EMPLOYMENT TRIBUNALS

Claimant: Mr P Bryant

Respondent: European Braking Systems Ltd

Heard at: Manchester **On:** 8-10 December 2020, 5 March & 8 April 2021

Before: Employment Judge Phil Allen
Mr B Rowen
Mr P Stowe

REPRESENTATION:

Claimant: In person
Respondent: Mr R Morton, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent did fail to comply with its duty to make reasonable adjustments as required by sections 21 and 22 of the Equality Act 2010, by not making the adjustment of moving where the claimant sat in its office between 2 and 15 December 2019;

2. The respondent did harass the claimant related to his disability in breach of section 26 of the Equality Act 2010, in a comment made by Mr Thornley on 13 November 2019;

3. The claimant's other complaints of harassment related to his disability in breach of section 26 of the Equality Act 2010 are not well-founded and do not succeed;

4. The respondent did victimise the claimant in breach of section 27 of the Equality Act 2010 and subjected him to a detriment because he had done a protected act, in a conversation on 11 November 2019;

5. The claimant's other complaints of victimisation in breach of section 27 of the Equality Act 2010 are not well-founded and do not succeed.

REASONS

Introduction

1. The claimant was employed by the respondent from 1 August 2013 until 28 March 2020, latterly as a UK Telesales Agent. It was accepted that he had rheumatoid arthritis and that it amounted to a disability at the relevant time. The claimant brought claims for breach of the duty to make reasonable adjustments; harassment; and victimisation. The respondent denied those claims.

Claims and Issues

2. Two Preliminary hearings (case management) were conducted in this case, on 12 February 2020 and 7 September 2020. The issues to be determined at the final hearing were identified by Employment Judge Slater at the hearing on 12 February. It was confirmed that they remained the issues to be determined at the start of the final hearing.

3. The issues identified were as follows (there is no issue 1):

<u>Failure to make reasonable adjustments</u>

The claimant relies on a provision, criterion or practice (PCP) of the seating arrangements.

2. Did this PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled in that, sitting in a draught, which the new arrangement entailed, exacerbated the effects of his rheumatoid arthritis?

3. Could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

4. If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage?

<u>Harassment</u>

5. Did the respondent engage in unwanted conduct by the following acts:

5.1. Turning up the heating higher than it had ever been in the period 7 to 15 November 2019;

5.2. Mr Thornley saying, on 4 or 5 occasions in the period 7-15 November 2019: "*Come on lads, get your trunks on, it's like a sauna in here*" [in the list this allegation was mis-recorded as being a comment by Mr Thornby, but there was no dispute that the allegation related to Mr Thornley].

6. Was this conduct related to disability?

7. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Victimisation

8. Did the claimant do a protected act by complaining, by email dated 7 or 8 November 2019 to Andrew Blower, Zac Desai and Dr Brooks, about the new seating arrangement, linking this to his health condition?

9. Did the respondent subject the claimant to a detriment by the following acts:

9.1. What was said in a conversation on 11 November 2019;

9.2. By suspending the claimant on 14 or 15 November 2019, without proper justification;

9.3. By issuing the claimant with a warning, without proper justification.

10. If so, was this because the claimant had done the protected act?

4. The claimant relied upon rheumatoid arthritis as the disability which constituted the protected characteristic for the claims pursued. The respondent accepted that the claimant had the condition and that it was a disability at the relevant time. That had been issue one identified at the first preliminary hearing, however as disability was conceded it was not a live issue at the final hearing.

5. The second preliminary hearing had been arranged to determine whether what was said in a conversation on 11 November 2019 was without prejudice, and therefore could not be referred to at the final hearing. However, at the second preliminary hearing, the respondent's representative (at that time) told the Tribunal that the respondent was no longer arguing that the conversation was without prejudice and therefore there was no issue to be determined at that hearing.

6. The claimant was dismissed by the respondent after the issues which formed the subject matter of this claim. The Tribunal was informed that the claimant had issued a new claim, which it is understood is for unfair dismissal and victimisation. The members of the Tribunal hearing this case have not read that claim form. At the preliminary hearing on 7 September 2020 Employment Judge Slater decided that the new complaints of unfair dismissal and victimisation, being sufficiently discrete from the complaints being determined in this claim, should proceed as a separate case and if the claimant wished to bring such complaints he needed to present a new claim. Employment Judge Slater in her order following that hearing, explained that combining the claims would cause considerable delay.

7. The respondent's representative was particularly concerned about the potential overlap of the two claims and, on a number of occasions, he raised the issue of the potential overlap between issue 9.3 and the subsequent claim. The Tribunal has needed to hear evidence about the final written warning (and the subsequent appeal) in order to determine issue 9.3. However, as far as it is able, the

Tribunal has been particularly careful to endeavour to ensure that the findings are limited only to those which needed to be made to determine the issues in this claim. This Tribunal has not made any findings in relation to the subsequent disciplinary process or dismissal (which were not the subject of these proceedings). The fact that the Tribunal would not do so, was made clear to the parties at the start of the evidence.

Procedure

8. The claimant represented himself throughout the hearing. Mr Morton, solicitor, represented the respondent throughout the hearing (having only been instructed shortly before it started).

9. The case was conducted as a hybrid hearing, with both parties and their witnesses attending the Employment Tribunal in person for the first three days of hearing (during which all the evidence was heard) and on the fifth day (when submissions were ultimately heard). The Employment Judge and one member of the panel (Mr Rowen) was also present in the Tribunal in person on those occasions. The other member of the panel, Mr Stowe, attended the hearing remotely using CVP remote video technology. As explained below, the arrangements were different on the fourth day of hearing.

10. The documents for the hearing had not been prepared in a way which assisted the Tribunal or which accorded with the case management orders. The claimant provided a bundle of documents for the hearing which included 108 documents. The respondent prepared a bundle for the hearing, which was initially only provided electronically, and included sixteen documents, the majority of which were also included in the claimant's bundle. The Tribunal itself ensured that both parties and all attendees had access to all of the documents before the evidence commenced. The respondent's representative was allowed a small amount of additional time to review the claimant's bundle in preparation for cross-examination (as he had not seen the bundle in the format provided to the Tribunal).

11. The Tribunal read the documents in the bundles to which they were referred either in witness statements or in the course of evidence. Where a number is referred to in brackets in this Judgment, it is a reference to the document number in the claimant's bundle (the numbering relates to documents and not individual pages of documents).

12. The Tribunal was provided with witness statements from; the claimant; Mr Z Desai, the respondent's General Manager; Mr I Thornley, the respondent's UK/Export Sales Office Manager (who reported to Mr Desai); and Mr A Blower, the respondent's UK Sales Manager (who was of comparable seniority to Mr Desai).

