EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Robson**		
Respondent:	**NGP UTILITIES Ltd**		
Heard by CVP		**On:**	**11 to 15 January 2021**
			12 to 13 April 2021
	Deliberations		**14 to 15 April 2021**
Before:	**Employment Judge Rogerson**		
Members:	**Ms J Noble**		
	Ms B R Hodgkinson		

Representation

Claimant:	Mr A Watson (Counsel)
Respondent:	Mr S Goldberg (Counsel)

RESERVED JUDGMENT

1. The complaints of harassment related to sexual orientation, a failure to make reasonable adjustments, constructive dismissal and victimisation succeed.
2. The claimant is awarded compensation in the sum of £30,800 (comprising injury to feelings in the sum of £20,800 and aggravated damages in the sum of £10,000). Interest in the sum of £5,907 is added making the total award £36,707.
3. The respondent is ordered to pay a financial penalty to the Secretary of State in the sum of £18,353.501 pursuant to section 12A Employment Tribunals Act 1996. Further information about payment of the penalty is annexed to this judgment.

REASONS

Issues

1. The claimant makes complaints of harassment related to his sexual orientation, disability discrimination of a failure to make a reasonable adjustment, constructive(discriminatory)dismissal and post-employment

victimisation. Counsel agreed the list of issues applicable to each complaint which is set out below.

Section 27 Equality Act 2010 ("EQA"): Harassment related to Sexual Orientation

1.1 The claimant identifies as a gay man and claims unlawful harassment related to his sexual orientation. In relation to each allegation the questions are as follows:

(a) Did the alleged conduct occur?

(b) Does it amount to unwanted conduct?

(c) Did that conduct have the purpose or effect of violating the claimant's dignity?

(d) Did that conduct have the purpose or effect of creating an intimidating, degrading, humiliating or offensive environment for the claimant? and

(e) In relation to allegation 12(m) below, whether the respondent is liable for that conduct.

1.2 The allegations of harassment are as follows:

(a) On the first day of employment, the claimant's equal opportunities form showing his sexual orientation was left on a desk in a file accessible by other employees who would know about his sexual orientation before he had the opportunity to tell anyone.

(b) Throughout his employment, on a daily basis the claimant was subjected to homophobic slurs and words such as "*faggot"*, *"puff"* and *"queer"* in the office.

(c) In the claimant's first week of employment, Mr Manterfield shouted, loudly and clearly enough for the claimant to hear from the other side of the office, "*great, there is a fucking bender in the office*".

(d) In early February 2019, following the claimant confirming his sexuality to a colleague Ms Tarren, the rest of the office began talking openly about the claimant's sexual orientation, and began attempting to provoke debates with opposing personal views, in a manner intended to make the claimant feel uncomfortable.

(e) In mid-February 2019, Mr Price said in front of the claimant and other members of his team, that two men having sex was *"unnatural and not right*". The claimant did not respond but Mr Price nonetheless continued to engage in this conversation in a deliberate attempt to unsettle the claimant.

(f) On 11 February 2019, Mr Peat posted a picture in the office WhatsApp group entitled "*K loves the job IDST*", containing a book with Thomas the Tank Engine on the front and the title "The Lost Puff". This was directed at another employee, Mr Proudfoot, although the claimant did not understand the joke at the time.

(g) On or after 11 February 2019, Mr Proudfoot responded and said that he liked the episode "Thomas on the Slopes". This was a

continuation of a joke at the expense of (Mr High) another gay employee.

(h) In and around February 2019, managers in the office would joke that Mr High had a soft spot for Mr Proudfoot. They would say that Mr Proudfoot would have to go skiing with Mr High and his husband. They would then perform the action of male masturbation, insinuating that Mr Proudfoot would perform this action on Mr High and his husband. This was not directed at the claimant but was done in his presence, was highly offensive, and did in fact offend the claimant

(i) In early March 2019, Mr Peat tried to engage the claimant in a conversation about how "*Gay Pride*" was unnecessary. The claimant tried to explain why it was a celebration, and Mr Peat went on to say that he was going to start a "S*traight Pride*" event so that he could "*rub it in people's faces*" in retaliation for gay people rubbing Gay Pride in his face, Mr Peat continued to try to engage the claimant in this debate causing frustration and upset to the claimant.

(j) On 30 April 2019, the claimant was several minutes late to work. He had informed the office WhatsApp group of this. When he arrived, he apologised to Mr Peat who responded, in front of the office, "*it's alright, you'll just have to mince a bit quicker next time*"

(k) In June 2019, Mr Dixon returned from annual leave with sweets in the shape of penises and breasts. Mr Dixon offered the sweets to his colleagues in the office. He offered the penis shape sweets to the women in the office and the breast shaped sweets to the men. When he reached the claimant, he said he didn't know which one to offer and asked the claimant to choose with one sweet in each hand. Surrounded by male employees in the office, the claimant found this exchange to be awkward, intimidating and highly embarrassing. He chose the breast shaped sweet because he felt that choosing the penis shape sweet would lead to further humiliation.

(l) On the first week of June 2019, Mr Dixon shouted across the office "*oi ya fucking faggot*" whilst looking in the claimant's direction.

(m) On 15 June 2019, Ms Tarren told the claimant about a message Mr Price had sent her in which he had said that "*gays, blacks and ethnics*" all leaving the office was "a good cleanse".

Sections 20 and 21 EQA: Failure to make reasonable adjustments

1.3 It is agreed the claimant was by reason of his dyslexia at all material times a disabled person within the meaning of Section 6 of the Equality Act 2010. The claimant asserts the respondent had knowledge of disability and substantial disadvantage from January 2019 triggering the duty to make reasonable adjustments. The respondent disputes it had knowledge of substantial disadvantage until 25 March 2019.

1.4 Did the respondent apply a provision criterion or practice 'PCP' requiring employees at the claimant's level to achieve a call time target of "3 hours per day"?

(a) Did that place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The claimant asserts the following disadvantages:

(i) Because it took him longer to complete administrative tasks such as writing emails and follow up letters to clients, he was not able to meet core time targets.

(ii) As a result of this he was unable to pass his probation.

(iii) He was furthermore subjected to constant performance criticism compared to his non-disabled colleagues.

1.5 Ought the respondent to have made the following reasonable adjustments?

(a) Implement and maintain a formal reduction to the claimant's core time target from 3 to 2.5 hours per day. The claimant avers that the respondent promised to make such a reduction but in practice continued to hold the claimant to the '3' hour standard.

Section 39(2) C EQA: Constructive discriminatory dismissal

1.6 The claimant relies on the following conduct as "individually or cumulatively, amounting to a breach of the implied term of trust and confidence:

(a) The allegations of harassment.

(b) The allegation of failure to make reasonable adjustments.

1.7 In relation to such of these allegations as are proved, the questions for the Tribunal are as follows:

(a) What was the most recent act (or omission) which the claimant says caused, or triggered, his resignation?

(b) Has the claimant affirmed the contract since that act?

(c) If not, was that act (or omission) by itself a repudiatory breach of contract?

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amount to a repudiatory breach of the implied term of trust and confidence?

(e) Did the claimant resign in response (or partly in response) to that breach?

Section 27 EQA: Victimisation

1.8 It is agreed the claimant did a protected act by bringing the above allegations of harassment and discrimination to the attention of the respondent on 23 July 2019?

1.9 Did the respondent subject the claimant to a detriment on the ground of that protected act?

(a) The claimant avers that the respondent sought to dissuade the claimant from issuing proceedings against them on the basis that the claims were a "coincidence" and that the respondent would bring the claimant's conduct to the attention of the court.

Section 124 EQA: Remedy

1.10 What compensation should the claimant be awarded for injury to feelings?

1.11 What compensation should the claimant be awarded for aggravated damages (the Tribunal may consider this as part of the award for injury to feelings)?

1.12 What compensation should the claimant be awarded for financial losses, to include:

(a) If he had not resigned would the claimant have been fairly dismissed for a non-discriminatory reason by the respondent in any event, and if so, when?

(b) What would the claimant's earnings have been if he remained in employment with the respondent?

(c) What are the claimant's earnings with his new employer? What if any commission structure is in place?

Our approach in these reasons

2. In these reasons we will set out our findings of fact for each allegation, the applicable law and our conclusions for each complaint in the following order:

2.1 Sexual orientation harassment from January to June 2019.

2.2 Failure to make reasonable adjustments from January/March to June 2019.

2.3 Constructive dismissal 14 June 2019.

2.4 Victimisation July 2019.

The Pleadings

3. Detailed 'particulars' of each of the allegations of harassment relied upon were set out in the grounds of complaint (GOC) (pages 16 to 21 of the bundle). In the grounds of resistance(GOR) (pages 34 to 59 of the bundle), the main defence to this claim was focussed on the claimant's conduct in leaving his employment to work for "A 2 L Energy" alleging the claimant had breached restrictive covenants in his contract of employment which had resulting in successful High Court action. The respondent denied the alleged unlawful conduct had occurred and accused the claimant of dishonesty and of fabricating the allegations in response to the High Court action. In the alternative the respondent sought to rely upon the statutory defence (section 109(4) Equality Act 2010) that it had taken all reasonable to prevent the alleged perpetrators, from doing the things alleged or anything of that description. In relation to allegation 2(m) (Mr Price's message) it was contended this was an act done outside the course of employment.

Credibility of Witnesses

4. The Tribunal was required to determine several important factual disputes between the parties which necessarily involved reaching conclusions about the credibility of the witness evidence. In his closing submissions, Mr Goldberg reminded the Tribunal that serious allegations of unlawful discrimination were made and the way in which that conflict was resolved would have important consequences/potential reputational damage for the respondent and its witnesses. Consistent with the case presented throughout, Mr Goldberg described the claimant as a dishonest witness who had fabricated these allegations. If true, our findings would have equally serious consequences for the claimant.

5. Before giving evidence, all witnesses were reminded of the importance of the solemn declaration they made to tell the truth and warned that adverse findings as to credibility may be made.

6. Before setting out our findings of fact, we agree with Mr Watson's observation that in this case different approaches were taken by counsel in their cross-examination of witnesses. The claimant's detailed evidence in chief was not scrutinised or challenged by Mr Goldberg other than to put to him the general contention that he had made it all up. In contrast Mr Watson cross-examination subjected the respondent's witness evidence to detailed scrutiny and challenge. He carefully put the claimant's case to each witness to test the veracity of the account given.

7. We found that the claimant gave his evidence in a straightforward, open and measured way. His detailed recollection was supported by other credible witness evidence and the contemporaneous documents. For the respondent we found Mr High was a credible witness who answered questions in a frank and open way, but that was not the case for other witnesses who gave evidence for the respondent (in particular, Mr Peat and Mr Dixon). In matters of dispute their recollections were vague and/or internally and externally inconsistent with other witness evidence and the contemporaneous documents. In matters of dispute we preferred the claimant's account which was more credible. We will explain in our reasons how we made our credibility assessment.

Conduct of Proceedings

8. Before we do that, it is important to set out at the outset our concerns about the misleading way in which the respondent has defended the claim to support its case about the claimant and A2L Energy.

