



# EMPLOYMENT TRIBUNALS

**Claimant** Mr Maretlwaneng

**Respondent** Commissioners for her Majesty's Revenue and Customs

**Heard at:** Exeter  
(remotely by video hearing)

**On:** 13 & 14 December 2021  
and in Chambers on  
7 January 2022

**Before:**

**Employment Judge** Goraj

**Members** – Dr J Miller

Ms Y Ramsaran

**Representation**

**The claimant:** Mr J Duffy, Counsel

**The respondent:** Mr T Poole QC, Counsel

## RESERVED JUDGMENT

**THE UNANIMOUS JUDGMENT OF THE TRIBUNAL IS that: -**

1. The claimant's complaints of direct race discrimination (pursuant to sections 6, 13 and 39 of the Equality Act 2010) are dismissed.
2. The claimant's complaint of harassment (pursuant to sections 6, 26 and 39 of the Equality Act 2010) in respect of paragraph 14 of the claimant's grounds of claim (the meeting on 3 July 2020) is dismissed.
3. The claimant was unlawfully discriminated against by the respondent (in breach of sections 6, 26 and 39 of the Equality Act

2010) in respect of paragraph 17 of the claimant's grounds of claim (the meeting on 8 September 2020).

4. The claimant is awarded, and the respondent is ordered to pay to the claimant, compensation for injury to feelings in the sum of £4,500 plus interest in the sum of £132.66 giving a total award of £4, 632.66

## **REASONS**

### **Conduct of the hearing**

1. The hearing was conducted as a remote hearing (CVP) to which the parties had consented/ not objected. A face-to-face hearing was not held because of the coronavirus pandemic and because it is in the interests of justice and in accordance with the overriding objective to minimise expenditure on time and costs.

### **Bundle of documents**

2. The Tribunal was provided with an agreed bundle of documents ("the bundle").

### **Background**

3. By a claim form and accompanying grounds of claim presented on 18 December 2020, the claimant, who remains in the employment of the respondent, brought claims of race and disability discrimination (direct and /or harassment and/or indirect and or victimisation and/or failure to make reasonable adjustments) (pages 5- 20 of the bundle).
4. The claimant describes himself as Black African. The impairment upon which the claimant relies for the purposes of his disability discrimination claim is a mental health impairment namely, depression and anxiety.
5. The claimant's ACAS Early Conciliation Certificate records that the claimant's EC notification was received by ACAS on 26 October 2020 and that the EC Certificate was issued by email on 19 November 2020.
6. The allegations were denied/ not admitted by the respondent in its response form (including that it was contended that many of the claims were out of time / that it was not admitted that the claimant was at the relevant times a disabled person for the purposes of

section 6 of the Equality Act 2010 (“the 2010 Act”). The respondent also relied on the statutory defence in respect of any proven acts of unlawful discrimination. The respondent’s response form and accompanying grounds of resistance are at pages 24-42 of the bundle. The respondent requested further particulars of the claimant’s claims.

7. The claimant subsequently withdrew many of his claims and made an application to amend his remaining claims of direct disability discrimination – (paragraphs 14, 17 and 22 (e) (ii) of his grounds of claim (pages 18-19 and 47 – 49 of the bundle) to bring them further and /or in the alternative as complaints of harassment related to disability. The claimant stated in his application to amend (paragraph 8 at page 48 of the bundle) that he relied on the comments referred to in paragraphs 14 and 17 of his grounds of claim for the purposes of his complaint of harassment. This application was opposed by the respondent.

#### **The case management hearing on 14 July 2021**

8. The matter was the subject of a case management hearing on 14 July 2021. The associated order, also dated 14 July 2021, is at pages 54 – 63 of the bundle (“the Order”). The claimant was given leave to amend his claims including to bring the allegations of direct disability discrimination identified at paragraph 7 above further/ in the alternative, as complaints of harassment as recorded in the Order. The remaining claims were dismissed upon withdrawal by the claimant as recorded in the Judgment dated 14 July 2020 – (page 61 of the bundle).
9. The respondent subsequent accepted by email dated 15 September 2021 (page 65 of the bundle) that the claimant was a disabled person by reason of anxiety and depression at the material times i.e., 3 July 2020 and 8 September 2020 (the dates of the alleged incidents).

#### **Witnesses**

10. The Tribunal received witness statements and heard oral evidence from 2 witnesses namely: - (a) the claimant and (b) Mr Hamid Ammour, manager with the respondent (alleged discriminator).

#### **Other documents**

11. The Tribunal was also provided with a helpful agreed chronology and a cast list.

## Clarification of the Issues

12. The Tribunal confirmed the issues with the parties at the commencement of the hearing (with reference to paragraph 63 of the Order) as follows: -

- (1) The two remaining claims (of direct disability discrimination and harassment related to disability) relate to the alleged comments of Mr Ammour on 3 July and 8 September 2020 as identified at paragraphs 14 and 17 and 22(e) (ii) of the grounds of claim namely:

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“14 I had a 1to 1 meeting in early July with Mr Ammour in which I expressed my wish to apply for a Grade 7 role. Mr Ammour asked if this was compatible with my well-being issues, seeming to suggest that I would not be suitable for this because of my disability.”

“17 I had a return-to-work meeting on 8 September 2020. In this meeting, Mr Ammour said in relation to any promotion opportunities, that he would not recommend me for promotion because of my mental health conditions and the stress this would cause. I was deeply worried and upset by these comments”.