13. The Tribunal heard evidence from the claimant. He confirmed the truth of his statement and was cross examined by the respondent's representative, as well as being asked questions by the Tribunal. The Tribunal also heard evidence from the witnesses who were called by the respondent: each of whom also confirmed the truth of their statements, before being cross-examined; as well as being asked questions by the Tribunal.

14. At the start of the hearing the claimant did raise the fact that Dr Brooks (previously the respondent's Group HR Manager) was not attending to give evidence. He felt that Mr Brooks was of fundamental importance to the issues. It was confirmed that who a party chose to call to give evidence was a matter for them. It was confirmed that in his submissions he would be able to explain to the Tribunal what the absence of evidence from Dr Brooks meant for the outcome of his case (as he did). During the claimant's cross-examination of the respondent's witnesses, he did, on occasion, ask questions of them which Dr Brooks would have been better able to answer, but nonetheless no objection was made to him doing so in the absence of Dr Brooks.

15. During the first three days of the hearing the Tribunal reversed the seating arrangements in the hearing room, in order to ensure that the claimant sat on the opposite side of the room from the open window (which needed to be open due to the arrangements in place as a result of Covid-19), so that he was away from any draught from the open window.

16. On the second day of the hearing it became evident that there was both a recording of, and a transcript of, the disciplinary hearing on 29 November 2019 which the respondent had prepared, which had never been provided to the claimant and was not available to the Tribunal. The Tribunal did make clear that this was not appropriate and that the respondent had not complied with its obligations by not disclosing it/them earlier. However, the Tribunal felt it important to see the record of the hearing, so a copy of the transcript was obtained and provided to the Tribunal and the claimant during the morning of the second day. The claimant was given time to read the document (during his cross-examination). The respondent's position was that the transcript was an accurate record of the hearing, save that the transcriber had recorded that Dr Brooks had said everything which had, in practice, been said by three people (Dr Brooks, Mr Mackenzie and Mr Roberts). The claimant's evidence was that the transcript was not accurate.

17. The recording of the hearing was not available at the same time as the transcript. Ultimately a device containing the recording was provided to the claimant only during the afternoon of the third day of hearing.

18. The claimant had requested in writing the recording and the notes of the disciplinary hearing, very shortly after the disciplinary hearing took place. The respondent had declined to provide either to him prior to the Tribunal hearing. Shortly before lunch on the third day, when the evidence had been heard, there was a discussion about the best and most appropriate approach to the recording and the end of the hearing. The discussion was deferred over lunch on the third day. The claimant's preference was for the case to be adjourned so that he could hear the transcript prior to making submissions. The respondent also expressed a preference for the case to be adjourned and submissions heard at a later date. In the light of the position of the parties, the Tribunal agreed that the case would be adjourned and submissions would be heard on 5 March 2021 (after the claimant had a full opportunity to listen to the recording).

19. Prior to the fourth day of hearing on 5 March 2021, the respondent provided the Tribunal with an amended transcript of the disciplinary hearing. The claimant informed the Tribunal that he believed the recording was incomplete, but he did not

raise any specific elements of the transcript which needed to be amended in the light of the recording having been heard. The Tribunal itself did not listen to the recording.

20. Prior to the fourth day of the hearing, each of the parties provided the Tribunal with written submissions/summing up. On the fourth day of hearing (5 March 2021), the respondent's representative and both members of the Tribunal attended remotely by CVP video technology. The claimant also took part in the hearing by CVP, whilst present in the Tribunal building. Unfortunately, however, due to technical issues which arose after the start of the respondent's submissions, the hearing was unable to progress further on that day. The hearing then reconvened on the fifth day (8 April 2021) when each party made oral submissions (with the claimant and the respondent's representative attending the Tribunal building in-person). The respondent's representative re-started his submissions afresh on the fifth day, having previously been interrupted early in his submissions.

21. At the end of the hearing the Tribunal reserved judgment and accordingly provides this written Judgment and reasons. The Tribunal has not addressed remedy issues, as the hearing has so far heard only the liability issues as confirmed in the list of issues stated above.

Facts

22. In the course of the hearing the Tribunal heard evidence about a wide range of matters which ultimately did not impact upon the Judgment the Tribunal reached. The Tribunal has not recorded in this Judgment all of the evidence heard or made findings on matters which were not relevant to the outcome. At the hearing, the Tribunal focussed upon the precise allegations as clarified at the preliminary hearing on 12 February 2020 and as recorded in the list of issues.

23. The claimant was employed by the respondent from 1 August 2013. He previously worked in the warehouse, but in the latter years of his employment he worked as a UK Telesales Agent. The claimant worked in an open plan office and, at the relevant time, he worked alongside seven other people in an office. Each employee had an allocated desk at which they worked.

24. The Tribunal was not provided with a copy of the claimant's employment contract nor was it provided with any policies or procedures. No equal opportunities or diversity policy was identified, nor was the Tribunal referred to any disciplinary or grievance procedure.

25. The claimant has suffered from rheumatoid arthritis since at least 2014. The claimant's evidence was that he informed a number of the respondent's previous HR Managers about his condition and that he had provided at least one document to the respondent which he believed had been placed on his personnel file. The respondent denied that there was any such documentation on the claimant's personnel file and each of the witnesses who attended the hearing said they did not know about this condition prior to the events in later 2019 on which the hearing was focussed. However, as Mr Desai's evidence was that he became aware of the claimant's rheumatoid arthritis on 28 October 2019 (something which the claimant disputed), the Tribunal did not need to determine whether the respondent was aware of the claimant's disability at an earlier date as nothing material to the issues turned

upon it (the respondent clearly being aware of the claiamnt's disability from that date).

26. The claimant had very serious health issues and was absent from work for an extended period of approximately six months. He returned to work on 3 July 2019. The claimant was very ill during this absence, including having an extended period of hospitalisation. This absence resulted from heart and kidney issues, it was not as a result of the disability relied upon in the claim (rheumatoid arthritis).

27. The claimant initially returned to work on a phased return, which was completed on 25 July 2019. Thereafter the claimant worked full time.

28. Mr Thornley managed the team in which the claimant worked. The Tribunal was shown an email of 3 October 2019 (43) from Mr Thornley to the team. The email recorded that the claimant had achieved the top call rate for the team on 2 October 2019. What was said to the entire team was: "*It doesn't lie! .. yes that's correct Paul hit the top of call rate yesterday… I know what you are thinking* [followed by a winking emoji] ... *Nice work Paul keep it up … (it was only 4 calls) but never the less LOL*". The claimant was not happy about the tone of this email. The Tribunal accepted the email as recording Mr Thornley's management style and finds that it demonstrated that he was happy to engage in what might be described as banter or jokiness, without being overly concerned about whether what he said about a member of his team (and the claimant in particular) was negative or might be (understandably) perceived negatively.