9. In the response presented on 6 November 2019, the respondent relies on an '*emergency (without notice) injunction*' granted by the High Court on 24 July 2019. It is asserted that the injunction "*compelled the claimant not to work for A2L Energy, not to contact the respondent's customers or induce any more of the respondent's employees to join him*". The return date for the High Court proceedings was 21 October 2019 and the respondent intimates a claim for damages in excess of £100,000 "*as a result of the claimant's/ Ms Tarren's (theft of confidential data) and their subsequent conduct at A2 L Energy" (3(j) GOR).*

10. Throughout the claimant's cross examination, the impression we were given was that the High Court proceedings supported the respondent's case that the claimant had breached his contract of employment and was guilty of

stealing confidential data. There was no evidence of any term in the claimant's contract prohibiting him from working for A2L Energy or any evidence of breach of contract. Mr Watson who had represented the claimant in those proceedings, corrected the misleading picture presented and confirmed that no particulars of claim had been provided to the High Court, the claim was struck out and the claimant was awarded costs. He provided a copy of the strike out judgment which was not included in the original hearing bundle or referred to, in any of the respondent's witness statements.

11. Another example of the misleading way in which the respondent presented its defence was its deliberate partial disclosure of the facts. In its GOR the respondent asserts that it was unaware that plans had been made by the claimant and a colleague Ms Tarren in relation to A2L Energy, to accuse the claimant of stealing confidential data on 14 June 2019, when he had passed his remaining leads to Ms Tarren before he left his employment. What the respondent failed to disclose, was that in May 2019, Ms Tarren had already informed the respondent of those plans and her intention to leave in order to play a key role in A2L Energy, to renegotiate a better contract with the respondent. The GOR and the witness statement did not disclose any of those facts left to be uncovered during Mr High's cross-examination.

12. The Tribunal were concerned about the tactics used by the respondent to defend this claim. Key facts were omitted or misrepresented to unfairly accuse the claimant of dishonesty/theft in order to bolster the case presented. All parties have a duty to assist the Tribunal and to present all the relevant evidence, whether it helps or hinders their case. It is not reasonable conduct for a legally represented party to try to mislead the Tribunal by only disclosing facts that fit the narrative presented. From the outset the respondent has sought to focus on the claimant's move to A2L Energy, not about the merits of the discrimination complaints based on a fair assessment of the strengths or weaknesses of the complaints on the evidence. Unfortunately, that approach did not change.

Findings of Fact

13. The Tribunal heard evidence for the claimant from the claimant, from Mr. D. Withers (previously employed by the respondent as an Energy Consultant from July 2018 to July 2019), from Mr C. Proudfoot (previously employed by the respondent as a Business Account Manager from April 2017 until 10 July 2019) and from Ms S. Baker (previously employed by the respondent from 29 April 2019 until 30 June 2019).

14. For the respondent we heard evidence from Mr S. High (Global People Director), Mr L. Bailey (Operations Manager, Leeds Office), Mr T. Bates (Operations Director Leeds Office), Mr G. Peat (Team Manager), Mr T. Horsfield (Team Manager Leeds), Mr D. Lynch (deal closer) and Mr K. Dixon (previously employed as a deal closer). We did not hear any evidence from either Mr C. Price (deal closer) and Mr K. Manterfield (deal closer) who were the alleged perpetrators for allegations 1.2 (c) and 1.2(e) who are not employed by the respondent and were not called to give evidence on behalf of the respondent in these proceedings.

15. We saw documents from an agreed bundle of documents to which some further documents (including the High Court strike out judgment) were

added, by consent at the resumed part heard hearing. We saw some documentary evidence, including contemporaneous WhatsApp group messages. The first WhatsApp group was called "K loves the job IDST" (IDST meaning "If destroyed still true") which we will describe in these reasons as the 'Office WhatsApp group' because it included most people in the Leeds office(notably the claimant, Mr Manterfield, Mr Lynch, Mr Proudfoot, Mr Price, Mr Peat, Mr O'Neill, Ms Tarren, Mr Horsfield and Mr Withers). The second WhatsApp group was called "Us Wok" which included Mr Price, Mr Peat, Ms Tarren and Mr Manterfield. The third WhatsApp group was called "A2L". It was created in May 2019 and included the claimant, Mr Withers and Ms Tarren.

16. We will refer to the WhatsApp group messages where they are relevant to the allegations to consider whether they support an inference about the language/behaviour used in the workplace. Mr Watson invites the Tribunal to make inferences that the language used by the group and the attitude demonstrated towards racist and homophobic 'jokes' especially by Mr Peat and Mr Price 'mirrored' the behaviour of individuals in the office. Although, Mr Goldberg counters against that inference being made, he was not supported by Mr High's concession during cross examination that the contents of the Office WhatsApp group "*may be good evidence of how individuals were communicating and the language they were using in the workplace, and the type of behaviour they thought was acceptable"*.

17. From the evidence we saw and heard we made the following findings of fact:

18. The claimant was employed by the respondent as an energy consultant/lead generator from 7 January 2019 until his resignation with notice on 14 June 2019.

19. Before working for the respondent, the claimant had successfully worked as a car salesman. He was attracted to the role with the respondent because of the potential earnings and the promise of a new and bright future. In his previous role he was employed on a package worth around £46,000 including bonus and benefits. He expected his potential earnings with the respondent to be in the region of £65,000 with additional benefits included with the job.

20. He attended an interview on 26 November 2018 and was offered and accepted a role as a lead generator on a basic salary of £25,000 with a pay rise of £5,000 payable on passing his probation period. He had the opportunity to earn 'uncapped' commission if financial targets were met.

21. The 'hierarchy' at the Leeds Office was that Mr Bailey the Operations Manager had overall managerial responsibility for the office. He was assisted by his Team Leaders/Managers, Mr Peat, Mr Horsfield and Mr Proudfoot. Mr Peat and Mr Horsfield each managed a team comprising deal closers and lead generators. Mr Proudfoot had responsibility for training and development including probationary reviews. All the team worked together in one open plan office

22. Each lead generator would cold call potential business customers to gather information to try to persuade the customer to enter a contract with the respondent to supply energy. If, the cold call was successful the lead

generator would obtain the relevant information about any existing contract, energy usage and cost, which would then be supplied to the deal closer who would contact the customer to negotiate the terms of the contract. Deal closers had authority to enter contracts with the customers on behalf of the respondent. They were senior to and more experienced than the lead generators but relied upon the lead generators to bring them good leads.

23. Lead generators were required to meet financial targets, call time targets and to complete the associated administration work for every call passed to the deal closer. Completed contracts with customers would earn the business income and would give the lead generator and others in the team the opportunity to earn commission. The lead generator and deal closer were expected to work closely to secure a contract as quickly as possible. Team Leaders were responsible for pushing the team to reach their targets, which in turn enabled Team Leaders to earn commission. The office was a highly pressurised competitive sales environment. Mr High describes it as no different to other sales environments where people are 'pushed' to achieve targets.

24. The culture in the Leeds office was accurately described by Mr Proudfoot as 'toxic' involving daily use of racist homophobic and anti-semetic language which some managers and senior employees actively engaged in treating it as acceptable banter between friends and colleagues.

25. Mr High conceded in his evidence that he had not taken any steps to deal with or to fix any of the problems identified with the culture in the Leeds office following the claimant's complaint after seeing the Office WhatsApp messages. No internal investigations had been conducted and no disciplinary action was taken against any individual. He conceded the respondent did not have in place any effective measures for preventing breaches of its Equality and Diversity policy. No training had been provided to staff/managers on equality and diversity, bullying and harassment and how to prevent unlawful discrimination from occurring in the workplace.

26. Mr High conceded that the respondent's equality and diversity policies were 'inadequate' they were not being enforced and were 'ineffective' in preventing discrimination/harassment. No training was provided to management or staff to enable them to identify what sort of behaviour constitutes harassment, how to prevent/deal with harassment in the workplace or about the duty to make reasonable adjustments for disabled workers and the action that duty entails.

27. Mr High accepted that although the equality and diversity policy has the stated objective of removing discrimination from the workplace it failed to identify any measures to achieve that objective. It was therefore ineffective and could not be relied upon to support the statutory defence. To his credit, after giving his evidence, Mr High informed the Tribunal that upon reflection, he had decided to take steps to improve the equality and diversity policies. However, it was clear that prior to this hearing, the policies had not been reviewed to consider whether they were effective in practice in preventing discrimination from occurring in the respondent's workplaces.

28. Those concessions do not support the respondent's pleaded case which relies on the statutory defence and asserts the existence of a 'zero-tolerance' policy, that effective policies were in place to prevent harassment

in the workplace and that disciplinary action would immediately be taken if any offensive comments of the sort described by the claimant were ever made.

Allegation 1.2(a): On the first day of his employment, the claimant's equal opportunities form showing his sexual orientation was left on a desk in a file accessible by the respondent's employees. This meant all employees knew about the claimant's sexual orientation before he had the opportunity to tell anyone. Allegation1.2 (b): In the claimant's first week of employment, Mr Manterfield shouted, loudly and clearly enough for the claimant to hear from the other side of the office, "great, there is a fucking bender in the office".

29. Before starting his employment on 7 January 2019, the claimant had completed an Equal Opportunities Form in which he identified as a 'gay man'. Mr Proudfoot kept the Equal Opportunities information completed by the claimant and other employees in a folder which was accessible to anyone in the office. It was not kept in a locked cupboard. The claimant had chosen not to disclose his sexuality to his colleagues and reasonably expected his employer to keep his protected characteristic confidential if he made the choice to disclose it.

30. On 8 January 2019, at around 8.45am the claimant came into the office, and was met with a comment of "*great, there's a fucking bender in the office*". At the time the claimant didn't know the individual that had made the comment because he had not been introduced to him. He later learned it was Mr Manterfield another lead generator.

31. The claimant gave a vivid and detailed description of the incident recalling where he was when the comment was made, how those around him laughed which gave him the impression that "*it was clearly considered funny for someone to make such a remark"*. The claimant was stunned and deeply upset by the comment which was deeply humiliating for him revealing his sexual orientation to his colleagues in a degrading manner. Despite the upset caused by the comment the claimant chose to try to ignore it and not make a big deal of because he was new to the job.

32. The claimant is not a confrontational person. He has heard hurtful comments about his sexuality from his teenage years and has had to learn to try to ignore them, not draw attention to himself, not to react or to complain. All the coping mechanisms he has had to develop to deal with the abuse, did not mean the comments made were not upsetting to hear.

33. We did not hear any evidence from Mr Manterfield about the alleged comment. However, this was the type of language commonly used in the office treated as 'jovial banter' and we found the claimant's account was credible and the comment was made.

Allegation 1.2 (c): Throughout his employment, on a daily basis, the claimant was subjected to homophobic slurs and words such as "*faggot"*, *"puff"* and *"queer"* in the office.

34. The claimant describes (paragraph 52 WS) how it was common in the office to hear the words "*puff, pufter, bender, queer, mincer, faggot or fairy*". Daily '*homophobic slurs*' were used in the office as part of normal conversation.

35. The claimant also heard racist words used such as "*Pakis and Blackie Chan*" often used to describe customers. Anti-Semetic slurs were also made such as "*you tight arse Jew*" aimed directly at Mr Withers, who was not Jewish (his wife was Jewish) referred to by management and senior staff as "the office Jew".