“22 (e) (as amended) I have been subjected to less favourable treatment because of my disability, in comparison to someone without my disability and /or subjected to harassment, in the following ways :-

(i)....

(ii) Being told that I am not suitable for promotion because of my disability”.

- (2) The alleged discriminator is Mr Ammour.
- (3) The respondent denies making the comments as alleged by the claimant (as addressed in Mr Ammour’s statement) / denies that they, in any event, constituted less favourable treatment/ a detriment / harassment.
- (4) The respondent accepted that the claimant was at all relevant times a disabled person for the purposes of section 6 of the 2010 Act (including that it had the relevant knowledge thereof) by reason of anxiety and depression.
- (5) There is a potential time issue in respect of the first incident – anything before 26 July 2020 is potentially out of time unless it forms part of a continuing act/ it is just and equitable to extend time – which the respondent disputes.

- (6) The respondent confirmed that it no longer relies on the statutory defence in respect of any proven acts of discrimination.
- (7) It was initially agreed that we would deal with liability first. It was however subsequently agreed with the parties, when the Tribunal decided to reserve its judgment, that if the claimant succeeded in either of his claims, remedy would be determined by the Tribunal without a further hearing and on the basis of the claimant's witness statement / the closing submissions of the parties. This was agreed as the claimant's claim for remedy is confined to a claim for injury to feelings (as contained in the Schedule of Loss which was served on the respondent on or around 6 September 2020) and as neither party sought to rely on any further evidence or cross examination for the purposes of remedy. The claimant also confirmed that, if successful, he did not want to pursue any recommendations (as sought in his claim form).

### **Findings of fact**

13. The claimant commenced his employment with the respondent as an Administrative Officer on 24 June 2019. The claimant remains in the employment of the respondent.
14. In December 2019 the claimant made a (successful) application for the post of Project Support Officer (HO grade) ie at a higher grade.

### **The occupational health report**

15. The claimant was the subject of an occupational health report dated 9 January 2020 (pages 72- 75 of the bundle). In summary, the report records that:- (a) the claimant advised the respondent that he had been diagnosed with anxiety and depression approximately five years ago (b) that the claimant was taking prescribed medication and privately funded CBT which he was finding helpful (c) that the claimant was receiving appropriate treatment and had a good understanding of his symptoms and that no further self-management / signposting was required . The report contained various recommendations to support the claimant including the preparation of a Disability passport. The report also advised that the claimant was likely to be considered as a disabled person by reason of anxiety and depression.

### **The Project Support officer role**

16. The claimant commenced in his role of Project Support officer in February 2020 with a new line manager, Mr N Allen. From around late March 2020, the claimant started working from home because

of the coronavirus pandemic which arrangement continued until in or around June 2020.

**Process for applications for promotion/ expressions of interest**

17. When an employee in the respondent applies for an internal promotion / responds to an expression of interest, he/ she is normally expected to discuss the proposed application with their manager and, where relevant, to tick the box on the application form confirming that they had done so.

**Application for the post of Programme Delivery Lead**

18. On or around 26 February 2020, the claimant applied for the position of Programme Delivery Lead but was unsuccessful at interview. The post was a grade 6 (3 grades higher than the claimant's existing position).

**The commencement of the claimant's dealings with Mr Ammour**

19. On or around 29 May 2020 Mr Ammour, who described himself as a person of African heritage whose first language is not English, took over responsibility as the claimant's line manager. Mr Ammour was also managing the claimant's previous line manager, Mr Allen, at that time. Mr Ammour was at that time a grade 7 manager.
20. On or around 29 May 2020, Mr Ammour telephoned the claimant in order to introduce himself. The claimant informed Mr Ammour about his mental health issues during their discussion. (page 103 of the bundle). The claimant also informed Mr Ammour that he believed that he had been racially abused by his previous managers and that as a consequence, he did not trust management.

**Dealings with Mr Allen**

21. Around that time, Mr Ammour also had a handover telephone call with Mr Allen, the claimant's previous manager. Mr Allen informed Mr Ammour that the claimant had experienced some challenges in completing the required flexi records and that the claimant had made a grade 6 expression of interest without first speaking to management.
22. In or around early June 2020, the claimant raised a formal grievance against Mr Allen concerning alleged inappropriate comments.

### **The claimant's dealings with Mr Ammour**

23. On 9 June 2020 there was an exchange of messages between the claimant and Mr Ammour regarding work matters (pages 80 – 85 of the bundle) including in respect of an outstanding work folder.
24. On 10 June 2020 there was a further exchange of messages between them during which the claimant informed Mr Ammour that he was not feeling great, that he was going through depression but would be fine. Mr Ammour expressed sympathy for the claimant's position and advised him that he should prioritise his health (page 86 of the bundle).
25. The claimant was signed off with work related stress on 11 and 12 June 2020 which the claimant attributed to the stress of lodging a grievance against his previous manager.
26. On 11 June 2020 Mr Ammour sent the claimant a supportive email (page 87 of the bundle).
27. On 29 June 2020 Mr Ammour sent a reminder to staff (including the claimant) to complete their flexi time records for June 2020 (page 89 of the bundle).
28. There was a further exchange of messages between the claimant and Mr Ammour on 1 July 2020 regarding his flexi time records (pages 88-89 of the bundle). Mr Ammour stated that as he had explained to the claimant the previous day, it was mandatory, as was the case for the rest of the team, to complete and submit his flexi time records every month. In response, the claimant stated that he had found it difficult to complete flexi sheets during the lockdown but had continued recording his time on the Clarity system and would endeavour to meet the relevant deadline. The claimant further informed Mr Ammour that his TU representative was happy to have a word with him about his disability passport and workplace adjustments (page 88 of the bundle).