29. On 28 October 2019 the claimant had an annual appraisal meeting with Mr Desai and Dr Brooks. The claimant was recorded as having good performance. The appraisal document (34) (36, as amended) contained a summary of the discussion. It was not in dispute that as part of his appraisal the claimant said the following: morale was low; there was a pressure to push sales; the bonus was unachievable; and his salary was low. There was also discussion about negativity and a prevailing negative attitude, which the notes prefaced by saying was an issue that was not about the claimant but was about the entire sales team, and the claimant emphasised in evidence was a discussion about the workforce, not him personally. There was also a discussion about toilet breaks and making tea.

30. Mr Desai's evidence was that the claimant discussed his health generally in the appraisal meeting and that included him referring to his rheumatoid arthritis. Mr Desai's statement said that the claimant informed Mr Desai that he was susceptible to fluctuations in the room temperature that may exacerbate his condition. The claimant vehemently denied that rheumatoid arthritis was mentioned in the appraisal at all. He also denied that he ever made any link between the condition and room temperature, his evidence being that temperature does not make any difference to his condition (save for when he first wakes in the morning). No record of this part of the conversation is contained in the note. Mr Desai explained in evidence that this was not the sort of information/discussion which would be recorded in the appraisal document.

31. At 12.14 on 31 October Mr Brooks emailed the claimant a copy of the appraisal document and asked for the claimant to check it, sign and return it. The claimant responded on the same day, explaining that two things needed correcting

(neither of which were material to the issues in the claim). Mr Brooks amended the appraisal document and sent it to the claimant shortly after. The claimant considered that the appraisal process was concluded when the document was agreed. Mr Desai's evidence was that the appraisal was an ongoing process.

32. On 6 November 2019 two members of the sales team were informed about a new office layout. At 9.59 on Thursday 7 November Mr Thornley emailed the team about the new layout (37). The email confirmed that the changes would begin at 2pm that day.

33. The purpose of the move was to facilitate changes in the business and improve efficiency. In answer to questions, Mr Desai explained why the move took place and the rationale for seating particular people together for business reasons. The claimant questioned why, in particular, he was moved and someone else who moved into the area took his seat. He could not understand why the person moving into the team was not allocated the vacant seat. The claimant's evidence was that, at the time, he was only told that it was for operational purposes.

34. The claimant's evidence was that the new seat was a very short distance from the old one. The claimant's evidence (which was not contradicted) was that the seat was in a draught. The draught related to a large double-glazed window. Attempts to stop the draught had not worked.

35. The claimant spoke to Mr Thornley. The claimant alleged that Mr Thornley said to him "*tough that's the way it is*". Mr Thornley confirmed that there was a conversation and the claimant did speak about the perceived cold draught. He denied saying what the claimant alleged.

36. At 10.26 on 7 November, the claimant emailed Mr Desai about the change in an email headed "*I AINT HAPPY*" (38A). That email said:

> "*I isn't happy to say the least I return to work and have my desk moved to where I am now which was great as I am away from the door and window which is warmer and helps so much as my rheumatoid arthritis as I don't feel it as much where I am sat at the moment. But to find out this morning I am being moved yet again to the desk opposite me and back next to the cold drafty windows … I feel hacked off to the point the thought of walking out even went through my head"*

37. The Tribunal noted that, in the first sentence of this email, the claimant himself appeared to make a direct connection between warmth in his previous seat (prior to the move on 7 November) and it being of benefit for his rheumatoid arthritis.

38. At 15.17 on 7 November, the claimant emailed Mr Desai again (38B):

> "*I know my totally valid point I put forward about the draft and cold was listened to by yourself but all I can feel is a draft and I know just what will happen as I explained as I have 6 years' experience of the problem I will update you as the issue arises with my rheumatoid arthritis"*

39. At 17.06 the claimant emailed his partner the email sent to Mr Desai (38B). When asked about this, the claimant explained that he did this so that she could print it off for him. When challenged about why he was sending this at this point, when he had only first heard about the office move that morning, the claimant's evidence was that he had already worked out there was something not right and something was going wrong, and he was gathering his evidence.

40. The respondent's evidence was that Dr Brooks only worked certain days a week and was not at work on 7 November. He was the respondent's sole HR adviser. Mr Desai forwarded the claimant's first email to Dr Brooks at 8.11 pm on 7 November and Dr Brooks responded to Mr Desai at 7.53 on Friday 8 November (39A). He said:

> "*I am mindful of the obligation to make reasonable adjustments – suggest dropping an email on this point to Paul and explaining we will assess the situation and if needs be make any necessary adjustments to Paul's workspace*"

41. At 10.38 on 8 November, the claimant emailed Mr Blower, copied to Mr Thornley (39B). He sought an explanation for why the move had been proposed and whose decision it had been.

42. Mr Blower responded at 10.49 (39C) suggesting a face to face meeting. The claimant responded at 11.02 (39D). He again objected to the move and the way in which it had been implemented, informing Mr Blower that he was starting to feel the effects. Mr Blower's evidence was that he was not in the office that day. Mr Blower's evidence was also that he was not aware of the claimant's rheumatoid arthritis at that time and did not know that was the reason why the claimant was objecting to the seat move.

43. At 13.18 on 8 November Dr Brooks emailed the claimant (39E). He said:

> "*I understand from Zak that you have raised some concerns regarding your recent desk move and its possible effect on an existing health condition. As a responsible employer we take your concerns seriously and will make any reasonable adjustments that are required. For the present time I suggest that we monitor the situation and review in a week's time"*

44. At 13.54 on 8 November, the claimant emailed Dr Brooks (39F). He suggested meeting face to face. He said "*To say I am upset is a under-statement I am livid with my treatment*".

45. At 13.56 on Friday 8 November, Dr Brooks emailed the claimant to invite him to, what the email described as, an HR Review Meeting on Monday 11 November 2019 at 10 am (40).

46. At 14.00 Mr Brooks emailed the claimant again (41). That email clearly explained that at the meeting arranged for the Monday he would be happy to discuss any concerns the claimant had. It also informed the claimant that the respondent would make any reasonable adjustments to the workplace where necessary.

47. In the morning on Monday 11 November, the claimant met with Dr Brooks and Mr Desai. The claimant's account was that he was told by Dr Brooks that he had two choices: an (unspecified) lump sum with a good reference with no comeback to go; or to keep his head down and do as he was told. The claimant was shocked. His evidence was that he did not want to discuss what was proposed and stopped the conversation there and then. He also said that he assumed it was because of the health issues which had meant he had taken a long time off sick. The claimant had taken the email of 3 October with him to the meeting (see paraph 28) as he wished to discuss it. His evidence was that Mr Brooks and Mr Desai thought it was funny.