36. We considered whether there was any support for the claimant's account of the type of language used in the office and the frequency of its use. The Office WhatsApp messages confirm highly offensive Anti-semetic language frequently used in exchanges between employees and senior managers in the group. The claimant refers to one particularly offensive joke on the office WhatsApp group made by Mr Price about Mr Withers' wife selling the children's old toys on Facebook to buy gas with the intention of 'gassing' their children. We saw Mr Peat comment, at the end of a long exchange amongst the group, incorporating the word 'gas' or 'Jew' in the name of a songs/band/artist, stating "*this banter has me gassed"* (page 206). This was a senior manager actively engaging in and encouraging the use of this language, which he described was '*jovial banter amongst friends and colleagues'.*

37. The established culture in the office to his sexual orientation was clear to the claimant in his first week of employment with the comment made by Mr Manterfield: "*great, there's a fucking bender in the office*" and this continued to the end of his employment (Mr Dixon's comment of "*oi ya fucking faggot*"). Senior employees and managers (in particular, Mr Peat, Mr Price and latterly Mr Dixon) confidently communicated in this way without fear of any consequence because managers (Mr Peat) were also engaging in and encouraging this type of behaviour.

38. It was put to the claimant, that he was making it all up and was exaggerating the frequency with which these words were used. We accepted the claimant's evidence. He was not exaggerating his evidence these terms (faggot/puff) were used as part of normal everyday conversation in the office accurately described by the claimant as homophobic slurs.

Allegation 1.2 (d): In early February 2019, following the claimant confirming his sexuality to Ms Tarren, the rest of the office began talking openly about the claimant's sexual orientation, and began attempting to provoke debates with opposing personal views, in a manner intended to make the claimant feel uncomfortable
Allegation 1.2 (e): In mid-February 2019, Mr Price said in front of the claimant and other members of his team, that two men having sex was *"unnatural and not right*". The claimant did not respond to this, but Mr Price nonetheless continued to engage in this conversation in a deliberate attempt to settle the claimant.
Allegation 1.2 (i): In early March 2019, Mr Peat tried to engage the claimant in a conversation about how gay Pride was unnecessary. The claimant tried to explain why it was a celebration, and Mr Peat went on to say that he was going to start a "*straight Pride*" event so that he could "*rub it in people's faces*" in retaliation for gay people rubbing gay Pride in his face, Mr Peat continued to try to engage the claimant in this debate causing frustration and upset to the claimant.

39. We grouped these 3 allegations together because 1.2(d) provides background to the specific allegations of the unwanted conduct identified in allegations 1.2(e) and (i). By early February, the claimant had chosen to confirm his sexuality to his colleague and friend, Jane Tarren. He alleges the rest of the office began talking openly about his sexual orientation and began attempting to provoke debates with him raising opposing personal views in a manner intended to make him feel uncomfortable.

40. In mid-February 2019, Mr Price in front of the claimant and other members of his team, said that two men having sex was *"unnatural and not right*". The claimant did not respond to the comment. Mr Price continued expressing his homophobic view to unsettle the claimant. Mr Price was a loud character/personality in the office who liked to be the centre of attention. The claimant was the complete opposite. He felt shocked and unable to respond to this "*intolerant, degrading and offensive*" statement. He felt numb. As the day progressed these comments preyed on his mind. His shock and humiliation turned to anger and upset. The claimant felt his sexual orientation was clearly not acceptable to Mr Price and felt unable to defend himself. Mr Price had been allowed to behave in this way without fear of any consequence.

41. Although the Tribunal has not heard any evidence from Mr Price, we accepted the claimant's unchallenged evidence about the comment and its effect. It was also reasonable in our view to draw inferences from our other findings of fact about Mr Price's and his propensity to express his bigoted views in the office or in WhatsApp messages.

42. In March 2019 the claimant describes in detail (paragraph 74 WS) the comment made by his manager Mr Peat about Gay Pride. Mr Peat was looking through social media on his phone and saw that Gay Pride was a topic of discussion. He said he was sick of seeing stuff about it when it was "*at least 3 months away*" directing his comment to the claimant. The claimant felt Mr Peat was trying to provoke a debate and was pushing the claimant to respond, seeing his role was to defend Gay Pride. The claimant tried to explain why it was a celebration. Mr Peat said he was going to start Straight Pride in retaliation for gay people rubbing Gay Pride in his face. The claimant described how the comments made him feel very angry. He felt he was being forced into a conversation he did not want to have with his manager. Afterwards he dwelled on that conversation and found it difficult to forget. It was a humiliating unnecessary and degrading experience leaving the claimant dreading what his manager might say next.

43. Mr Peat (paragraph 11 WS) said he was aware of the claimant's sexual orientation when he started working because of "*his general demeanour and mannerisms"*. His stereotypical view of how a gay man looks/behaves was shared by Mr Dixon who also said he knew straightway that the claimant was gay because of his mannerisms.

44. Mr Peat "*absolutely denied*" any discussion with the claimant about Gay Pride and expressed outrage and indignation at this allegation (paragraph 17WS) "*I find his insinuation extremely offensive as it casts me in a homophobic light when I genuinely have no such feelings and would regard such a sentiment as abhorrent. I find the Gay Pride movement to be just*

another example of the wonderfully open and tolerant society in which we live".

45. Mr Peat accepted that the comments were homophobic but denied making them. We found his denial and the outrage and indignation expressed was unconvincing. We preferred and accepted the claimant's detailed recollection. The Tribunal could also see how in both situations the claimant felt unable to confront the perpetrators and later suffered feelings of self-recrimination. From our industrial knowledge it is not uncommon in these situations for the victim to feel powerless against the perpetrator, not to challenge, complain or draw attention to themselves or to the situation. Feelings of a desire to get away from the situation and later regret not challenging the perpetrator/reacting differently are common in our experience. In the workplace, it is the employer not the employee, who is responsible for ensuring the workplace is safe and free from harassment.

Allegation 1.2 (j) On 30 April the claimant was several minutes late to work. He had informed the office WhatsApp group of this. When he arrived, he apologised to Mr Peat who responded, in front of the office, "it's alright, you'll just have to mince a bit quicker next time"

46. Our assessment about Mr Peat's lack of credibility is supported by our findings of fact about the comments made on 30 April 2019, when the claimant arrived to work a few minutes late. On that day the Office WhatsApp messages began at 07:55am when Mr Price messaged the group to suggest "drinks at 5pm". At 08:51am the claimant messaged the group to explain the M1 was closed he was stuck in traffic and was going to be late. This message showed the Office WhatsApp was used to interact with colleagues inside and outside of work.

47. By the time the claimant arrived at work, the daily morning meeting which everyone attended had already started. He apologised for being late. Mr Peat's response was "*it's alright you'll just have to mince a bit quicker next time"*. The claimant describes how humiliating the comment was and how he felt his dignity had been stripped away 'bit by bit' by his manager who was using his sexual orientation for entertainment to publicly degrade and humiliate him.

48. The claimants detailed recollection of that event was not challenged in cross-examination. Ms Baker corroborated that account and maintained her account under cross-examination. She recalled it because it stood out. She was '*quite disgusted and flummoxed to think that anyone let alone a manager, in this day and age, would use those words*". We found Mrs Baker was a very credible witness. She had only been employed by the respondent for a short period of time (29 April 2019-30 June 2019). She left because of the 'culture' in the Leeds office. She recalls that the claimant was embarrassed, he put his head down and looked upset by the incident. She recalls that when she looked around most of the staff were laughing, they thought it was funny. Mr Peat was laughing. He thought it was funny.

49. Mr Peat again *'absolutely*' denied making the comment (paragraph 18 WS) suggesting it was '*beyond belief'* that it had been suggested he would single the claimant out in this way and "*insult him about his sexuality*". Again, while Mr Peat recognises the comment, if made was an insult related to the

claimant's sexual orientation, he strongly denies making it. We preferred the claimant's account which was supported by other credible evidence. Mr Peat has demonstrated a propensity to make insults of a similar nature in the office and in the Office WhatsApp group which are the next group of allegations we deal with.

Allegation (f) On 11 February 2019, Graham Peat posted a picture in the office WhatsApp group entitled "K loves the job IDST", containing a book with Thomas the Tank Engine on the front and the title "The Lost Puff". This was directed at another employee, Mr Proudfoot, although the claimant did not understand the joke at the time.
Allegation (g) On or after 11 February 2019, Mr Proudfoot responded and said that he liked the episode "Thomas on the Slopes". This was a continuation of a joke at the expense of another employee, Mr High, who is also gay.
Allegation(h) In and around February 2019, managers in the office would joke that Mr High had a soft spot for Mr Proudfoot. They would say that Mr Proudfoot would have to go skiing with Mr High and his husband, and they would then perform the action of male masturbation, insinuating that Mr Proudfoot would perform this action on Mr High and his husband. This was not directed at the claimant but was done in his presence, was highly offensive, and did in fact offend the claimant

50. The first message was "The Lost Puff" Thomas the Tank image posted on the Office WhatsApp group, another 'joke' initiated by Mr Peat. The claimant describes how he saw the message and viewed it as another example of the homophobic behaviour in the group 'spilling over' into the office. Although the 'joke' was aimed at Mr Proudfoot, who is not gay, it showed how managers (Mr Peat in particular) felt comfortable, using words like "puff" (and "mincer") in an open forum and in general conversation with other colleagues.

51. When Mr Peat was taken to the message, he could not remember sending it. He said he read a lot of these books to his children and sent this picture using the cover of one of these books. Pausing there this is a senior manager in the business, who searches out a specific book and posts a picture for the sole purpose of (using Mr Peat's words) '*banter between his friends and colleagues in the group"*. Although he initially could not recall how the conversation about the book had continued in the office when it was put to him that Mr Bailey had corroborated the claimant's account, he accepted the conversation did take place.

52. Mr Peat was reluctant to accept '*puff*' was a derogative term for a gay man suggesting that there could be many meanings you could take from it. He knew full well what the meaning of the word was and the context in which he was using the word.

53. His evasiveness continued when he was asked about how the initial joke was continued in the office amongst managers in the presence of the claimant. Mr Proudfoot said that he liked the title "Thomas on the Slopes". Mr Peat suggested that Mr Proudfoot would have to go 'skiing' with Mr High and his husband, who were due to go on a skiing trip. The claimant understood the reference to 'skiing' was to a sexual act suggesting Mr Proudfoot simultaneously masturbate Mr High and his husband.

54. Mr Peat (paragraph 16 WS) states: "*I did not hear any joke about Mr High and Mr Proudfoot at any time: but would have been present on the sales floor at the time*". Mr Watson put to Mr Peat the evidence given by Mr Bailey who had overhead this conversation and had taken Mr Peat to one side to tell him to stop. Mr Peat's initial denial then changed. He said he could not remember what had been said and did not know what the term 'skiing' meant. Mr Watson had to jog his memory by explaining the meaning of the term and only then did Mr Peat agree suggesting it was 'jovial banter'.

55. Mr Peat was asked if he could see how offence might be caused to the claimant by this comment. He agreed it could be offensive but only if *"someone wants to take offence*". He accepted the claimant would have seen the message on the Office WhatsApp and could have overheard the conversation in the office. Again, the asserted facts where different to the true facts which only came to light under the scrutiny of cross examination.

56. Mr Peat expressed outrage in his witness statement about this allegation also, suggesting the claimant '*invents conversations that did not happen'*. He insisted the claimant '*withdraws his lies*'. It was astonishing that Mr Peat felt justified in taking such a strong stance against the claimant, when he knew the accusations made against the claimant were not supported by the facts known to him.