### **The events of 3 July 2020**

29. On 3 July 2020 the claimant and Mr Ammour had a "weekly one to one telephone call." Mr Ammour prepared draft notes by way of an agenda which he sent to the claimant in advance of the meeting. The notes, as subsequently updated by Mr Ammour following the meeting, are at pages 91- 92 of the bundle. There were 5 principal issues identified namely, setting goals and training plan together with status on wellbeing, current assignments and workload and issues relating to flexi records. The notes record concerns relating to outstanding assignments/ work completed and missing flexi

records. The Tribunal is satisfied that they are a broadly accurate account of the discussions. When reaching this conclusion, the Tribunal has taken into account in particular, the contemporaneous / near contemporaneous nature of the notes, together with the contents of Mr Ammour's email dated 3 July 2020 (pages 93-94 of the bundle) and the matters which were accepted by the claimant in his witness statement /in cross – examination.

30. In summary, we are satisfied in particular that :- (a) at the commencement of the meeting the claimant expressed his wish to apply for a grade 7 post (b) the claimant also explained that he had applied to the TSP (training programme) when he was an O grade and had come out in the top 400 (c) in response Mr Ammour asked the claimant whether he felt that it (such application) was compatible with his current wellbeing issues (d) the claimant perceived Mr Ammour's reference to his "wellbeing," to relate to his diagnosis of depression and recent absence, as a barrier to his progression (e) the claimant became upset and defensive and quoted back Mr Ammour's comments as he understood them (f) in response Mr Ammour repeated several times his original question about whether such an application was compatible with the claimant's current wellbeing issues (g) Mr Ammour further added that the claimant had apparently struggled in his previous job to deliver basic tasks and was struggling in his current position (in respect of which they were working on work adjustments to assist him) and that the claimant should first make sure that he was comfortable in his current assignments (h) the claimant continued to be very upset and changed the topic to flexi time records. (i) Mr Ammour explained to the claimant that he wanted the conversation to be friendly and that the tone which the claimant was adopting was hurting his feelings (j) the claimant asked to have his trade union representative present during future conversations.

### **The email dated 3 July 2020**

31. Mr Ammour sent an email to HR dated 3 July 2020 entitled "Potential breaches of our Standards of Conduct" in which Mr Ammour included a brief summary of his account of what had occurred at the meeting that day together with an account of his subsequent discussion with the claimant's TU rep and his concerns regarding the claimant's time recording / failure to comply with management requests. Mr Ammour stated in the email that the claimant informed him during the meeting that he



found it difficult to complete his flexi times because of childcare commitments during the day and that the input sheet did not allow him to input time after 7pm. Mr Ammour also stated in his email that the claimant had “responded very aggressively to me” when I asked him if it was appropriate to think to be a grade 7 before settling into his current position, and the importance of focussing on his current wellbeing issues”. This email is at pages 93 – 94 of the bundle.

### **Subsequent events**

32. Following the meeting on 3 July 2020, there was an exchange of correspondence between the parties concerning the completion of the claimant’s flexi sheets together with contact / correspondence with the claimant/ his TU representative regarding a wellbeing meeting to discuss the claimant’s workplace passport.
33. Mr Ammour conducted a wellbeing meeting with the claimant on 7 July 2020 at which the claimant was accompanied by his TU representative. Mr Ammour’s brief summary of the key points discussed at the meeting are contained in an email dated 7 July 2020 (at pages 102 of the bundle). The claimant became very distressed during the meeting. The claimant referred during the meeting to grievances against previous managers and raised concerns regarding Mr Ammour’s conduct towards him.
34. It was agreed, in recognition of the claimant’s ill health, that the claimant would take sick leave with effect from 6 July 2020. The claimant’s subsequent GP note dated 17 July 2020 (at page 105 of the bundle) states that the claimant was unfit for work by reason of work-related stress anxiety and depression. There was further correspondence between the parties during this period with a view to assisting the claimant to secure psychological therapy.

### **The claimant’s email dated 15 July 2020 and subsequent events**

35. On 15 July 2020, Mr Ammour sent an internal email setting out his understanding of the chronology of events relating to the claimant’s employment with the respondent. This email is at pages 103 – 104 of the bundle.
36. The claimant returned to work on 3 September 2020 on a phased return.

### **The meeting on 8 September 2020**

37. Mr Ammour conducted a telephone performance and development meeting with the claimant on 8 September 2020. The claimant’s TU representative was also in attendance at the meeting. Mr

Ammour's notes of the meeting with claimant's deletions (in red) and additions (in blue) are at pages 108 – 114 of the bundle. The subsequent correspondence between the parties concerning the contents of the transcripts is at pages 137 – 144 of the bundle. The key area of dispute relates to the discussions between the parties regarding promotion. On this issue, the Tribunal has considered the oral evidence of the parties in the light in particular of the documentary evidence at pages 111- 113 and 137 and 138 of the bundle including the comments of the claimant's TU representative at page 137 and those of Mr Ammour at page 138 of the bundle.