48. None of the respondent's witnesses referred to this meeting in their witness statements. However, in answering questions, Mr Desai denied that he had thought the email was funny. He said the proposal was made because the respondent thought the claimant wasn't happy. He accepted (when it was put to him) that on 11 November the claimant said he was happy and wanted to stay in his job. His evidence was that he was pleased that the claimant did not want to leave. The Tribunal finds that the meeting occurred as alleged, save that it does not find that Mr Desai found the email funny as that was not subsequently something which the claimant raised (see for example his email to Mr Luby of 17 November (52)).

49. At 11.49 on 11 November, Dr Brooks emailed the claimant (45A) saying that, following the earlier meeting, there was to be a performance review meeting on 9 December. At 16.39 on the same day, Dr Brooks emailed Mr Desai, Mr Thornley and Mr Blower about the claimant (47).

50. The Tribunal was provided with the claimant's text messages exchanged with his partner. On the 11 November, following the meeting, the claimant said the following (44):

> *"All I got to say is tossers I still calm though I had it here they aren't interested so nor am I now sent my cv to some job applications today b******ks to them"*

51. There was no dispute that the heating in the office was turned up. The claimant alleged that this was an act of harassment. In answer to questioning, he said he thought that the respondent was probably trying to turn people against him, by doing so. However, in answer to a later question, he accepted that the respondent must have thought that it was helping. He emphasised in his evidence that he had explained to the respondent that it was the draught which was the issue, not the temperature. It was clear from Mr Thornley's evidence that (whether or not mistakenly) he thought that heat assisted the claimant with his condition. The issues with the increased heat in the office only applied from Monday 11 November until the claimant's suspension on Thursday 14 November 2019.

52. What is notable from the text messages between the claimant and his partner on 13 November (48) are the following:

a. The claimant referred to the heating being on full blast;

b. The claimant said "*Ian keeps saying I think it's time for our trunks I keeping my cool don't worry";*

c. The claimant said the window was opened, which the claimant described as providing some air;

d. The claimant's partner told the claimant to "*just keep gathering evidence and smiling*";

e. The claimant informed his partner that he had turned all the radiators down; and

f. The claimant referred to two job applications which he had just completed.

53. There is a direct conflict of evidence about whether or not Mr Thornley made a comment or comments as alleged on 13 November. The claimant's evidence was that on 13 November Mr Thornley made "*sarcastic comments of it's like a sauna in here it's time to get our trunks on*". That was also what was alleged in the claim form. The list of issues recorded the allegation as being that the comment was made on four or five occasions in the period 7-15 November 2019, but there was no evidence before the Tribunal of the comment having been made other than on 13 November. Mr Thornley categorically denied that he made such a comment or comments. He accepted that people in the office were aware of the link between the increased heat and the claimant.

54. The Tribunal finds on balance that the comment alleged was made by Mr Thornley on 13 November. The Tribunal noted that the claimant himself recorded the comment as being made in his text message to his partner sent that day, providing support for the claimant's evidence in the only contemporaneous record available. The claimant also alleged the same thing in his email to Mr Luby sent four days later, on 17 November (52) (see paragraph 64 below). As explained in paragraph 28 above, the Tribunal was also provided with evidence in the 3 October email (43) of Mr Thornley's approach to management and the type of things which he thought it appropriate to say to his team. The Tribunal finds that what the claimant alleged Mr Thornley said is consistent with what this evidence showed about what Mr Thornley would say. For these reasons and having needed to determine the issue in the light of directly conflicting evidence, the Tribunal finds that the comment alleged was made. However, the Tribunal does not find that the purpose of the comment was to undermine the claimant and create a humiliating environment for him, even though it did have that effect. The Tribunal finds that the comment was made because it was part of Mr Thornley's general approach to office communication (as explained at paragraph 28).

55. On 13 November a conversation took place in the office about the smell of a box of brake pads, which it was observed smelt like fish. What exactly was said is a matter of dispute, albeit there was no disagreement that a conversation occurred about the subject matter of the smell.

56. The Tribunal has seen a statement from the respondent's only female member of staff, Ms Fay, made on 15 November (56). In it she alleged that the claimant said to another colleague, with reference to Ms Fay, "*It's not just me who thinks she has not had a wash yet?*" (following on from discussion about the smell of fish).

57. The claimant vehemently denied that he made the alleged comment. In the statement which he wrote for the respondent's disciplinary investigation (58), he said he responded to a comment about the fishy smell "*I jokingly replied I am glad we've all had a wash*". In his evidence to the Tribunal he explained that he was concerned that the smell related to the after effects of one his conditions (not the disability relied upon).

58. When cross-examined, the claimant did not dispute that Ms Fay had made the statement. He alleged that Mr Brooks was behind a statement being made, and he contended that the process which followed was a vendetta against him. However, during his evidence, the claimant did not suggest that the statement made by Ms Fay was not a genuine statement.

59. In his submissions, the claimant placed significant emphasis on the absence of statements from certain people. There was, however, no dispute that a statement was made by Mr Spencer (57), whose account was that the claimant had said to him, regarding Ms Fay, "*It is probably because she has not had a wash*".

60. It is not necessary for the Tribunal to determine whether the alleged comment was made, as it is not material to the issues to be determined.

61. On 13 November Mr Blower was informed that Ms Fay would not be in for the rest of the day. Ms Fay was in his team. He was not in the office himself at all that day. He told the Tribunal that he contacted Ms Fay who was very upset. A statement he made at the time (55) said she was in an emotional and distressed state and clearly very upset. As part of the investigation Mr Blower himself wrote a statement, albeit that was not about what occurred when the alleged comment was made, as Mr Blower was not there.

62. The claimant was suspended on Thursday 14 November 2019. He was told by Mr Thornley to go to Mr Desai's office. In the office were Mr Desai, Dr Brooks and Mr Blower. The claimant was informed that he was suspended on full pay. He was told to collect his belongings and leave the premises. Mr Desai's evidence was that he made the decision to suspend the claimant, having taken guidance from Dr Brooks.

63. The claimant alleged that as he was collecting his belongings, Mr Blower said "*now begins the big clear out*". Mr Blower denies that he said this. He stated that he explained to the claimant the need to clear his work area of his personal belongings, as he would not be allowed back during any suspension (his evidence was that he was particularly concerned about the claimant's medication).