Allegation 2.1 (k): In June 2019 Kieran Dixon returned from annual leave with sweets in the shape of penises and breasts. Mr Dixon offered the sweets to his colleagues in the office. He offered the penis shape sweets to the women in the office and the breast shaped sweets to the men. When he reached the claimant, he said he didn't know which one to offer and asked the claimant to choose with one in each hand. Surrounded by male employees in the office, the claimant found this exchange to be awkward, intimidating and highly embarrassing. He chose the breast shaped sweet because he felt that choosing the penis shape sweet would lead to further humiliation.

Allegation 2.1(l): On the first week of June 2019, Kieran Dixon shouted across the office "oi ya fucking faggot" whilst looking in the claimant's direction.

57. The first allegation made against Mr Dixon is that when he joined the Leeds office he shouted: "*oi you fucking faggot*" in the claimant's direction. The claimant recalls being surprised that a new member of staff felt comfortable enough to instantly join in with the office culture. When Mr Dixon was asked when and how he became aware that the claimant was gay, his said "*without being rude I don't know if it's discriminatory to say this, but when you first meet the claimant it's clear that he's gay because of his mannerisms".*

58. Mr Dixon had previously worked for the respondent in a management role in the Newcastle Office and had returned to work as a deal closer in the Leeds office in June 2019. Mr Dixon is described by his colleagues as another 'loud' 'dominant' character in the office who like Mr Price liked to be the centre of attention. Mr Dixon describes the claimant as a quiet person who just got on with his work. Mr Dixon denies the comment alleging the claimant has fabricated the allegations made against him. In a contemporaneous A2L What's App Group message the claimant sent at this

time, he refers to Mr Dixon calling him 'faggot' and expresses his relief that he once he left would not no longer have to hear him using that term.

59. In relation to the second allegation the claimant recalls and identifies the specific customer deal he was working on with Mr Dixon just before the 10 June 2019 when Mr Dixon handed out the sweets to his friends. His evidence was not challenged. He recalls Mr Dixon gave penis shaped sweets to his female colleagues and breast shaped sweets to male colleagues. The claimant believed he was included in this because they had recently worked together on the deal. He recalls that when Mr Dixon came to give the claimant a sweet, he said: "*Ha Ha. I don't know which to give you*". The claimant felt he was being put under the spotlight because of his sexual orientation. He was worried he would show his embarrassment. To divert attention away from him/his sexuality he picked a breast shaped lolly. He felt bad afterwards and thought he should have handled the situation differently.

60. In the GOR (paragraph 20) the respondent denies both allegations. For the second allegation it is asserted that "*Mr Dixon did not offer any sweets to the Claimant only to his closest colleagues"*. An admission is made that Mr Dixon offered sweets but only to his closest colleagues. Mr Dixon's witness statement gave a different account. He stated that he did not hand the sweets out to any colleagues. He left them on the desk for all his colleagues to help themselves. He explained the reason for bringing the sweets was to break the ice with his new colleagues, to get to know them.

61. Mr Watson tested Mr Dixon's account in cross examination. On the one hand Mr Dixon suggested the sweets were used as an 'icebreaker' giving him an opportunity to get to know his new colleagues by speaking to them about the sweets but he says he does not then interact with any of them to 'break the ice'. Other witnesses confirm that Mr Dixon handed the sweets out and appeared to make a joke about them corroborating the claimant's account.

62. We did not find Mr Dixon's account was plausible or credible given the internal and external inconsistencies. We preferred and accepted the claimant's evidence about both allegations.

The final allegation of sexual orientation harassment is 1.2(m) that on 14 June 2019 Ms Tarren told the claimant about a message Mr Price had sent her in which he had said that "gays, blacks and ethnics" all leaving the office was "a good cleanse".

63. The claimant resigned by letter dated 14 June 2019. His evidence about this allegation (paragraph 147-148) was unchallenged. He came into the office on the morning of Monday 17 June. Ms Tarren told him about the message she had sent to Mr Price on 14 June 2019 about the claimant leaving to warn Mr Price what he would be coming back to when he returned from his holiday. She told the claimant about the message Mr Price had sent in response. The claimant wanted to see the message and Ms Tarren showed him the message on her phone. It said *"That's both gays, all blacks, and ethnics gone. Good cleanse if you ask me" (*page 208 of the bundle).

64. The claimant was the only gay employee and there were no Black and Ethnic Minority employees working for the respondent in the Leeds Office.

The claimant describes this as the most hurtful and most offensive comment he has seen. He describes how "*it makes me feel ashamed of myself as if I'm dirty because of my sexuality and as such should be removed as I don't conform to the heterosexual white predominance of the office"*. He was so upset he told his parents about it which in turn upset them which added to his upset. He later reported the message to the police who investigated it as a hate crime.

65. The GOR defend this allegation on the basis that the text message was sent to Ms Tarren and shown to the claimant by his 'co-conspirator' while Mr Price was on holiday and that it was not done in the course of Mr Price's employment.

66. In closing submissions, Mr Goldberg's put the respondent's case in a different way accepting that *"there is no doubt that the message was reprehensible and wrong. if the respondent had been made aware of it at the time, Mr Price would have faced disciplinary proceedings"*. Firstly, the respondent is accepting that Mr Price would have been subject to disciplinary proceedings as a result of this message if they had knowledge of it. Mr High did see a copy of this text message because it was attached to the claimant's complaint in July 2019. No disciplinary proceedings were initiated against Mr Price by Mr High.

67. Secondly Mr Watson relies on the context and content to support his submission that the message was sent in the course of Mr Price's employment. It was a message from one work colleague to another about work, shared with the claimant while he was at work. He submits that Mr Price is not precluded from acting in the course of his employment, by being on annual leave, when he sends a work-related message. Mr Watson gave the example that if Mr Price had taken a work call whilst on holiday and closed a deal, he would be entering into a contract on behalf of the respondent. In that situation the respondent would not argue that it was not bound by that contract under the law of agency because Mr Price was on holiday at the time. We agreed with that submission supported by our findings of fact that interactions and communications amongst colleagues regularly took place in and outside work and there was no clear demarcation between the two.

68. This was a message celebrating the workplace being free of '*gays, all blacks, and ethnics'*. These words were correctly described by Mr Watson as 'indefensible racism and bigotry' and by Mr Goldberg as 'reprehensible and wrong'. We bear in mind the fact that we are reading these words as part of these proceedings in a different context to the claimant who read them in his workplace after experiencing 6 months of daily homophobic abuse and having had first-hand experience of Mr Price's bigotry and intolerance towards him (being gay was "*unnatural and not right")***.** That was the context in which the claimant read the message.

69. A further illustration of Mr Price's bigotry and racism is the office WhatsApp group message posting an image of Adolf Hitler with the text "*you can't hate Jews when there is no Jews*". While Mr Goldberg accepted the message was 'grossly offensive', it shows that Mr Price felt comfortable openly expressing his bigotry in WhatsApp messages or in the workplace to his colleagues and managers without fear of any consequence.

70. What we found particularly shocking is Mr High's response to the claimant's complaints when he became aware of them in July 2019. Mr High is critical of the claimant (paragraph 48WS) because he appeared to think that because Mr High was gay, he might have a better understanding of the issues the claimant was raising in his complaint. We find it difficult to see why he takes that view. It is reasonable for an employee to try to seek out someone else in the organisation that shares the protected characteristic to better understand the complaints raised about it. Instead of taking the complaints seriously and approaching the complaints with empathy and an open mind Mr High immediately took against the claimant "*because he believed the claimant was sending information in purely because the respondent had commenced proceedings about A2L*". The 'information' includes Mr Price's message which the respondent now accepts was 'reprehensible and wrong'. Mr High confirmed that the reason why he took no action at all having had sight of that message was because he had already decided the complaints were not genuine. He formed a 'jaded' view of the claimant which never changed, irrespective of any evidence provided to support the complaints made.

Applicable law for the sexual orientation harassment complaint

71. For any proceedings alleging a contravention of the EQA2010 the burden of proof provision in section 136 EQA 2010 apply. Subsection (2) provides that "*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"*.

72. Section 109 EQA2010 deals with the liability of employers and subsection (1) provides that: "*Anything done by a person(A) in the course of A's employment must be treated as also done by the employer".*

73. The Equality and Human Rights Code of Practice on Employment 2011 (EHRC) provides Tribunals and others (lawyers, advisers, trade union representatives HR departments, employees and employers) with guidance on the EQA2010 and how it should be applied and interpreted. The respondent might benefit from reading the code when it reviews its policies.

74. In relation to section 109 EQA at paragraph 10.45 the guidance provides that "*Employers will be liable for unlawful acts committed by their employers in the course of their employment, whether or not they know about the acts of their employees"*. Paragraph 10.46 provides that the phrase *'in the course of employment has a wide meaning*" it includes acts in the workplace and may extend to acts outside.

75. Subsection (4) provides a statutory defence if "*In proceedings against A's employer (B) in respect of anything alleged to have been done by A, in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A from (a) doing that thing, or (b) doing anything of that description*".

76. Paragraph 10.47 of the Code provides that an employer will not be liable for unlawful acts committed by an employee if they can show they took '*all reasonable steps to prevent the employee acting unlawfully"*. It could be a reasonable step for an employee to have an equality policy in place and to ensure it is put into practice. Paragraph 10.51 provides that "*An employer*

would be considered to have taken all reasonable steps ***if there were no further steps that they could have been expected to take****".*

77. Paragraph 10.52 lists what reasonable steps an employer might take: implementing an equality policy: ensuring workers are aware of the policy: provide equal opportunities training: reviewing the equality as appropriate: and dealing effectively with employee complaints. The code emphasis that an equality policy should be more than a statement of good intention: there should also be plans for its implementation and it should be monitored and reviewed to ensure it is effective and is put in place in practice.

78. Harassment occurs under section 26(1) EQA2010 if: "*A engages in unwanted conduct which is related to a protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B"*.

79. In deciding whether conduct has that effect the Tribunal should take into account the following factors: the perception of B, the other circumstances of the case: whether it is reasonable for the conduct to have that effect (26(4) EQA 2010).

80. Paragraph 7.7 of the code states that: "unwanted conduct" covers a wide range of behaviour, including "*spoken or written word or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour*". Paragraph 7.8 provides that "*the word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted"*.

81. At paragraph 7.18 of the code each of the factors to consider in deciding the 'effect' of the unwanted conduct are explained.

    81.1 "*26(4)(a) the perception of the worker: that is, did they regard it as violating their dignity or creating an intimidating(etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.*

    81.2 26(4)(b) The other circumstances of the case: circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct: for example, the worker's health: mental capacity: cultural norms: or previous experience of harassment: and also, the environment in which the conduct takes place.

    81.3 *26(4)(c) Whether it is reasonable for the conduct to have that effect: this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended"*.

Conclusions on Harassment Complaint

82. The first issue for the tribunal to decide was whether the alleged conduct had occurred. We found the claimant has proved all allegations of unwanted conduct and refer back to our detailed findings of fact in relation to each allegation.

83. The respondents defence to each allegation was to deny the unwanted conduct had occurred on the basis the claimant had made it all up unjustifiably portraying as 'dishonest'. No challenge was made to the claimant's evidence about the effects of the unwanted conduct or to suggest the conduct did not have that purpose or effect of harassing him. It is important to confirm that the claimant was an honest witness and that we found the witnesses who accused the claimant of dishonesty (Mr Peat and Mr Dixon) were the ones that were untruthful in the evidence they gave.