38. In summary, the claimant contends that Mr Ammour raised the question of promotion including that Mr Ammour :- (a) expressed concerns about the consequences of the claimant applying for promotion at 2 grades higher than his previous grade on the claimant's wellbeing as the claimant had mentioned that he was suffering from anxiety (b) the claimant's condition had "impeached" his ability to execute reasonable management requests such as time sheet records and clarity timesheets (c) stated that as far as he was aware, internal promotions required manager sign off and (d) further stated that he would not recommend the claimant to apply for promotion because of his mental health conditions and the stress this would cause ( the claimant's additions at pages 112 – 113 of the bundle).
39. In summary, the respondent contended that :- (a) it was the claimant who raised at the meeting that he wanted to apply for a higher grade (however Mr Ammour accepted during cross examination that he may have raised the matter) (b) Mr Ammour raised his concerns about the consequences on the claimant's wellbeing of applying for a role that was two grades above his previous role (c) Mr Ammour explained that independently of any matters of wellbeing, the claimant had not demonstrated any of the behaviours or skills expected of his job position (d) the claimant accused Mr Ammour of blocking any promotion because he was BAME. The respondent denied that Mr Ammour stated that the claimant should never apply to be promoted or that the claimant was not suitable for promotion because of his disability.
40. Having regard had regard to all of the above, together with the information submitted by the parties as part of the subsequent grievance process, the Tribunal is satisfied on the balance of probabilities as follows :- (a) Mr Ammour conducted a telephone meeting with the claimant on 8 September 2020 at which the claimant was accompanied by his TU representative (b) the stated

purpose of the meeting was to discuss the claimant's performance and development (c) the meeting started with a discussion regarding the claimant's current work arrangements/ participation in projects (d) there was a discussion regarding performance expectations and the feedback which Mr Ammour had received regarding the claimant's work including that the claimant was not as proactive as expected for someone of his grade (e) there was also a discussion regarding the claimant's ongoing failure to complete flexi records/ use of Clarity (f) Mr Ammour advised the claimant that in the light of such concerns he did not consider that the claimant had achieved any of the required competencies or expected behaviour to fulfil his current assignments and which had resulted in his associated performance ratings (g) Mr Ammour raised the issue of promotion. Mr Ammour raised his concerns in the context of the claimant's previously stated intention to apply for promotion at 2 grades higher and of the consequences on the claimant's mental wellbeing as the claimant had mentioned that he was suffering from anxiety. Mr Ammour advised the claimant to settle in first in his HEO position and to apply for a higher grade when the claimant was ready (h) the claimant was upset and worried by Mr Ammour's comments relating to promotion which he perceived as a barrier to promotion (i) the claimant raised concerns about the previous challenges which he had experienced in employment because of his race, which led to a heated discussion between the claimant and Mr Ammour as the latter perceived the claimant to be suggesting that Mr Ammour was saying that the claimant should not get a promotion because he was black - in response to which the TU representative intervened to calm things down (j) there was a further discussion regarding the process for promotion during which Mr Ammour stated that the claimant required "line manager sign off" for internal promotions/ expressions of interest and advised the claimant that he would not recommend the claimant to apply because of his current mental health conditions and the stress this would cause (k) Mr Ammour also raised concerns about the impact that the effect of a jump between grades would have on the claimant's wellbeing. Mr Ammour also offered the claimant an opportunity of a discussion outside the performance meeting about job applications and offered to support the claimant.

41. The notes of the meeting also record a summary of next steps including the issue of further guidance regarding the completion of flexi sheets and that a written warning would be sent to the claimant in the light of the seriousness of the issues relating to the completion of flexi records (page 113 of the bundle).

### **The claimant's Workplace Adjustment Passport**

42. The claimant's Workplace Adjustment Passport" (two versions) as dated and signed by the claimant on 8 September 2020 and 14 September 2020 are at pages 117- 119 and 127 – 129 respectively of the bundle. In the document dated 8 September 2020 (which explains the background to the claimant's request for workplace adjustments) the claimant stated that he had severe anxiety and depression for which he was being treated with antidepressants. The claimant also stated in the document that recent work events regarding previous managers had made him more anxious and depressed to the point that he had considered not returning to work/ changing jobs because of being harassed bullied and racially abused. The claimant set out a history of alleged disability and race discrimination in respect of previous roles/ managers and the associated difficulties experienced in relation to the securing of a Workplace passport /his ongoing grievance with a former manager.

### **The occupational health report**

43. The claimant attended an occupational health appointment on 18 September 2020. The occupational health report dated 28 September 2020 is at pages 162 of the bundle. The report recorded a history of stress, anxiety and depression for over 6 years, that the claimant's condition had gradually worsened over a period due to perceived stress at work and that the claimant had needed urgent help at the end of July 2020 for which he had received counselling. The report advised that the claimant was not fit for work, that he should be signed off sick for 6 – 8 weeks and the benefits of seeking to identify an amicable resolution to workplace issues as the claimant's perception of such matters were perpetuating his depression. The claimant was subsequently absent from work from 29 September 2020 until 5 January 2021.

### **The claimant's grievance against Mr Ammour**

44. The claimant subsequently raised a grievance against Mr Ammour on 14 October 2020 (pages 173 – 182 of the bundle). The grievance contained a number of complaints against Mr Ammour including in respect of the discussions relating to promotion at the meeting on 8 September 2020 (the claimant's statement at page 173 of the bundle).