64. On 17 November 2019 the claimant emailed Mr Luby, the respondent's managing director (52). That email raised various issues including: the office move and the impact that the move had on his rheumatoid arthritis; Mr Thornley saying that it was like a sauna and get your trunks on guys; the 11 November meeting; and being suspended on 14 November. Mr Luby responded on 18 November (53A), referring to the disciplinary investigation. The issues raised by the claimant were not addressed formally by the respondent nor were they treated as a grievance.

65. Dr Brooks investigated the disciplinary issue. The claimant was invited to a disciplinary hearing in a letter from Dr Brooks dated 21 November 2019 (54). The letter explained that the allegation was "*Derogatory comments*" made to Ms Fay on 13 November. Three statements were enclosed with the letter (including Ms Fay's). The letter made clear that dismissal on grounds of gross misconduct or a final written warning were possible consequences. The right to be accompanied was confirmed.

66. The disciplinary hearing took place on Friday 29 November 2019. The hearing was attended by: the claimant; Mr Mackenzie; Mr Roberts; Dr Brooks; and Mr Lowe (as the person who accompanied the claimant). The Tribunal is not entirely clear about the role of each of the three respondent attendees at the meeting and it was not spelt out in any document. The notes record that Dr Brooks did the majority of the talking. The respondent's position was that Mr Mackenzie chaired the meeting. The claimant produced a statement for the hearing (58) which was read aloud. Amongst other things, the statement endeavoured to highlight the discrepancies between what was said in the two statements provided and the absence of any other evidence. Neither Ms Fay nor Mr Spencer attended the disciplinary hearing.

67. As a result of the disciplinary hearing, the claimant was given a final written warning. The claimant's unchallenged evidence was that this outcome was provided verbally after a break of approximately ten minutes, and was given by Dr Brooks. This was confirmed in writing by Dr Brooks (60). His letter says "*The Chair felt that on the balance of probabilities you did make derogatory and highly offensive comments towards Miss … Fay*".

68. The claimant returned to work, following his suspension, on Monday 2 December 2019. He returned to the seat to which he had been moved after the changes in early November. He worked in that seat until the Christmas shut down (being a period of a little over three weeks).

69. A meeting was held with the claimant on 3 December, which was followed by a letter (68). The claimant's rheumatoid arthritis was discussed. His seating was not changed, but Dr Brooks recorded in the letter that the situation would be monitored.

70. In response to a request, on 5 December the claimant provided a heavily redacted letter from an NHS Trust confirming that he had attended an outpatient appointment in the rheumatology department (72).

71. The claimant's Tribunal claim was entered on 15 December 2019 and therefore the matters complained of can only be the issues as they occurred up to that date.

72. Mr Desai's evidence was that he made the decision to agree to the claimant's request to change back to his previous seat on 19 December 2019. Dr Brooks confirmed this in a letter of 19 December 2019 (83). In that letter he said:

> "*With regard to your rheumatoid arthritis you confirmed that fluctuations in temperature exacerbate your condition. We discussed moving you from your current workstation so that you are away from the window. You confirmed that moving from your current location would be beneficial. We will therefore arrange for a desk move first thing in January 2020. In addition we will monitor*

the situation to establish if any further reasonable adjustments are required. It is hoped that this move will reduce any inflammation and improve your rheumatoid arthritis so that it does not impact upon your working day"

73. The claimant changed back to his old seat on his return from the Christmas break (2 January 2020).

74. The claimant asked to listen to the recording of the disciplinary meeting. Mr Brooks emailed the claimant at 8.49 on 3 December (67A) to say that the recording would be fully transcribed in time for the appeal hearing and that the respondent could arrange for the claimant to listen to the recording. At 9.39 on 3 December (67C) Mr Brooks emailed to say that, given the sensitive nature of what was discussed, they would not be releasing the audio recording, but were willing to provide a summary of the meeting or to allow the claimant to listen to the recording with HR present. The claimant's uncontested evidence was that he was never given the opportunity to listen to the recording and was never provided with any notes or a transcript (prior to the Tribunal hearing). The Tribunal could not understand why it/they were not provided to the claimant shortly after he requested it/them.

75. The claimant appealed against the final written warning in an email of 4 December to Mr Luby (71). The appeal hearing took place on 14 February 2020 and was attended by: Mr Luby; Dr Brooks; the claimant; and Mr Lowe (as the person who accompanied the claimant). In a letter of 20 February 2020 Dr Brooks wrote to the claimant and informed him that his appeal had not been successful as no grounds for appealing the original decision were substantiated (Respondent's bundle, document 9).

76. The Tribunal did not hear evidence from any of:

a. Ms Fay, the person who made the allegation which led to the final written warning;

b. Mr Spencer, the other person for whom a statement was provided by the respondent which recorded what he heard was said;

c. Dr Brooks, who was the (main) investigator, the person who interviewed the witnesses, and the person who did the majority of the speaking at the disciplinary hearing;

d. the disciplinary decision-maker (which appeared to be Mr Mackenzie); or

e. Mr Luby, who heard the appeal.

77. The claimant accepted that Ms Fay made the complaint, whilst emphasising that it was the only thing he accepted.

78. The claimant did accept in cross-examination that: if he had made the comment to Ms Fay that was alleged it would have been misconduct; and, on the same basis, gross misconduct. He vehemently denied that he had said what was alleged.

The Law

The duty to make reasonable adjustments

79. The claimant alleges that the respondent breached the duty to make reasonable adjustments which applies under sections 20 and 21 of the Equality Act 2010.

80. Section 20 of the Equality Act 2010 provides:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

81. **Environment Agency v Rowan [2008] IRLR 20** is authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

82. For the first question is if the respondent had a provision, criterion or practice which put the claimant at a substantial disadvantage in relation to a relevant matter when compared with persons who are not disabled. If it did, then the respondent is required to take such steps as are reasonable to have to take to avoid that disadvantage. A failure to comply with a duty to make reasonable adjustments, is discrimination.

83. Section 20 of Schedule 7 of the Equality Act 2010 says that A is not subject to a duty to make reasonable adjustments if A did not know and could not reasonably be expected to know that the claimant had the disability and was likely to be placed at the disadvantage.

84. The Equality and Human Rights Commission Code of Practice on Employment, at Chapter 6, describes the principles and application of the duty to

make reasonable adjustments for disabled people in employment. Paragraph 6.10 says:

> "**The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions**"

85. Paragraph 6.28 of the EHRC code describes some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take, which include: whether taking the step would be effective in preventing the substantial disadvantage; the practicability of the step; the costs of making the adjustment; the extent of any disruption caused; and the type and size of the employer.

The burden of proof

86. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

87. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case.

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

88. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the EAT summarised the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

Harassment

89. The claimant alleges harassment on the grounds of disability.

90. Section 26(1) of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."**

91. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds (here of disability). Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

92. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa).