84. In deciding the effects of that proven conduct we considered how the claimant viewed the treatment, his previous experiences of harassment and the culture/environment at the Leeds Office and whether objectively viewed it was reasonable for the conduct to have that effect. The claimants working environment was 'toxic' involving daily use of racist, homophobic and Anti-Semetic language which some managers and senior employees actively engaged in treating that behaviour as acceptable 'jovial banter'.

85. Dealing with allegations 1.2 (a) (b) and (c). The claimant was unaware of the culture in the Leeds Office before he joined in January 2019.He had completed the equal opportunities in good faith, identifying as a gay man expecting that information to be kept confidential by his employer. He did not want to disclose his sexuality to his colleagues until he chose to. The respondent failed to keep this information confidential. This was unwanted conduct related to his sexual orientation which the claimant reasonably perceived created an intimidating environment by giving his colleagues access to information about his sexual orientation which he did agree to. In the claimant's first week of employment Mr Manterfield said: "*great, there's a fucking bender in the office*". The homophobic slurs continued from the beginning to the end of his employment (Mr Dixon: "*oi ya fucking faggot*"). Daily the claimant was subjected to homophobic slurs and words such as "*faggot"*, *"puff"* and *"queer"*. Senior employees and managers (in particular, Mr Peat, Mr Price and latterly Mr Dixon) confidently engaged in this behaviour without fear of any consequence because senior managers (Mr Peat) engaged in and encouraged that behaviour. It was reasonable for the claimant to perceive the words used as homophobic slurs having the effect of violating his dignity and creating a degrading and humiliating environment for the claimant.

86. For allegations (1.2(d)(e)(e)(f) we found the claimant was subjected to unwanted conduct by the comments made Mr Peat and Mr Price about the claimant's sexual orientation. Mr Price comment that two men having sex was *"unnatural and not right*" shocked the claimant who felt unable to defend himself against the "intolerant, degrading and offensive" comments made. He felt numb and as the day progressed and these comments preyed on his mind, his shock and humiliation turned to anger and upset. The claimant felt his sexual orientation was clearly not acceptable to some of his colleagues. In a similar vein his manager Mr Peat made derogatory comments about gay pride suggesting it was 'rubbing it in people faces'. This was also unwanted conduct related to the claimant's sexual orientation deliberately made to provoke a reaction from the claimant and to make him feel uncomfortable. The claimant felt frustrated and upset. We found these comments had the purpose and effect of violating the claimant's dignity and creating a degrading and humiliating environment for the claimant.

87. For allegations 1.2 (f)(g)(h) the 'jokes' related to gay men were not directed at the claimant but were initiated in the Office WhatsApp group chat and were continued in the office in the claimant's presence. Our findings of fact are set out at paragraphs 51-58. We found Mr Peat did not give a truthful account about his conduct in the office or the message he posted on the Office What's App deliberately using his children's book to make a derogatory comment ("Thomas and the Lost Puff") and to continue the 'joke' in office with managers referring to 'skiing' knowing both of the terms were insults or a sexual term that could and did cause offence. The joke in the office had to be stopped by Mr Bailey. On both occasions Mr Peat knew exactly what he had written and what he had said but rather than admit to that he has accused the claimant of dishonestly and fabrication. The EHRC code provides that unwanted conduct does not mean that express objection must be made by the recipient for that conduct to be unwanted. The unwanted conduct need not be directed at the worker. These comments we found were had the effect of violating the claimant's dignity and creating a degrading and humiliating environment for the claimant. This was an allegation where before this hearing the respondent had seen the WhatsApp messages and the respondent's own witness (Mr Bailey) corroborated the claimant's account. The strength of that available evidence was not assessed to reflect upon the stance adopted by the respondent in defending the claim at this hearing.

88. For allegation 1.2(j) our findings of fact are set out at paragraphs 46-49. Mr Peat in the morning meeting said to the claimant "*it's alright, you'll just have to mince a bit quicker next time*". We found the words were said and the accepted effect would be to single out the claimant in order to "*insult him about his sexuality*". The claimant describes how he felt humiliated by the words used by his manager which stripped away his dignity 'bit by bit' using his sexual orientation for entertainment, to publicly degrade him. The claimant was subjected to unwanted conduct related to his sexual orientation that had the intended purpose and effect of violating the claimant's dignity and creating a degrading and humiliating environment for him.

89. For allegations 2.1 (k) and(l) the unwanted conduct related to the claimant's sexual orientation was Mr Dixon conduct handing out breast shaped sweets to his male colleagues and penis shaped sweets to his female colleagues saying to the claimant "*ha ha. I don't know which to give you*". The claimant felt he was being put under the spotlight because of his sexuality. This was another situation where the claimant's sexuality was being used for 'entertainment' purposes which was humiliating for the claimant. This type of behaviour fitted in with Mr Dixon's loud character he liked to be the centre of attention. Mr Dixon describes the claimant as quiet and was using the claimant's sexual orientation to put the spotlight on the claimant in a humiliating way. The claimant was embarrassed by the comment and tried to divert attention away from him/his sexuality by picking a breast shaped lolly. He felt bad afterwards and thought he should have handled the situation differently. The effects include the claimant unfairly blaming himself for his reaction to a situation out of his control which should never have occurred if reasonable steps had been taken by the employer to set the expected standards of behaviour. The claimant was subjected to unwanted conduct related to his sexual orientation that had the intended

purpose and effect of violating the claimant's dignity and creating a degrading and humiliating environment for him.

90. For allegation 1.2(m**)** our findings of fact are set out at paragraphs 63-70 Mr Price writing a message shown to the claimant at work stating *"That's both gays, all blacks, and ethnics gone. Good cleanse if you ask me".* We have set out the context in which the claimant read those words in an office where he had worked for 6 months, been subjected to daily homophobic abuse had directly experienced intolerance from his manager and Mr Price's saying that being gay was "*unnatural and not right".* The claimant describes his reaction was that this was the most hurtful and offensive comment he has seen. The effect was degrading it made him "*feel ashamed of myself as if I'm dirty because of my sexuality and as such should be removed as I don't conform to the heterosexual white predominance of the office"*. He was so upset he told his parents about it, upset them which added to his upset. He felt so strongly about it that he later reported the message to the police who treated it as reported hate crime.

91. For the reasons set out in our findings (paragraphs 66 and 67) we concluded that this was an act done in the course of Mr Price's employment and there was a sufficient connection to his employment. The claimant was subjected to unwanted conduct related to his sexual orientation that had the effect of violating the claimant's dignity and creating a degrading and humiliating environment for him.

92. Finally, the respondent has sought to rely on the statutory defence that it took all reasonable steps to prevent the alleged harassment from occurring. We noted the repeated assertion in the GOR that: "***If** any issues had been raised or **if** management had been informed of comments, **then** the respondent **would have done** what was reasonably expected to enforce their policies or procedures and/or had any employee made offensive comments so openly in the office environment they **would immediately** have been **subjected to a disciplinary process and face dismissal** in line with the respondent's **zero tolerance policy***" (highlighted text is our emphasis).

93. The way the defence is pleaded demonstrates a fundamental misunderstanding of the statutory defence as it seeks to frame the statutory duty in a way that the respondent **only** has a duty to takes reasonable steps **if** a complaint is made. The respondent's equality policy was ineffective, there was no 'zero tolerance' policy in place and no one was subjected to any disciplinary process/faced dismissal when these complaints were brought to the respondent's attention by the claimant.

Findings of Fact Disability Discrimination Complaint

94. It is accepted that the claimant is a disabled person by reason of his dyslexia the dispute between the parties is the date of knowledge of the substantial disadvantage. The claimant must prove the respondent had knowledge of disability and substantial disadvantage for the duty to make reasonable adjustments to be engaged for the complaint of a failure to take reasonable steps to succeed.

95. The claimant accepts that he did not disclose his disability to his employer on the Equal Opportunities form (page 293) and that he only provided

information to Mr Bailey about the substantial disadvantage on 25 March 2019, when he provided him with a copy of his diagnostic assessment.

96. The diagnostic assessment states that the claimant's dyslexia would cause him "*difficulties when working under timed conditions and when copying from a board or screen and this would have a knock- on effect on the claimant's accuracy and reading and his ability to complete written documents under timed conditions*".

97. It is accepted that the respondent applied a PCP requiring employees at the claimant's level to achieve a call time target of "3 hours per day". In practice the 3 hours target was split up into segments which had to be completed by a certain time during the day to ensure the target was met by the end of the day (page 297). By 10.30 am: 30 minutes of call time had to be achieved, by 12.30 pm: 1 hour 15 minutes, by 3pm: 2 hours and by 5pm: 3 hours. The claimant was required to achieve that target and complete the associated administrative work for each call under these '*timed-conditions'.*

98. The claimant found it was very difficult to achieve the targets set because of the effects of his dyslexia. Each call involved numerous administrative tasks which either had to be completed at the end of the call or at the end of the day. It is accepted the claimant was substantial disadvantaged by this PCP, because it took him longer to complete the associated administrative tasks such as writing emails and follow up letters to clients copying and transfer the information onto a screen. He was unable to meet the core time target.

99. On 25 March 2019, the claimant raised these difficulties with Mr Bailey and provided a copy of the assessment. Mr Bailey in his email to HR team on the same date confirms that he was '*working on a support system'* for the claimant to help him complete the associated paperwork which was '*negatively impacting his call time*' because of his dyslexia. The email also confirms that Mr Bailey had asked Mr Peat to provide the claimant with as much support as possible going forward.

100. Mr Bailey's initial suggestion was for the claimant to ask his colleagues to assist him with the paperwork. That did not work. On 3 April 2019 the claimant's probation period was extended by 1 month and his sales target was set at £15,000. At the probationary review the claimant was told his call time was the main issue of concern.

101. On the same day the claimant sent an email to Mr Bailey asking for support by being given extra time in line with the measures suggested in the diagnostic assessment. He suggested the call time target was reduced by 30 minutes which would be 25% less than the extra time recommended in the diagnostic assessment. By pointing this out the claimant was informing his employer that 30 minutes reduction of target may be 'insufficient'. Nevertheless, he requests the 3 hours target is reduced by 30 minutes to 2.5 hours to help him at work and make allowances for his dyslexia (page 105).

102. On the same day Mr Bailey consulted with Human Resources requesting the reduction which was agreed the same day. The claimant's complaint is that despite the agreed reduction in the overall core time target and offers of support, Mr Bailey and Mr Peat constantly shouted at him throughout the

day and criticised him for not meeting his target. In practice they were expecting him to achieve the same target as his colleagues at the set intervals for the majority of the day, while giving him ½ reduction at the end of the day.

103. The claimant recalled one occasion towards the end of April 2019 when Mr Bailey shouted and swore at him telling him to '*fucking pick up the phone and get fucking dialling*'. Although Mr Bailey did not address this allegation in his witness statement and he denies 'pressurising' the claimant, we found he did shout at the claimant in the way described. The office environment was one in which managers were expected to 'push' the teams to achieve targets and that did not change for the claimant when his managers became aware of the substantial effects of his dyslexia on his performance. Mr Peat shouted at the claimant and repeatedly put copies of the breakdown of core time targets in and around the claimant's desk. Whenever the claimant removed the copy Mr Peat would replace not supporting the claimant but putting additional pressure on him.