45. The grievance was not upheld. The Tribunal has however had regard to the observations contained in the outcome report ( the deliberation document at page 229 of the bundle), regarding Mr Ammour's comments at the performance review meeting on 8 September 2020 relating to promotion. The Tribunal has noted in particular, the observations in the report that the use of such phrases by Mr Ammour explained the claimant's perception that Mr Ammour saw the claimant's health condition as a barrier to progression at that time and further that it was reasonable that the claimant's confidence was impacted by the comments and that as a result of which the claimant chose not to reapply for the TSP 2020.

## THE LAW

46. The Tribunal has had regard in particular to the following statutory provisions and associated provisions/ legal authorities: -

- (1) Sections 6, 13, 23 (1) & (2) (a), 26, 39 (2) (b) & (d), 123, 124 and 136 of the 2010 Act.
- (2) The Equality and Human Rights Commission – Code of Practice on Employment (2011) (“the Code”) and in particular, the guidance contained in Chapter 3 (direct discrimination) and Chapter 7 (harassment), paragraphs 15.20 – 15.31 (time limits) and paragraphs 15.32 – 15.35 (burden of proof).
- (3) The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (“the Interest Regulations”).
- (4) **Vento v Chief Constable of West Yorkshire Police (no2) 2003 ICR 318 CA**, together with the Guidance of the Presidents of the Employment Tribunals (3<sup>rd</sup> addendum) on Vento bands dated 27 March 2020 and **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 337 HL**.

47. The Tribunal has reminded itself in particular of the following: -

### Direct discrimination

- (1) Section 13 (1) of the 2010 Act states that :- A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) It is for the claimant to establish, on the balance of probabilities, the factual basis of their claim including facts from which a Tribunal could conclude, in the absence of any other

explanation, that the employer has acted in breach of the 2010 Act.

- (3) When determining whether an employer has treated an employee “less favourably” a comparison should be made with how they have treated other employees or would have treated other employees, in similar circumstances.
- (4) The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, in cases involving direct disability discrimination, the relevant circumstances of the disabled person, including their abilities, must not be materially different. An appropriate comparator will therefore be a person who does not have the disabled person’s impairment (in this case anxiety and depression) but who has the same abilities or skills as the disabled person (regardless of whether they arose from the disability itself) (section 23 (1)/(2) (a) of the 2010 Act and paragraphs 3.29 & 3.30 of the Code).
- (5) Less favourable treatment could include being excluded from an opportunity. The employee does not have to experience actual disadvantage, it is enough if the employee could reasonably say that they would have preferred not to have been treated differently from the way in which the employer treated, or would have treated, another person. The Tribunal is however required to consider whether the treatment is of such a kind that a reasonable employee would or might take the view that in all the circumstances it was to his/ her detriment. An unjustified sense of grievance cannot amount to a detriment (**Shamoon**).
- (6) Less favourable treatment cannot be justified save in limited circumstances which do not apply in this case.
- (7) The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or main cause. It is sufficient if it is an effective cause.
- (8) In many cases it may be more appropriate for the Tribunal to establish the reason for the claimant’s treatment first. If the reason for the treatment is found to be because of a protected characteristic a comparison with the treatment of a hypothetical comparator can then be made.

### **Harassment**

- (9) Harassment occurs where a person engages in unwanted conduct which is related to a protected characteristic and which has the purpose or effect of :- (a) violating the employee’s

dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee (section 26 of the 2010 Act).

- (10) Unwanted conduct includes unwelcome or uninvited behaviour and covers a wide range of conduct. Unwanted conduct amounts to harassment if it has the effect referred to at (9) above regardless of any intended purpose.
- (11) “Related to” also has a broad meaning and does not have to be because of the protected characteristic.
- (12) When determining whether the unwanted conduct had the effect referred to at (9) above, the Tribunal is required to have regard to the following :- (a) the perception of the employee – this is a subjective question namely, how did the employee regard the treatment (b) the other circumstances of the case including the personal circumstances of the employee such as his/ her mental health and (c) whether it is reasonable for the conduct to have had that effect – this is an objective test.

## **CLOSING SUBMISSIONS**

48. The Tribunal has had regard to the oral closing submissions of the parties which are summarised below. The parties did not rely on any legal authorities.

### **THE ORAL CLOSING SUBMISSIONS OF THE RESPONDENT**

49. In summary, the respondent made the following oral submissions:

#### **Time issues**

49.1 The first alleged act (3 July 2020) is out of time as there is no continuing state of affairs/ it is not, in any event, just and equitable to extend time to allow the claim to proceed. The alleged act on 3 July 2020 was a one-off isolated incident with no meaningful connection with the later alleged act on 8 September 2020. It would therefore be perverse to consider it as a continuing act. Moreover, it would not, in any event be just and equitable to extend time as the claimant had the support of his trade union representative and has given no proper explanation as to why his claim was not brought earlier.