93. In each case, even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

94. In ***Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225***, the EAT placed particular emphasis on the last element of the question, i.e. whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, the EAT said it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

95. The Equality and Human Rights Commission Code of Practice on Employment, at Chapter 7, provides guidance on harassment. In relation to whether conduct is related to a protected characteristic, it says that "related to" has a broad meaning and the conduct does not have to be because of the protected characteristic.

Victimisation

96. Section 27 of the Equality Act 2010 says:

> **"A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act."**

97. The first step is to identify whether the claimant did a protected act (or whether the respondent believes that he has done, or may do, a protected act). Section 27(2) defines the following as being a protected act (as far as the elements may be relevant to these proceedings):

> "**(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act"**

98. For victimisation the second question for the Tribunal is whether the respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had any material influence on subsequent detrimental treatment. That exercise has to be approached in accordance with the burden of proof.

99. If the Tribunal concludes that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment. Where errors affect only the claimant the Tribunal must be particularly careful in its scrutiny of the decision-making process to see whether the respondent's explanation withstands that scrutiny, or whether the error in truth masks a discriminatory decision-making process.

100. The Equality and Human Rights Commission Code of Practice on Employment, at Chapter 9, provides guidance on victimisation. In particular, paragraphs 9.8 to 9.10 address what is a detriment. It says:

> "**Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage…There is no need to demonstrate physical or economic consequences. However, an unjustified grievance alone would not be enough to establish detriment".**

101. It also says:

> **"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.**"

The submissions

102. In considering its decision the Tribunal took into account the submissions made by each of the parties and all matters referred to in them (both verbally and in writing). In practice neither party made reference to any case law when making their submissions, they concentrated on the facts of the case.

Conclusions– applying the law to the facts

The duty to make reasonable adjustments

103. The first issue which the Tribunal was required to determine (issue 2) was did the provision, criterion or practice put the claimant at a substantial disadvantage in comparison with persons who are not disabled in that, sitting in a draught, which the new arrangement entailed, exacerbated the effects of his rheumatoid arthritis? The claimant relied on a provision, criterion or practice of the seating arrangements.

104. In submissions the respondent's representative contended that the seating arrangements were not in fact a PCP at all. The Tribunal therefore started by considering whether the seating arrangements were a PCP applied by the respondent. It noted that the reason for the claimant being asked to move seats was not a unique bespoke decision about his seating. The move was explained by the respondent as being for reasons of business efficiency and involved at least one other person moving seats at the same time. As explained in the law section above, the EHRC code of practice explains that the term Provision Criterion or Practice should be construed widely, so as to include any formal or informal arrangements, including one-off decisions and actions. On that basis, the Tribunal finds that the respondent's seating arrangements for its employees in the office and the changes to those arrangements, were exactly such an arrangement amounting to a PCP, when the term is construed widely.

105. The claimant's evidence to the Tribunal was that sitting in a draught did exacerbate the effects of his rheumatoid arthritis. The Tribunal accepts that evidence. There is no evidence which contradicts that assertion. That did mean that the seating arrangements (once they changed on 7 November 2019) did place the claimant at a substantial disadvantage when compared to persons who are not disabled. Whilst sitting in a draught may not be ideal for any employee, the Tribunal finds that the impact would be more significant for someone, like the claimant, who has rheumatoid arthritis.

106. Issue three related to knowledge of disability and also asked could the respondent reasonably be expected to know that the claimant was likely to be placed at the disadvantage? Based upon the respondent's own evidence, Mr Desai (and therefore the respondent) knew about the claimant's rheumatoid arthritis from 28 October 2019. Whilst the claimant contends that the respondent was aware of it much earlier, as the alleged breach of the duty to make reasonable adjustment only applied from 7 November 2019 nothing turns upon whether the respondent knew prior to the end of October 2019.

107. In his submissions, the respondent's representative focussed on the contention that the respondent was not aware that the claimant was likely to be placed at the particular disadvantage. The Tribunal finds that, while it may have been true when the move was proposed that the respondent did not know about the particular disadvantage which it represented for the claimant, the claimant clearly informed the respondent about the disadvantage at which he would be placed in his new seat as soon as he became aware of the proposed change. His email at 10.26 on 7 November to Mr Desai (38A) clearly explained that to him. The claimant went on to reinforce that point in his subsequent emails and conversations as recorded above.

108. Whilst the Tribunal had no doubt that the respondent had been made aware that the claimant was likely to be placed at a substantial disadvantage by the changed seating arrangements on 7 November as explained, Dr Brooks email of 8 November (39A) to Mr Desai in which he said "*I am mindful of the obligation to make reasonable adjustments*" makes it patently clear that the respondent was, by 8 November, aware of the fact that the claimant had a disability and was likely to be placed at a disadvantage by the seating arrangements as a result. That is why Dr Brooks would have been mindful of the obligation to make reasonable adjustments. If he was not aware that the claimant was likely to have been placed at a substantial disadvantage, he would not have been mindful of the obligation.

109. Issue four was - did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage? In considering this issue, the Tribunal noted that the respondent did in fact make exactly the adjustment that the claimant sought in January 2020. The question therefore was whether in the period between the 7 November 2019 and the date when the claimant entered his claim at the Tribunal (15 December), there was a failure to make a reasonable adjustment (being the adjustment that was later made).

110. The Tribunal has considered the factors listed in paragraph 85 above, taken from the EHRC Code of Practice on Employment. Moving the claimant's seat was entirely effective in preventing the disadvantage suffered by the claimant. When he moved it removed the particular issue for him with rheumatoid arthritis arising from sitting in a draught. The step was easily undertaken; the claimant simply moved seats. It was entirely practicable, as demonstrated by the fact it happened in January 2020. The disruption was limited to the need to move another employee. The move had no cost. Whilst the limited size of the respondent can be a factor, it had no impact on its ability to move the claimant's seat back to the one he where he had previously been located.

111. The Tribunal finds that the respondent did fail to take such steps as it would have been reasonable to take to avoid the disadvantage. The Tribunal can understand that it might have taken the respondent a few days to arrange for the relocation of the claimant's seat, and therefore it was not unreasonable that the respondent failed to make the adjustment by Thursday 14 November (when the claimant was suspended and therefore was not, in any event, in work). However, when the claimant returned to the office on 2 December 2019, there had been three weeks from the claimant raising the problem and explaining why an adjustment was required. In the period from his return until the Christmas break, the respondent failed to take the step which it would have been reasonable to take to avoid the

disadvantage (that is moving the claimant back to be seated where he had before the change). The meetings and requests for evidence about the claimant's disability during December 2019, provide no genuine reason why the adjustment was not reasonable. Whilst the respondent did make the adjustment in January 2020, it still failed to make a reasonable adjustment during the period when the claimant was in work in December 2019.