104. Mr Bailey and Mr Peat accepted the breakdown of the call time target was applied to all the lead generators and had not been adjusted for the claimant. If it had been adjusted it would have made it clear to the claimant and his colleagues that his performance was not being measured in the same way. They could not explain why they failed to take what would have been an easy step of adjusting the breakdown times during the day, if their intention was to support the claimant. In practice they were expecting the claimant to achieve the same targets and used the same pushing techniques (applying pressure/shouting/displaying call time targets) for the claimant used for his non-disabled colleagues in order to achieve sales. Mr Pete displayed the unadjusted breakdown targets in/around the claimant's desk and replaced any copies the claimant removed to emphasise the point that the target applied to the claimant. The approach taken in practice was surprisingly unsupportive when both managers agreed they could see that the claimant was '*visibly struggling*' to achieve the adjusted target in order to justify their reprimands. Both managers knew the claimant was only achieving a daily average of two hours call time and that the adjustment made on 3 April 2019 was insufficient and ineffective. The steps taken were not working in avoiding the substantial disadvantage the claimant faced as a disabled person. Other than reprimanding the claimant no further steps were taken to help the claimant to avoid the substantial disadvantage which continued up to his resignation.

Applicable Law and Conclusions

105. Section 20 EQA 2010 sets out the duty to make reasonable adjustments and refers to 'A' as a person on whom the duty is imposed (in this case A is the respondent). Section 20(3) applies *"where a provision, criterion or practice(PCP) 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***". Section 21 EQA provides that "a failure to comply…is a failure to comply with a duty to make a reasonable adjustment and that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that person"(highlighted text our emphasis).*

106. In Environment Agency-v- Rowan 2008 ICR 210 the EAT reminds Tribunals to consider and identify the PCP applied, the identity of the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant to help it to decide whether there is a failure to make reasonable adjustments.

107. Here the PCP applied by the respondent to all lead generators was the call time target of 3 hours and how it was applied in practice as we have set out at paragraph 97 above. The nature and extent of the substantial disadvantage was not in dispute (see paragraph 96 98 99) and we found the duty to make reasonable adjustments was engaged on 25 March 2019 when the respondent had knowledge of the disability and of the nature and extent of the substantial disadvantage. Having found the duty to make reasonable adjustments was triggered the Tribunal had to decide whether the respondent took such steps as it is reasonable to have to take in all of the circumstances to help the claimant as a disabled person overcome the substantial disadvantage.

108. In his closing submissions Mr Goldberg contends that there was nothing wrong with the respondent "reprimanding" the claimant for not meeting his adjusted target. He suggests the claimant's case demonstrates a 'fundamental misunderstanding' of the reasonable adjustment complaint (paragraph 11 closing submissions). If the claimant considered the reduced core time target was '*still too difficult to achieve*' he could have asked for a further reduction. Mr Goldberg appears to be placing all the onus on the disabled person to suggest the reasonable steps the employer should take to remove the substantial disadvantage the employer's PCP puts the disabled person at.

109. The EHRC Code at paragraph 6.24 makes it clear that the onus is not on the disabled worker to suggest what adjustments should be made. The duty to make adjustments requires the employer to take such steps as it is reasonable **to have** to take in all the circumstances (paragraph 6.23).

110. The respondent's submission also does not fit well with the agreed fact that managers were aware, after on 3 April 2019 that the claimant was visibly struggling to achieve the adjusted 2.5 hours target and in reality was only on average achieving 2 hours(when the claimant had already alerted them the reduction might be insufficient: see paragraph 101). The respondent knew the adjustment made was ineffective and did not remove/avoid the substantial disadvantage and that further reasonable steps needed to be taken (adjust interim call time targets /further ½ hour reduction of overall).

111. Paragraph 6.28 of the EHRC Code provides that a factor in deciding what a reasonable step is, is to consider whether taking any particular step will be effective in preventing the substantial disadvantage. No steps were taken to help the claimant when it became apparent the adjustment made was ineffective.

112. Neither Mr Peat nor Mr Bailey reviewed or considered the effectiveness of the adjustment made or whether further steps should be taken to help the claimant when they *'reprimanded'* him for not achieving the adjusted target. The respondent approached its duty to make reasonable adjustments as a 'tick box' exercise, that by agreeing to a step, they were complying with the duty, irrespective of the effectiveness of the step taken. It did not help the

respondent that its managers were not trained on the Equality Act 2010 to enable them to recognise their duties and responsibilities to disabled employees on behalf of the employer. That lack of understanding has continued through to closing submissions where the respondent seeks to justify 'reprimanding' the claimant in circumstances where it was known the dyslexia was '*negatively impacting his call time*'.

113. For the sake of completeness, we will deal with the point raised by the Tribunal in its questions about the PCP as to whether it was sufficiently clear from the pleaded case, that the call time target incorporated the interim targets within the overall target. Mr. Watson has responded to this in paragraphs 80-81 of his closing submissions. He poses the question "*Did the pleaded PCP adequately capture the argument made by the claimant that in reality "the claimant was being held to the '3' hour target for the majority of the working day because his interim targets were not reduced as they should have been"*? He has identified paragraph 30 ET1(page 19) which refers to "*the claimant should have had different targets to his colleagues by each break in the day*" and paragraph 31 ET1 "*the constant pressure by his managers to achieve the same targets as his colleagues nullified the effect of the adjustment made*" and paragraph 40 "*the claimant was constantly pressured by management to make the same volume of calls and was continually reprimanded for not doing so, thereby nullifying the effect of the adjustment*". We agree the pleadings were clear and the respondent understood the PCP was the call time target which incorporated the interim targets within the overall target.

Findings of fact: Constructive discriminatory dismissal

114. The claimant passed his probation on 8 May 2019. At the time he was working to a reduced target of £15,000, in comparison to his colleagues who were working to a target of £25,000 a month. It was clear that despite this and the fact that the claimant was not achieving the call time target the respondent considered the claimant had the potential to succeed in the business. The probationary review notes record the claimant was viewed as "*a potential asset to the company and was growing in confidence in the role that he was performing*".

115. From the claimant's perspective he found the daily harassment related to his sexual orientation and the respondent's failure to make effective reasonable adjustments was becoming more and more difficult to tolerate. He reached breaking point in mid-May and spoke to Mr Peat about how he was feeling. At paragraph 118 of the claimant's witness statement he set out his detailed recollection of that meeting. He explained that he was struggling with the reduced target and achieving the administrative tasks that were required. He referred to the Anti-sematic and homophobic abuse and to the constant references to 'faggot' and 'puff'. Mr Peat advised the claimant to "*keep his head down and to smash the phones*". His complaints were not taken seriously.

116. We also heard persuasive evidence from Ms Baker who had also left her employment with the respondent because of the culture in the Leeds Office. She felt she could not have raised her complaints about the office environment with Mr Peat because he would not have taken them seriously. She said: "*he'd turn it into a joke, take the mick out of you and laugh at you"*.

117. The claimant started to look for alternative employment and his father put him in touch with Mr Littlewood, a director of a company "Aim 2 Learn". Mr Littlewood was interested in setting up a new utility company. Initial discussions took place in May 2019 involving the Claimant, Ms Tarren and Mr Withers. The claimant accepted a contract with "Aim to Learn" on a higher basic salary of £35,000 (with no commission) to perform a similar role to his role with the respondent (£25,000 with commission). "A2L Energy" was created on 1 July 2019. The claimant had no financial stake in the new company and was not a director in the new company.

118. At the time the claimant was thinking of leaving, he was aware Ms Tarren and Mr Withers were also unhappy with the working environment and culture. He saw this new company presenting them all with a 'way of escape'. As a result of her experience it was intended that Ms Tarren would play key role in running the new business. At the time the claimant was unaware that in May 2019, Ms Tarren had used that to renegotiate her contract with the respondent and had agreed not to leave the respondent.

119. The claimant, Ms Tarren and Mr Withers separately contacted Mr Littlewood to negotiate their new contracts. The claimant had shared his experiences working with the respondent with Mr Littlewood who reassured him that things would be different at A2L Energy.

120. On about 10 June 2019, the sweets incident had occurred which was the last straw having endured 6 months of sexual orientation harassment. On Friday 14 June 2019 (4 days later) the claimant signed his contract with his new employer and resigned from his role with the respondent. The claimant's resignation letter is brief, stating that he "*did not enjoy the environment in which he was required to work*". On the same day, Mr Peat asked the claimant to pass any existing leads he had on to Ms Tarren. This fits with the fact Ms Tarren had renegotiated her contract and was staying with the respondent. The claimant followed his managers instruction and sent his existing leads to Ms Tarren using her work email address.

121. On 16 June in the "A2L" WhatsApp group the claimant sent a message stating: "just got to hear Kieran shouting "*oi you fucking faggot*" across the room for one more time." The claimant's last day of work was to be 21 June 2019.

122. Following the claimant's resignation, no enquiry was made with him about the work environment or to attempt to dissuade him from leaving. This was because the respondent was not concerned about the claimant leaving. The respondents only concern was about Ms Tarren leaving the business and they had renegotiated her contract. It was reasonable to infer that the respondent thought it had 'scuppered' the chances of 'A2L Energy' succeeding having persuaded Ms Tarren to stay in May 2019, consistent with Mr Peat's instruction for the claimant to pass his leads to her. Any perceived threat associated with the claimant's departure had been negated.

123. When the claimant handed his resignation letter, Mr Proudfoot recalls the claimant explaining that the reason he was leaving was the bullying, the constant gay comments and the harassment to hit core times. Mr Proudfoot described the culture in the Leeds office was "*incredibly negative,*

characterised by bullying, abusive racist anti-semetic and homophobic language treated as acceptable banter".

124. We found the effective cause of the claimant's resignation was the discriminatory treatment he had been subjected to over 6 months of his employment related to his sexual orientation (with the last act occurring 4 days before his resignation), the respondent's failure to make reasonable adjustments for him as a disabled person, the reprimands that followed and the generally negative intolerant work environment established in the Leeds Office.

125. While the respondent might want to focus its defence on the fact the claimant had a job lined up at A2L Energy before he left. The claimant only took that job as his escape route out from the discriminatory treatment he had been subjected to and that treatment was the catalyst and effective cause of his resignation. Where the claimant worked afterwards was a consequence of that decision but was not the effective cause of his resignation. The harassment and disability discrimination the claimant suffered individually and cumulatively amounted to a breach of the implied term of trust and confidence, a repudiatory breach of contract by the respondent in response to which the claimant resigned: he was constructively dismissed.

Victimisation

126. The protected act is not in dispute and is the email dated 19 July 2019 the claimant sent to Mr High bringing his attention to his detailed allegations of harassment and discrimination.

127. The dispute is whether the respondent victimised the claimant by subjecting him to a detriment by issuing a threat in a letter dated 23 July 2019 which was sent by the respondent's solicitor, Mr Anderson on behalf of the respondent, and whether the claimant was subjected to that detriment on the grounds of his protected act.

128. In the email dated 19 July 2019 (pages 155 to 156) the claimant provides details of the harassment he has experienced identifying what happened who the perpetrators were (Mr Peat, Mr Dixon, Mr Price, Mr Manterfield) and some evidence. In that email the claimant states "*I am not a confrontational person and brushed it off so as not to make a fuss at the time so as not to be seen a trouble maker but this behaviour made me extremely uncomfortable and made me feel like I was not welcome as a result of my sexuality*".

129. In email the claimant also refers to the meeting he had in May 2019 with Mr Peat, when he raised his concerns with Mr Peat. He provides some evidence attaching Mr Price's text (*"that's both gays all blacks and Ethnics gone. Good cleanse if you ask me*") and states "*this incident particularly hurt my feelings as it was directly aimed at me and I knew I had to spend time around him for 2 last days when he returned from holiday"* .