## General background

- 49.2 The Tribunal should place more weight on the agreed facts and the contemporaneous records than on the claimant's oral evidence which was inconsistent/ relied upon the claimant's inaccurate perceptions of the Mr Ammour's understanding and actions.
- 49.3 By the time of the first incident (3 July 2020) Mr Ammour had had 4/5 weeks to assess the claimant's capabilities including from: - (a) a handover from the claimant's previous manager (b) the information at page 230 of the bundle and (c) that the claimant had not completed his flexi time records / performed his other work to the expected standards.
- 49.4 Further Mr Ammour had genuine concerns regarding the claimant's mental health and was aware that the claimant had anxiety (page 222 of the bundle).
- 49.5 The claimant has failed to establish the factual basis of his claims namely the allegation at paragraph 3.1.1 of the Order (paragraph 22 (e) (ii) of the particulars of claim) that he was told that he was not suitable for promotion because of his disability. There is a critical distinction between telling the claimant that he was not suitable for promotion (a barrier to promotion) and advising him that he was not suitable for promotion at that stage because of his wellbeing and offering to work with the claimant. Mr Ammour was required, as the claimant's manager, to have discussions with him about goal setting and whether or not he should be applying for promotion or not.

## Direct disability discrimination - The factual basis of the claims

- 49.6 The meeting on 3 July 2020 – As confirmed by Mr Ammour's notes of 3 July 2020 (page 91 of the bundle) Mr Ammour asked the claimant if he felt that applying for a grade 7 position was compatible with his current wellbeing issues which is consistent with the subsequent references to settling into his role. On the claimant's own evidence, he did not contend that Mr Ammour had said that he was not suitable for promotion.
- 49.7 The meeting on 8 September 2020 – again, it is all about context – Mr Ammour's comments about performance / wellbeing were made in the context of not recommending the claimant for promotion at that time (pages 111, 113 and 138 of the bundle).



### **Direct disability discrimination – less favourable treatment**

49.8 The claimant has not identified an actual comparator and the Tribunal therefore has to consider how the respondent would have treated a hypothetical comparator in similar circumstances with the exception of the claimant's disability. A hypothetical comparator would share the following characteristics – (a) be relatively newly appointed to the HO role (b) not demonstrating the necessary competencies to fulfil his assignments (c) be majorly impeded in his role by previous experiences and (d) be expressing a wish to apply for a role 2 grades higher than his existing position (notwithstanding that he was not displaying the necessary competencies for his existing role). The respondent contends that the same questions/ comments would have been asked of / made to a hypothetical comparator in such circumstances.

49.9 An unjustified sense of grievance does not constitute less favourable treatment.

49.10 Mr Ammour denies any suggestion that he told the claimant that he would have to endorse any applications. Mr Ammour 's conduct towards the claimant was exemplary and did not constitute discrimination.

### **Harassment**

49.11 The claimant faces the same hurdles as for the claims of direct disability discrimination. Further, in order to constitute harassment, the conduct has to be unwelcomed or uninvited as made clear by the Code.

### **The meeting on 3 July 2020**

49.12 The meeting on 3 July 2020 – the purpose of the meeting was to discuss setting of goals and issues such as flexi sheets – as confirmed by Mr Ammour's notes at page 93 of the bundle. The issue of promotion was raised by the claimant to which Mr Ammour responded – his response cannot therefore be said to be uninvited.

49.13 The meeting on 8 September 2020 – the purpose of the meeting was to discuss the claimant's performance and development which was conducted against the background of the claimant's previously expressed desire to apply for a grade 7 post. The words spoken by Mr Ammour cannot therefore be considered to constitute unwanted conduct.

49.14 The respondent did not speak to the claimant with the purpose of creating a hostile or intimidating environment or of violating his dignity. Further, although the effect of any conduct has to be considered from the claimant's point of view it is still necessary to have regard to all of the circumstances and also (which is an objective test) whether it was reasonable for such conduct to have such an effect.

49.15 Even if, which is denied, Mr Ammour's conduct on 8 September 2020 was uninvited the claimant was hypersensitive as is apparent from his disability passport. If the Tribunal considers the precise words used there was no actionable harassment.

### **Remedy**

50. If the Tribunal finds in the claimant's favour, any award for injury to feelings should be at the bottom end of the lower Vento band. They are 1/ 2 isolated acts, and any award of compensation should be limited to £1,000 - £2,000.

## **THE ORAL CLOSING SUBMISSIONS OF THE CLAIMANT**

### **General background**

51. Direct discrimination – section 13 of the 2010 Act – the Tribunal has to consider for such purposes why the respondent acted in the way that it did. The claimant's disability does not have to be the only or principal reason for the treatment, it is sufficient if it had a significant influence on the treatment ie if it was more than minor or trivial.
52. Harassment – the claimant does not contend that the respondent's conduct had the purpose of harassing him – it is the "effect" which is relied upon by the claimant in this case. Motive / intention is irrelevant. The Tribunal must have regard to the perception of the claimant and whether it was reasonable for him to have such perception in all the circumstances of the case. The Tribunal is entitled to take into account for such purposes the claimant's view of previous managers as recorded in his disability passport together with the effect of Mr Ammour's conduct.
53. The alleged acts of discrimination are not confined to paragraph 3.1.1 of the Order (paragraph 22 (e) (ii) of the grounds of claim) – the Tribunal is required to go back to the claimant's pleaded case as contained in his grounds of claim (as subsequently amended at the Case Management hearing on 14 July 2020) which also include the allegations at paragraphs 7 and 14 thereof.

