above) and *Adedeji v University Hospitals Birmingham NHS Foundation Trust* (also see above).

175. Going through these factors, the Tribunal accepts that there was some limited prejudice to the Respondent in that, it is possible that, had the application to amend been made at an earlier point in time, then the final hearing might have taken place earlier, having regard to the fact that the original final hearing, which had been listed to deal with a complaint of constructive dismissal, was listed for June 2023. It is inevitable that the passage of time will have some adverse effect on the memories of witnesses, particularly when they are dealing with an events from 2022, some of which were undocumented. Although that said, this is partly a rod for the Respondent's back which is of its own making, in that it was within the Respondent's power to have

undertaken an investigation by which witnesses provided their versions of events and these were committed to writing at a much earlier point in time, whether as part of the grievance investigation or otherwise.

176. In terms of any prejudice to the Claimant, the reality of the position is that the Tribunal has now considered his complaints of discrimination and found them to be unfounded, although the Tribunal has some sympathy for the Claimant regarding the circumstances in which he has come to consider himself as having been mistreated and brought Tribunal proceedings as a result. Such sympathy is tempered by the fact that, had the Claimant considered that any alleged mistreatment amounted to disability discrimination, the Tribunal would have expected this to have been flagged up in a more obvious way at an earlier point in time

177. There was nothing relevant as far as the conduct of the Respondent was concerned in terms of contributing to any delay in issuing proceedings. As far as the conduct of the Claimant was concerned, the explanation put forward for not having included disability discrimination at the outset did not seem to be correct. The Claimant suggested that there was nowhere on the ET1 Form of Claim to bring a complaint of disability discrimination. This is clearly wrong. At section 8.1 there are boxes to tick in respect of discrimination and in respect of disability discrimination. What then seems to have happened, is that he wrote to the Tribunal indicating that he wanted to claim injury to feelings. This was in November 2022. The Tribunal wrote back in the February 2023 suggesting that if he wanted to bring a complaint of discrimination he would need to amend his Claim. This he did so promptly, but by this point in time he was out of time. He was out of time by approximately five weeks if the last act complained of is effectively his treatment on 30 September 2022.

178. As far as the Claimant's medical condition is concerned, whilst the Tribunal has made findings to the effect that he has a relevant disability by reason of mental health issues, this does not seem to have impacted upon the commencement of proceedings, in that he was able to complete the ET1 Form of Claim in order to bring the constructive dismissal complaint.

179. In so far as the Claimant had received any advice, it was only from ACAS, but the Tribunal is satisfied that the Claimant would have been aware of the applicable time limits through having sought the assistance of ACAS, or that such information was readily available to him.

180. The Tribunal was not satisfied that any delay in dealing with the Claimant's grievance or his grievance appeal was a factor which provided a basis for exercising any discretion to extend time. The Claimant had been able to commence proceedings before the outcome of his grievance and any ongoing and outstanding grievance appeal's role tonight young decision had not prevented him from being able to seek to amend his claim. The tribunal

did not consider that any ongoing internal processes (which post-date of the termination of employment in any event) were a relevant factor in any delay the

181. In all of the circumstances, notwithstanding our sympathy for the circumstances in which the Claimant came to make any complaint of disability discrimination after the time limit had expired, we were not satisfied that it was just and equitable to extend time in this case.

Outcome

182. It follows that the conclusion of the Tribunal is that the complaints of direct discrimination on the grounds of disability, discrimination arising from disability, breaches of the duty to make reasonable adjustments and harassment (related to disability) are all dismissed.

Postscript

183. By way of a postscript, the Tribunal would comment that this was a case where, once the events of 30 September 2022 were the subject of a complaint, it was surprising that any investigation did not involve making sure that the participants had provided their written version of events. The Tribunal was also surprised that Respondent had not put in place arrangements for there to be equality and diversity training within its organisation. The Respondent would be well advised to do so as to improve its chances of avoiding future complaints of discrimination.

184. However, for the reasons set out above, the Claim is dismissed.

Approved by
Employment Judge Kenward

Dated 3 July 2025