130. It is important to consider Mr High's response to that letter which we have referred to in our earlier findings (paragraph 70). Mr High had decided not to take the complaints seriously he had decided the claimant was lying and the complaints were disingenuous irrespective of any evidence presented (the text message) or the known facts about the lack of diversity in the Leeds

Office. Mr High confirmed in cross examination that the respondent was playing 'lip service' to the claimant complaints and any references made in letters about investigating the complaints was untrue.

131. The respondent did not respond to the letter and the claimant chased a reply by email on 23 July 2019.The claimant informed Mr High he was disappointed by the lack of response. He explained it had taken 'courage' to write to explain his experiences. His evidence to this Tribunal was that he just wanted to put it behind him and get on with his new job. Nowhere in the email does the claimant suggest he intends to bring a claim to the Employment Tribunal. He just wanted his complaints investigated.

132. On 24 July 2019, Mr High sent a reply informing the claimant that his letter had been forwarded to the legal team and the in-house solicitor Mr Anderson who was "*currently leading on the investigation relating to your allegations and other ongoing legal matters*".

133. Mr Anderson responded by email on 26 July 2019. Mr High confirmed that the letter sent by Mr Anderson was sent with his full approval and instruction. That was an important concession to make because we did not hear any evidence from Mr Anderson. Mr High was questioned about his motivation(conscious/subconscious) for sending the letter and its content.

134. The alleged detriment is that the letter included a paragraph which sought to dissuade the claimant from issuing Tribunal proceedings by including an unjustified threat that the respondent would bring to the Tribunal's attention the claimant's conduct and the high court action.

135. Before we consider that paragraph of the letter we read and considered the whole of the letter. There are 4 headings. It starts with "Your assertions" and identifies the alleged discriminatory conduct the claimant complains about. The 2nd heading is "Our position" in which Mr Anderson recites parts of the respondent's harassment and bullying policy. The 3rd heading is "Next Steps" which requests that the claimant provides further information about the complaints (specific dates, times, locations and witnesses) and the entire email chain containing Mr Price's comments so that those texts could '*thoroughly be investigated*'. The 4th heading is "*parallel matter*" which contains the alleged threat which we set out in full:

Parallel matter

"It must be objectively recorded that these issues have been **raised now immediately after our intention to seek an injunction** to enforce the terms of your employment contract had been notified to you (i.e. on 17 July 2019). You have failed to give the undertakings that we have requested, and we thus attended court on Thursday 25 July 2019 where we obtained an injunction against you. **We assure you that the coincidence will not prejudice the conduct of our investigations**: **but should you attempt to submit a premature claim for constructive dismissal, before our investigations are concluded, I reserve our rights fully to *bring the fact of this coincidence to the court's attention***.

136. From our reading of the email the respondent was using the timing of the injunction as the '*coincidence*' it wanted to use to its advantage. The assurance made that the high court injunction would not prejudice any investigation the respondent would undertake was false. Mr High had

already made his mind up the claimant was lying so the promise of an investigation was untrue and was made in bad faith. The following sentences "*should you attempt to submit a premature claim*" "*I reserve our rights fully to bring to the Courts attention the fact of this coincidence*" were not necessary to include in the letter. The timing of the high court proceedings and any ET claim would be a matter of fact. The claimant and respondent knew the injunction had been granted on 25 July 2019 and that as at the date of this letter the claimant had not made or intimated making any ET claim.

137. The claimant understood this paragraph was a warning it was making an unjustified threat to dissuade him from bringing an ET claim. The claimant's frank evidence was that notwithstanding how deeply unpleasant the discrimination was he would have let it lie, if not for the fact that the respondent came after him and were trying to stop him from pursuing a claim. It was a worrying time for the claimant and the respondent used the High Court proceedings as leverage against the claimant knowing he was a litigant in person in a weaker position.

138. Mr High agreed that the letter was "*an attempt to dissuade the claimant from bringing these issues before the Employment Tribunal*". Mr High admitted the purpose behind that paragraph was to "*try to avoid going to the Tribunal. The objective was to avoid that from happening"*. He agreed this was because he and the respondent did not want allegations of sexual orientation harassment to be brought before the ET. Mr Watson put the following proposition to Mr High: "Y*ou're here a year later in the employment tribunal. Does it not suggest that your mistaken about the reason the claimant brought the claim?*" Mr High did not agree suggesting the claimant "*had invested in the case and has seen it through*". The concessions made by Mr High was were important in understanding the reason why those words were used.

Applicable Law and Conclusions

139. A 'contravention' of Section 27(1)(a) (Equality Act 2010 (victimisation) occurs when "*A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act."*

140. It is not in dispute that the Claimant had done a protected act by raising a complaint on 23 July 2019 alleging harassment related to his sexual orientation.

141. It is not in dispute that Mr High and Mr Anderson had knowledge of the protected acts at the time of the alleged detriment. Guidance as to the meaning of 'detriment', is given in paragraph 9.8 of the EHRC Code which states that "*a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage"*.

142. Paragraph 9.9 of the Code provides that "*a detriment might also include a threat made to the complainant which they take seriously, and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance would not be enough to establish detriment*".

143. Paragraph 9.10 states that "*detrimental treatment amounts to victimisation if a protected act is one of the reasons for the treatment but it need not be the only reason*".

144. To establish causation the reasoning in **Nagarajan-v- London Regional Transport (1999) IRLR 572 HL** applies and makes clear that there is no need for 'conscious' motivation. The alleged discriminator may 'subconsciously' be significantly influenced by the protected act in his/her treatment of the complainant. Paragraph 37 of the judgment of Peter Gibson LJ in the Court of Appeal in **Igen-v Wong 2005 IRLR 58 CA** clarified that: "a "significant" influence is an influence which is more than trivial".

145. Contrary to the evidence given by Mr High, Mr Goldberg invites the Tribunal to find the claimant was wrong to suggest this was an attempt to dissuade him from bringing Tribunal proceedings. Mr Watson submission that the 'overtures' made to the claimant that the respondent wanted to speak with him/investigate his complaints were 'disingenuous' was supported by the concession made by Mr High that he had no intention of investigating them or taking them seriously contrary to the assurances that were given to the claimant in the letter which were untrue and given in bad faith.

146. Mr Golberg has sought to focus on the claimant's motivation for bringing these proceedings. Mr Watson points out his motivation is irrelevant and *"victims of harassment and discrimination choose to bring or not bring tribunal proceedings for all sorts of reasons. Litigation is expensive, time consuming and can be stressful*". The claimant's frank evidence was that notwithstanding how deeply unpleasant the discrimination was he would have let it lie if not for the fact that the respondent came after him and were trying to stop him from pursuing a claim. It was a worrying time for the claimant and the respondent used the High Court proceedings as leverage against the claimant knowing he was in a weaker position.

147. We agree with Mr Watson that it does not go to the respondent's credit that they used these tactics to dissuade the claimant from bringing these proceedings. The claimant reasonably considered the content of the letter included an unjustified threat which changed his position for the worse. Was Mr High motivated subconsciously or consciously in significant part by the protected act (the complaint making allegations of sexual orientation harassment). His evidence was clear his reason for subjecting the claimant to this detriment was because the respondent did not want the allegations of sexual harassment (the protected act) to be brought before the ET. We found the complaint of victimisation is proven.

Remedy

148. Mr Goldberg submits that if the complaints of unlawful harassment related to sexual discrimination and disability discrimination succeed the respondent would still argue the claimant may have been fairly dismissed for a non-discriminatory reason of breaching his contract of employment.

149. Mr Watson refers to the guidance given by the Court Of Appeal in **Chagger -v- Abbey National Plc** at paragraphs 43 and 59 which identifies the approach to be taken in a redundancy dismissal context " *the question was not what would have occurred had there been no dismissal but what would have occurred had there been no discriminatory dismissal, that requires*

consideration of whether dismissal might have occurred even had there been no discrimination". This requires the Tribunal "*to determine what in fact were the chances that dismissal would have occurred had there been no unlawful discrimination*"

150. The Tribunal must construct this counterfactual world and then ask whether there is a chance (and if so what chance) that the claimant would have been dismissed. Mr Watson referred to the case of Chagger-v- Abbey National Plc (2010) ICR 397 and correctly identifies the difference on the facts in this case to a redundancy situation where creating the 'counterfactual' world is more straightforward because it is the same redundancy process absent unfair treatment tainted by unlawful race discrimination. In this case the respondent must adduce evidence to show that if the claimant was not subjected to unlawful harassment, what are the chances he would have been dismissed for gross misconduct?

151. Mr Goldberg relies on the claimant taking confidential information which he submits would inevitably have resulted in his dismissal for gross misconduct. We have not found that any confidential information was taken by the claimant. Mr Goldberg relies on the claimant discussing and planning to leave the respondent's employment, signing a contract of employment for the new employer, and doing some work for his new employer in his own time before he resigned. None of those matters entitle the respondent to treat that conduct as a repudiatory breach to dismiss the claimant on the grounds of gross misconduct. The claimant's conduct must be considered separate from anything Ms Tarren did or did not do in relation to A2L Energy.

152. We found no evidence of any repudiatory breach of contract committed by the claimant. No doubt if that evidence did exist it would have been provided at this hearing and would also have been used in the High Court claim before it was struck out.

Remedy

153. The level of compensation for injury to feelings the claimant seeks is £8,800 for a failure to make reasonable adjustments and £12,000 in respect of the harassment and aggravated damages in the sum of £10,000. The respondent agrees the sum of £12000 for the harassment related to sexual orientation but disputes the other amounts of compensation claimed.

154. At the time the complaint was presented the lower Vento band was £900 to £9,000 (for less serious cases), the middle band was £9,000 to £27,000 (for cases that do not merit an award in the upper band) and the upper band was £27,000 to £45,000 (the most serious cases).

155. The general principles that apply in assessing an appropriate injury to feelings award have been set out by the EAT in **Prison Service v Johnson [1997] IRLR 162** at paragraph 27.

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award.

- Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards, could be seen, as the way to untaxed riches.
- Awards should bear some broad general similarity to the range of awards in personal injuries cases – not to any particular type of personal injury, but to the whole range of such awards.
- Tribunals should take into account the value in everyday life for sum they have in mind by reference to purchasing power or by reference to earnings.
- Tribunals should bear in mind the need for public respect for level of awards made.