### 3 July 2020 – direct discrimination

54. The phrase used was in itself an act of disability discrimination/ which leads to the discrimination.
55. Hypothetical comparator – the claimant agrees some of the elements identified by the respondent namely someone – (a) who has been line managed for a short period of time (b) is in a new role and (c) who is not meeting all his potential goals. The claimant however contends that it would be dangerous to have regard to previous experiences / grievances which the claimant says caused/ exacerbated his stress and anxiety. The Tribunal is required to consider whether the respondent would have treated a non-disabled person in the same way in materially similar circumstances ie if the comparator did not have the same level of anxiety and stress because of his disability. If the Tribunal considers the incident on 3 July 2020 solely in the context of competencies and experience, there was no reason for Mr Ammour to question the claimant about wellbeing issues which were part and parcel of the claimant's disability.
56. If the treatment was different was it "less favourable" – the claimant says yes as :- (a) it is the responsibility of a manager to recommend, support and encourage promotion (b) the claimant had continued to work with his disability for 5 years - he has therefore demonstrated that he can cope with his disability and (c) the claimant cannot change his disability. The treatment constitutes a disadvantage as it creates a barrier to promotion, and which has more than trivial or minor impact on the claimant.

### 3 July 2020 – harassment

57. The Tribunal should have regard to the claimant's perception including: - (a) the comment was clearly unwanted/ uninvited (b) the repetition of the question regarding the effect on the claimant's wellbeing / disability of stress and anxiety created an offensive environment for someone with a disability. Further, the occupational health report had made it clear that the claimant could self-manage his symptoms. Mr Ammour's repeated questions regarding the claimant's ability to manage his disability created a hostile environment which was degrading and offensive for the claimant. Further it was reasonable for the claimant to have perceived it in that way in the light of the repeated questioning of his disability rather than his capability/ competence.

## Meeting on 8 September 2020

### Generally

58. The question of promotion was raised at the meeting on 8 September 2020 by Mr Ammour. Even though this was a performance meeting Mr Ammour was fully aware that the claimant had been on sick leave for two months and the claimant's distressed reaction to the previous discussions regarding his disability/ performance at the meeting on 3 July 2020.

### Direct discrimination

59. Difference in treatment – (a) Mr Ammour's references during his oral evidence as to how he would have treated someone with a broken leg, including that he would not have encouraged them to run before they could walk, indicates that the claimant's disability was the core reason for making such comments (b) the Tribunal should also take into account Mr Ammour's subjective / unsupported comments (page 112 of the bundle) that it would be safer to settle into his current position before applying for promotion which would not have been made to a non-disabled comparator.

60. Less favourable treatment – Mr Ammour tells the claimant that any application for promotion/EOI has to be signed off by him – he does not say that he can apply in any event. What Mr Ammour is saying in reality is that he will not recommend the claimant for promotion because of his mental health condition. Mr Ammour has gone out of his way to discourage the claimant from making any applications and as a consequence of which the claimant does not make any applications for promotion. Mr Ammour has created an additional barrier to promotion.

### Harassment

61. Mr Ammour operated a similar environment to that adopted at the meeting on 3 July 2020. Further, Mr Ammour knows that the claimant has just taken 2 months sick leave and is also aware of how much the previous discussion on 3 July 2020 offended the claimant. Mr Ammour however raises it again with the effect of creating an offensive and degrading environment for the claimant and in the circumstances, it was reasonable for the claimant to have such perception. Such perception is supported by the comments made in the Deliberation/ outcome document in respect of the claimant's subsequent grievance.

### **Time issues**

62. The claimant's complaint regarding the meeting on 3 July 2020 is in time as it forms part of a course of conduct including as :- (a) the subject matter is consistent between the two meetings (b) Mr Ammour is the alleged perpetrator in respect of both allegations and (c) the gap of two months between the incidents is explained by the claimant's sick leave and Mr Ammour, in any event, bridges the gap by saying at the meeting on 8 September 2020 that the claimant had mentioned it before his sick leave.

63. Further it is, in any event, just and equitable to extend time having regard in particular to the claimant's periods of sick leave after 6 July 2020, his pursuit of his internal grievance and the absence of any prejudice to the respondent.

### **Injury to feelings**

64. The claimant relies on his schedule of loss and witness statement. The Tribunal should have regard in particular to :- (a) the short term impact together with the claimant's fear of the long term impact of the conduct on his career progression and (b) the effect on the claimant's mental health including the claimant's two month's absence following the meeting.

## **THE CONCLUSIONS OF THE TRIBUNAL**

**The allegations of direct discrimination and/or harassment (paragraphs 14 and 22 (e) (ii) of the claimant's grounds of claim as amended ( paragraphs 7, 8 and 12 above) in respect of the meetings on 3 July 2020).**

**The allegation of direct disability discrimination in respect of the meeting on 3 July 2020**

65. The Tribunal has considered whether the claimant has established a prima facie case of direct disability discrimination before, if still required, determining any issues as to time limits.

66. The Tribunal has considered first whether the claimant has established the factual basis of his claim. The claimant's claim of direct disability discrimination in respect of the meeting on 3 July 2020 is as pleaded at paragraphs 14 and paragraph 22 (e) (ii) of his grounds of claim (pages 18 and 19 of the bundle) and as set out at paragraph 12 above.