Harassment

112. The first act which the claimant alleged was unwanted, was recorded in the list of issues as the respondent turning up the heating higher than it had ever been in the period 7 to 15 November 2019. The evidence in fact was that the issues with increased heat only applied from Monday 11 November until Thursday 14 November (when the claimant was suspended). It was clear from the claimant's evidence and his text messages at the time (48), that the increased temperature was unwanted.

113. The second question is whether this was conduct which related to the claimant's disability? The Tribunal finds that it was. Mr Thornley increased the heating in the office because of the claimant's condition. The increased heat was therefore conduct related to the claimant's disability, even though (as recorded at paragraph 51) the Tribunal finds that he did so because he thought the increased heat assisted the claimant.

114. The next question is whether the conduct had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant argued that the increased heat was a deliberate way of trying to turn people against him. However, as recorded at paragraph 51, he also accepted when answering questions that the respondent thought it was helping. The Tribunal does not find that the respondent increased the heat with the purpose of undermining the claimant's dignity or creating a hostile environment for him. The Tribunal finds that the respondent increased the heat because it thought doing so assisted the claimant with his condition.

115. Conduct can still be harassment if it has the required effect, even where the purpose was not to do so. The claimant did perceive the increased heat as violating his dignity and creating a hostile and humiliating environment for himself. It did have that effect, for the claimant. As part of the legal test the Tribunal also needed to determine whether it was reasonable for the conduct to have had that effect – that is the objective element to the test. The Tribunal finds that it was not reasonable for the conduct to have had that effect. In reaching this decision the Tribunal has taken into account the following:

a. The period of time involved was less than four days (of increased heat in the office);

b. The claimant was able to turn the radiators down, which he did, as he explained in a text message to his partner;

c. Windows were also able to be opened to reduce the heat, something which the claimant explained occurred; and

d. Whilst the claimant in his evidence to the Tribunal was adamant that heat did not assist him and that the respondent had misunderstood what he was requesting, the claimant's email to Mr Desai at 10.26 on 7 November (see paragraph 36 above) (38A) did say that the fact that the claimant's previous desk had been warmer had helped his rheumatoid arthritis.

116. Accordingly, the Tribunal does not find that it was reasonable for increased heat in the office between Monday 11 November and Thursday 14 November 2019 to have had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

117. The second alleged act of harassment was recorded in the list of issues as Mr Thornley having said, on 4 or 5 occasions in the period 7-15 November 2019: "*Come on lads, get your trunks on, it's like a sauna in here*". As recorded at paragraphs 53 and 54 above, the Tribunal found that the alleged comment was made by Mr Thornley on 13 November 2019 (for the reasons explained in paragraph 54).

118. The comment was clearly unwanted, as the claimant's evidence to the Tribunal made clear that he did not like the fact that the comment was made.

119. The Tribunal has carefully considered whether the conduct related to disability? It was a comment addressed to everyone in the office. The claimant perceived himself as being the butt of the joke, because the claimant and his condition was the reason why it was hot in the office. Mr Thornley accepted that people in the office were aware of the link between the increased heat and the claimant. As addressed in the law section at paragraph 95, the EHRC Code of Practice makes clear that "related to" has a broad meaning and the conduct does not have to be because of the protected characteristic. Applying that to the circumstances of this case, the Tribunal has found that the comment made was related to disability. It was related to the temperature, which was raised because of the claimant's disability, and Mr Thornley was aware that the raised temperature was because of the claimant.

120. As is recorded at paragraph 54, the Tribunal does not find that the purpose of the comment was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The comment was made by Mr Thornley because it was part of his general approach to office communication, that is he thought he was being funny.

121. However, whatever the purpose, the effect on the claimant was that he did find it to be undermining and it did create a humiliating environment for him. The claimant was offended by it and did perceive it to be aimed at him. Taking into account what was said, the reason why the heating had been raised in the office, and the fact that people in the office were aware of the link between the increased heat and the claimant: the Tribunal finds that it was objectively reasonable for the effect of the conduct to be that it created a humiliating environment for the claimant.

122. Accordingly, the Tribunal does find that that Mr Thornley said on 13 November 2019 "*Come on lads, get your trunks on, it's like a sauna in here*", that had the effect of creating a humiliating environment for the claimant, it was

reasonable for it to have that effect, it was related to disability, and accordingly the respondent unlawfully harassed the claimant in breach of section 26 of the Equality Act 2010.

Victimisation

123. The first question for any victimisation claim is whether the claimant did a protected act (in this case issue 8). In this claim, the claimant relies upon his emails dated 7 and 8 November 2019 to Andrew Blower, Zac Desai and Dr Brooks, about the new seating arrangement (38A, 38B, 39B, 39C and 39D). The respondent did not concede that the claimant did a protected act.

124. As is recorded in paragraph 97, a protected act is: doing any other thing for the purposes of or in connection with the Equality Act 2010; and/ or making an allegation (whether or not express) that the respondent or another person had contravened the Act. The content of the emails is recorded in paragraphs 36 to 44 above. The claimant did not explicitly state that he believed that the respondent had breached the Equality Act 2010 nor did he use the word discrimination, however neither of those things is required for a protected act. What the claimant did was allege that the respondent had failed to do what was required in relation to his rheumatoid arthritis. What he alleged was clearly effectively an allegation that the respondent had breached its duty to make reasonable adjustments, even though specific and/or legal terminology was not used. Section 27(2)(d) provides that an allegation that the respondent had contravened the Equality Act is a protected act, whether or not it was express. Whilst not express, the Tribunal finds that was nonetheless what the claimant was alleging in his emails of 7 November 2019 (38A and 38B), that is he was alleging that the respondent had breached its duty to make reasonable adjustments. Even were that not to have been what he was alleging, the Tribunal finds that the terminology used was clearly sufficient to amount to doing something in connection with the Equality Act 2010 (which is all that is required under section 27(2)(c)).

125. The Tribunal has reached that decision based upon its own view of the emails sent by the claimant. However, that conclusion is reinforced by the way in which the emails was read by the respondent at the time. Dr Brook's response to the first email, as recorded in his email to Mr Desai (39A) (see paragraph 40), was that he was mindful of the obligation to make reasonable adjustments. Dr Brook's response to the claimant (39E) (see paragraph 43) stated that the respondent would make any reasonable adjustments. It is clear from those emails that the respondent, at the time, had read the claimant's emails (or at least the first of his emails) as either alleging that the respondent had contravened its obligation to make reasonable adjustments, or at the very least that what he was saying was in connection with that obligation. For something to be a protected act only requires the respondent to believe that the claimant has done one of the things required, and had it been necessary to consider it as a separate issue, the emails make clear that Dr Brooks did appear to believe that the claimant had done so.