156. The matters to be considered in deciding a just and equitable award of compensation for injury to feelings award, encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, anguish, humiliation, unhappiness, stress and depression. It is for the claimant to prove the nature and extent of the injury to feelings for his complaints of discriminatory treatment which were all proven. His detailed evidence (paragraphs 92 89, 99, 103, 159 to 180 WS) was not challenged in cross-examination. In addition to the findings of fact we have already made in relation to the effect on the claimant of each individual act of harassment, we made the following further findings:

- The claimant sought treatment from his GP after he left the respondent's employment which has continued to the date of this hearing.
- The mental effects have lasted and continues to this hearing. The claimant describes living in a state of fear and dread. He was physically ill and felt threatened. He suffered from extreme nightmares. He has suffered from depression and anxiety.
- He made a complaint to the police about the email sent by Mr Price reporting it as a hate crime because he felt so strongly about what had happened and felt he should do something about it.
- His GP gave him a number for a helpline which he rang. He was prescribed Sertraline. He has received counselling sessions.
- He describes crippling financial difficulties, as a consequence of the unlawful treatment and bringing these proceedings, an additional worry for him.
- He describes how difficult it has been as an individual bringing these proceedings against an industry powerhouse and how the respondent's conduct of these proceedings has impacted on him and that he has only been able to continue to pursue the claim because of the support of his family.
- He describes how it felt at work when he "*just did not know what to do: I had the chance to earn significant sums of money but I was in*

a position whereby I was being pushed to do a target I could not achieve due to my dyslexia and I was continually being harassed due to being gay. Every day was a challenge mentally and emotionally. I found it increasingly difficult to get myself out of bed to gear up for the day, something which is extremely out of character for me "

- He describes the impact this discrimination has had on his family and on his personality and social interactions. He has shut himself away and avoided social events. He says "*I feel that I'll have to put in a lot of work to get back to being the bubbly person I've always prided myself on being and hope that my ongoing counselling will help me get back to some sense of normality*".
- He describes the effects of the disability discrimination and how he left his probationary review meeting 'deflated and demoralised like he couldn't do the job because he was struggling with dyslexia and the respondent was not supporting him. He was scared to ask for a bigger reduction in the call time target. He was constantly shouted at by his manager and was sworn at in relation to his call times. He describes feeling angry at the way he was spoken and disappointed at the lack of support. "*The job became a living nightmare due to the pressure being applied I was shouted at and constantly told I wasn't where I needed to be and pressured to the point of tears*". Mr Peat putting up the call time targets around his desk which would be removed by the claimant made him feel like his manager was goading him and singling him out as if he was a failure, humiliating him in front of everyone.

Aggravating Features: Respondent's conduct of these proceedings

157. We were invited to make findings of fact about the respondent's conduct of these proceedings and aggravating features of that conduct to support the claimant's claim for aggravated damages/higher award for injury to feelings.

158. Mr Goldberg suggests there is 'no basis' for making any findings there were he submits no aggravating features in this case. Mr Watson invites us to find the respondent conducted this litigation in an intimidating and heavy-handed way throughout. Some of the respondent's witnesses in their statements have "*gone out of their way to minimise the nature and seriousness of the discrimination which the claimant suffered*". We agree that even where the claimant's account was supported by credible witness evidence and the contemporaneous evidence the respondent has continued to accuse the claimant of dishonesty, an accusations repeated in closing submissions after the respondent had the benefit of seeing and hearing all the evidence.

159. The respondent had the benefit of seeing the Office WhatsApp messages "The Lost Puff" image posted by Mr Peat and the continuation of that discussion in the office, the comment made by Mr Peat about 'skiing' confirmed by Mr Bailey. The 'mince' a bit quicker comment and the credible evidence given by Ms Baker, Mr Price's text which in closing submission was for the first time recognised as 'reprehensible and wrong'. Some of the perpetrators in this case have sought to blame the claimant and presented themselves as the injured party in these proceedings (particularly Mr Peat

and Mr Dixon) and the respondent has supported them in that approach in defending the claim.

160. We agree with Mr Watson that the respondent has unfairly sought to portray the claimant as a liar throughout this case in the pleadings, in witness statements, in the claimant's cross examination and in submissions. The respondent chose not to subject his evidence to any scrutiny to test his account but continued to make serious accusations of dishonesty when the evidence of his accusers, did not stand up to scrutiny (Mr Peat Mr Dixon).

161. We agree that the respondent has sought to make these Tribunal proceedings about the claimant's move to A2L Energy and has never taken the complaints of discrimination seriously. It has victimised the claimant by making an unjustified threat in a letter sent by the respondent's solicitors for the purpose of dissuading the claimant from bringing this claim, at a time when the claimant was at his most vulnerable. This tactic and the other tactics used in the conduct of this case do not assist Mr Goldberg's argument that there are no aggravating features in this case.

162. We agree with Mr Watson's submissions supported by our findings of fact. The respondents conduct in responding to the initial complaints made before litigation and during litigation from start to finish was intimidating and heavy-handed. Based on our experience compensation for these aggravated features in the sum claimed of £10,000 was an appropriate level of award to compensate the claimant.

163. For the disability discrimination the respondent contends that £5,000 would be an appropriate sum to compensate for a one-off failure disputing the £8,800 the claimant seeks. We refer to our findings of fact on this complaint. The respondent knew the adjustment made was ineffective and insufficient because the claimant was visibly struggling with his call time target. Nothing was done to support the claimant instead he was reprimanded for not meeting the target. In defending this claim the respondent has sought to justify that treatment and sought to put the onus on the claimant for any failure when the duty to make reasonable adjustments rests with the employer not the disabled person. If reasonable steps had been taken to remove the substantial disadvantage the length of time the claimant was placed at that substantial disadvantage might have decreased, to support the argument of a one-off failure/lower award. However, those steps were not taken, instead the claimant was reprimanded for not achieving ab unachievable call time target because of his dyslexia. The claimant's evidence about the effects of that are set out above and describe in detail the effect of that discrimination. We agree that the sum of £8,800 is a just and equitable sum to compensate the claimant for the injury to feelings he has suffered.

Financial Loss

164. In relation to the claim for compensation for loss of earnings most of the facts are agreed as follows:

- The claimant's salary at A to L is £35,000 per annum gross and his salary with the respondent was £25,000 so he is financially better off with his new employer.

- There is no loss in the basic pay. The claimant claims loss of commission and would have to show a loss of at least £10,000 per annum in commission.
- The claimant asserts he would have made sales in excess of £100,000 for the respondent and would have earned £10,000 in commission per quarter.
- However, the claimant did not earn any commission while he was employed by the respondent. His case in support of financial loss was that his performance would have radically improved if he had not left the respondent's employment which would have entitled him to the commission payment. There was no evidence to support the claimant's case that he would have earned that level of commission for the respondent and no evidence to support an inference based on past performance.
- The facts were that the claimant's target had been reduced because he was not achieving the same sales targets as his colleagues. We accepted the respondent's evidence confirming the claimant's sales during his employment did not generate any entitlement to commission.

165. The claimant has not established that he has lost earnings in potential commission that he would have earned with the respondent and therefore no award for pecuniary loss is made.

Amount of Compensation

166. We considered our assessment of compensation for non-pecuniary loss of injury to feelings for the discrimination (harassment related to sexual orientation and discriminatory constructive dismissal victimisation and disability discrimination) of £20,800 and aggravated damages of £10,000 giving an overall figure of £30,800 as compensation for discrimination.

167. We considered whether there was any element of double recovery but were satisfied that separate awards for the harassment and disability discrimination were reasonable to make given that the discriminatory conduct arose from separate facts, not the same facts. We stepped back and considered the total figure of £30,800 claimed by the claimant and considered whether it was excessive having regard to the value in everyday life of that sum to the claimant and the award is should compensate for the discrimination the claimant has suffered not punish the respondent. Our unanimous view was that this was a case based on our findings falling into the most serious category of case in the top Vento band. In deciding the seriousness we considered the following factors: all complaints of harassment related to the claimant's sexual orientation had succeeded: there was a course of continuing very serious conduct, repeated and frequent homophobic abuse committed by a number of perpetrators including senior employees and managers over the course of 6 months. For several months the claimant was subjected to disability discrimination. Although he was visibly struggling, he did not receive the more favourable treatment and support he was entitled to as a disabled person. He was shouted at by his managers and continually reprimanded until he could no longer cope with the treatment and resigned. His resigned in response to

the discriminatory treatment and has lost his employment through no fault of his own. With it he lost the prospects and promises that had attracted him to the role in the first place. After he resigned the respondent did not stop its unlawful discrimination of the claimant subjecting him to post-employment victimisation, trying to dissuade the claimant from bringing allegations of harassment related to his sexual orientation to the attention of the Tribunal. That was of itself serious conduct by the respondent who did not want allegations of sexual harassment to be brought before the ET making this threat at a time the claimant was most vulnerable. To the claimant's credit he was not deterred by the threat or the subsequent conduct of these proceedings which was intimidating oppressive and highhanded seeking to defend the claim using inappropriate tactics supporting the perpetrators of the unlawful conduct to make repeated unfounded accusations of dishonesty against the claimant and attempting to mislead the Tribunal to bolster the case presented. The respondent has steadfastly chosen to stand by the perpetrators despite the evidence it has seen and heard about their unlawful conduct. That catalogue of treatment supports our view that this is very serious case meriting a top Vento band award in the sum claimed of £30,800, a just and equitable award to compensate the claimant for the unlawful discrimination he has suffered.

168. In relation to interest on that award under section 139 of the Equality Act 2010 we looked at the period from 7 January 2019 to 7 June 2021 of 740 days. The date of the first act of discrimination was 7 January 2021. The calculation date is 7 June 2021, the interest rate 8% and the annual amount of interest is £2,464. The number of days 875 days. The calculation is therefore 875 days x 0.08% x 1/365 x £30,800 = £5,907. Adding interest to the award makes the total amount of compensation awarded in the sum of £36,707.

169. In relation to grossing up it is the responsibility of the claimant or the claimant's representative to raise the question of grossing up before the ET (Bethnal Green and Shoreditch Trust v Dippenaar UK EAT/0064/15) Grossing up has not been raised and in those circumstances we have not grossed up the award.

Financial Penalty.

170. The Tribunal considered whether it should exercise its discretion under section 12A Employment Tribunals Act 1996 to order the employer to pay a financial penalty.

Section 12A (1) provides that: "*Where an Employment Tribunal determining a claim involving an employer and a worker-*

(a) concludes that the employer has breached any of the worker's rights to which the claim relates, and

(b) is of the opinion that the breach has one or more aggravating features

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim".

171. Section 12(2) provides that "*the tribunal shall have regard to an employer ability to pay-*

(a) In deciding whether to order the employer to pay a penalty under this section

(b) *(subject to subsections (3) to (7) in deciding the amount of penalty"*.

172. Applying subsection (4) to calculate the penalty 50% of the award of £36,707 is £18,353.50. Subsection (10) provides that if the employer pays 50% of the penalty (£9,176.75) within 21 days of the day the decision is sent to the parties, the employer will have discharged liability to pay the full penalty as an incentive for early payment.

173. The Tribunal has assumed the respondent has the ability to pay the penalty based on the size of the business and its resources. If our assumption is wrong, the Respondent can apply for reconsideration and provide evidence of its inability to pay a penalty/the amount. We have found *employer has breached any of the worker's rights to which the claim relates* in respect of all the claims brought by the worker (harassment related to sexual orientation disability discrimination discriminatory dismissal and victimisation) and have found this was a very serious case of a breach of the claimants rights for the reasons set out above at paragraph 166.

174. Turning next to 12(A)(1)(b) were the Tribunal of the opinion that the breach had '*one or more aggravating features". In our reasons w*e have identified a large number of aggravating features at paragraphs 156 to 162 in relation to each of the claims brought and the respondent's conduct of these proceedings. We refer to the summary at paragraph 166. Although it was the respondent's case that there were no aggravating features in this case our findings of fact do not support that submission. The Tribunal were of the opinion that this was an appropriate case to order a penalty in that the breaches of the claimant's rights in relation to each of the claims of discrimination he brought had made many aggravating features which justified the exercise of our discretion. In those circumstances we order the respondent to pay a financial penalty to the Secretary of State in the sum of £18,353.50.

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Employment Judge Rogerson

15 June 2021.

16 June 2021