126. The first alleged victimisation detriment was what was said in the conversation on 11 November 2019 (issue 9.1). What occurred on 11 November is recorded at paragraphs 47 and 48, which was that: a proposal for the claimant to leave the respondent's employment was raised; the claimant immediately said he did not want

to discuss it; and the conversation ended. In his submissions, the respondent's representative argued strongly that what was said could not amount to a detriment, a submission which the Tribunal understood (although as explained below, does not agree on the facts of this case). When asked why he felt it amounted to a detriment, the claimant did not explain why the conversation itself was felt to be a detriment, he rather focussed upon subsequent events as being the detriment rather than the meeting itself. However, as the claimant was not legally represented, it was appropriate for the Tribunal to determine for itself whether the conversation was a detriment without limiting itself to exactly what was said by the claimant during his submissions.

127. The Tribunal does find that the respondent informing the claimant that it wished to propose an option where the claimant ceased to be employed in the circumstances in which it was put on 11 November 2019 and as part of the alternatives explained, was a detriment. There was nothing specific to trigger the meeting or to suggest that the claimant had sought such a conversation. There was no positive reason given by the respondent in the meeting for the termination being raised. The Tribunal has taken account of what is said about detriment in the EHRC code of practice as explained at paragraph 100: anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage – it doesn't require physical or economic consequences to be demonstrated. Where an employer tells an employee that it envisages no longer employing the employee, the Tribunal does find that such a conversation can certainly amount to a detriment. Someone being told that their employer does not really want to employ them anymore, must be able to be a detriment. Here, the claimant was shocked by the suggestion. His real feelings were clearly evidenced in his text message following the meeting (44) (see paragraph 50), that is that his employer was not interested in him anymore. That is, he reasonably believed that the conversation changed his position for the worse. That was more than an unjustified grievance, the feeling of grievance being fully justified by what was said to him.

128. Issue 10 was whether the act was done because the claimant had sent the email (or emails), that is was the fact that he had done the protected act a material influence on the conversation on 11 November. In considering this question, the Tribunal has focussed on the timing of the events and the emails sent. The claimant's emails regarding the move were sent on 7 and 8 November 2019. Dr Brooks first responded to 7 November emails at 7.53 on Friday 8 November, as he had not been working the previous day. His first email to the claimant was sent at 13.18 on 8 November and he received a response from the claimant at 13.54. At 13.56 on Friday 8 November he invited the claimant to the 11 November meeting. At some point, either prior to the invite being sent or between the invite being sent on the Friday afternoon and the meeting taking place on the Monday morning, the decision was made to speak to the claimant about leaving employment on 11 November. The Tribunal did not hear from Dr Brooks. Based on the evidence heard and, in particular, the timing of the meeting and what was said, the Tribunal finds that the reason for Dr Brooks speaking to the claimant as he did on 11 November was because of the claimant's emails of 7 November, that is it was because of the protected act. The protected act was certainly a material influence upon what was said.

129. As a result, the Tribunal finds that the respondent did victimise the claimant in breach of section 27 of the Equality Act 2010 by subjecting him to a detriment in what was said to him in the meeting of 11 November 2019.

130. The Tribunal considered issues 9.2 and 9.3 together. Issue 9.2 was whether the respondent subjected the claimant to a detriment by suspending him on 14 November 2019 without proper justification? Issue 9.3 was whether the respondent subjected the claimant to a detriment by issuing him with a warning (on 29 November 2019) without proper justification. It was in respect of these allegations which the respondent's representative particularly emphasised the importance of the Tribunal only determining what it was required to on the issues identified in this claim, because of the claimant's subsequent claim which was not being heard by this Tribunal.

131. The claimant in his submissions (and throughout the hearing) emphasised in clear and strong terms why he felt this process was unfair and, in particular, why he felt he should not have been issued with any sanction. He particularly emphasised in his submissions the absence of certain statements, the very late provision of the transcript, and the issues with the process undertaken by the respondent.

132. Importantly, as recorded at paragraphs 58 and 59 above, the claimant did not dispute that Ms Fay had made the statement, nor did he contend that the statement was not genuine. The claimant did emphasise that Ms Fay was mistaken in what she believed she heard him say and he was very critical of the respondent for the actions taken. As recorded at paragraphs 77 and 78: the claimant accepted that Ms Fay made the complaint; and that. if he had made the comment to Ms Fay that was alleged. it would have been misconduct (whilst denying he had said what was alleged).

133. The Tribunal has no hesitation in finding that the respondent did not suspend the claimant on 14 November 2019 without proper justification. Suspension was entirely justified in the light of what Ms Fay alleged the claimant had said (and where she had been upset by it and had left work as a result). Ms Fay's allegation and statement was proper justification for the suspension. Indeed, the Tribunal's view is that suspending the claimant was an entirely appropriate thing to do in the light of what had been alleged.

134. On the same basis, what was alleged and what was said in the statements taken from Ms Fay and Mr Spencer provided a proper justification for imposing a final written warning on the claimant. As recorded above, the Tribunal does not need to determine whether the alleged statement was said. Based upon the allegations contained in the list of issues, the Tribunal also does not need to determine whether the process followed by the respondent was fair or whether the sanction imposed was correct or fair. The issue recorded was whether or not the final written warning was imposed without proper justification, and the Tribunal does not find that it was imposed without proper justification. The claimant himself effectively accepted this (whilst denying that he said what was alleged).

135. As a result of the decisions reached on issues 9.2 and 9.3 it was not necessary for the Tribunal to determine issue 10 in relation to those alleged detriments. However, had it needed to do so, the Tribunal would not have found that

the claimant was suspended or given a final written warning because he had done the protected act. The claimant was suspended and issued with a final written warning because of what Ms Fay alleged/stated he had said, not because of his emails about the seating arrangements.

Conclusion

136. Accordingly and for the reasons explained above, the Tribunal does find that:

a. The respondent did fail to comply with its duty to make reasonable adjustments by not making the adjustment of moving where the claimant sat in its office between 2 and 15 December 2019 (the latter date being when the claim was entered – the adjustment was in fact made in January 2020);

b. The respondent did subject the claimant to unlawful harassment related to his disability in a comment made by Mr Thornley on 13 November 2019; and

c. The respondent did victimise the claimant by subjecting him to a detriment in what was said to him in a meeting of 11 November 2019 because he had done a protected act.

137. The claimant's other claims have not been found and do not succeed.

Employment Judge Phil Allen

Date: 16 April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 April 2021

FOR THE TRIBUNAL OFFICE