67. The claimant has established on the facts (paragraph 30 above) that: -
- 67.1 On 3 July 2020 the claimant had a weekly “one to one” telephone discussion with his manager, Mr Ammour.
- 67.2 At the commencement of that meeting the claimant expressed a wish to apply for a grade 7 post in response to which Mr Ammour asked the claimant whether this was compatible with the claimant’s current wellbeing issues.
68. The claimant has not however established on the facts (paragraph 30 above) that he was told by Mr Ammour that he was not suitable for promotion. The Tribunal is further satisfied on the facts that:-  
(a) Mr Ammour’s above mentioned response was made in the context of the apparent work related difficulties which the claimant had experienced / was experiencing in his previous and current roles (including in particular with regard to the completion and submission of flexi time sheets) and (b) that in such circumstances Mr Ammour advised the claimant that he should ensure first that he was comfortable in his current assignments (paragraph 30 above).
69. The Tribunal has gone to consider whether, in the light of the above, the claimant has established facts from which the Tribunal could conclude, in the absence of any other explanation, that the respondent had treated him less favourably because of his disability of anxiety and depression than the respondent treated or would treat others in similar circumstances for the purposes of sections 13 and 39 (2) (b) / (d) of the 2010 Act (affording the claimant access to opportunities for promotion / transfer or subjecting him to any other detriment). The claimant’s primary case is that Mr Ammour’s comment was disability specific and therefore discriminatory as the claimant’s disability was the effective cause of the treatment. The claimant has not sought to rely on an actual comparator, or construct a hypothetical comparator, other than to the extent summarised in the closing submissions above.
70. The Tribunal is however satisfied, particularly as section 23 (2) (a) of the 2010 Act provides that in cases of direct disability discrimination the relevant circumstances include a person’s abilities, that it is appropriate to adopt a comparative approach. The Tribunal has therefore considered whether the claimant has established any evidence that ;- (a) he was treated differently to how someone without the claimant’s disability of anxiety and depression but with the same abilities was, or would have been treated in materially similar circumstances, and (b) whether any such treatment could, in any event, properly be considered to be unfavourable in respect of the claimant’s access to opportunities

for promotion or transfer/ or otherwise subject him to a detriment ( namely something that a reasonable worker would or might take the view had placed him at a disadvantage).

71. Having given careful consideration to all of the above (including the circumstances of the case and the submissions of the parties) the Tribunal is satisfied that it is appropriate to consider whether an employee who did not have the claimant's disability of anxiety and depression but who shared the characteristics listed at paragraph 72 below, would also have been asked by his manager whether it was compatible with his current wellbeing / best interests to apply for a grade 7 post at that time.

72.1 The Tribunal is satisfied that the relevant characteristics of a hypothetical comparator (some of which have been agreed between the parties) consist of someone who had: -

72.2 Made a previous positive application to the TSP training programme (paragraph 30 above).

72.3 Commenced his/ her duties in a promoted HO role 5 months ago (paragraph 16 above).

72.4 Made an unsuccessful application for a grade 6 post (which was 3 grades higher than his/her existing post) approximately 4 months ago (paragraph 18 above).

72.5 Ongoing difficulties regarding the completion and timely submission of flexi time sheets which was an important requirement of his/her job (paragraphs 21, 27 & 28 above).

72.6 Outstanding assignments/ work (paragraphs 23 and 30 above).

72.7 Expressed an interest in applying for a grade 7 role which was 2 grades above his/ her existing role (paragraph 30 above).

73. Having given careful consideration to all of the above, the Tribunal is not satisfied that the claimant has established facts from which the Tribunal could conclude that an employee who did not have the claimant's disability of anxiety and depression, but who shared the above characteristics, would, on the balance of probabilities, have been treated differently by Mr Ammour in such circumstances ie that Mr Ammour would not also have made the comments at paragraphs 30, 67.2 and 68 above regarding any proposed application for promotion at that time.

74. Further the Tribunal is not satisfied, on the facts, that the comment referred to at paragraphs 30 and 67.2 above, can properly be regarded as unfavourable treatment in the way that respondent afforded the claimant / did not afford the claimant access to promotion or transfer and/or in any event constitute a detriment. In the Tribunal's view, the above-mentioned comment by Mr Ammour cannot reasonably be regarded as going further than a question/ observation (or at the most advice) which cannot therefore be properly construed as restricting the claimant's access to promotion. Further the Tribunal is not satisfied, for such reasons, that Mr Ammour's comment was something that a reasonable employee would consider had placed them at a disadvantage.

75. This allegation (regardless of any issues as to time) is therefore dismissed.

**The allegation of disability related harassment in respect of the meeting on 3 July 2020.**

76. The Tribunal has adopted the same approach as set out at paragraphs 65-66 above. The Tribunal has also reminded itself however that when the claimant applied to amend his claim to pursue his direct discrimination claim in the further/ alternative as one of harassment pursuant to section 26 of the 2010 Act, he expressly stated that he was relying in respect of all allegations on the existing factual basis contained in paragraphs 14 ( the meeting on 3 July 2020) and 17 ( the meeting on 8 September 2020) of his grounds of claim (paragraph 12 above). The claimant however sought to rely in his witness evidence on Mr Ammour's repeated reiteration of such question. The Tribunal has considered the matter accordingly below.

77. The claimant confirmed at the hearing that he does not contend that Mr Ammour made his comment with purpose of harassing the claimant and that he relies only on the "effect" element of section 26 of the 2010 Act.

78. The Tribunal is satisfied that the claimant has established the facts at paragraphs 30 and 67.2 above including, that Mr Ammour made the comment recorded at paragraphs 14 of his grounds of claim (paragraphs 12, 30 and 67.2 above).

79. The Tribunal has considered first the allegation as pleaded at paragraph 14 of the claimant's grounds of claim.

80. As a starting point the Tribunal has considered whether the claimant has established on the facts that the respondent engaged in unwanted conduct. The Tribunal has reminded itself, that in accordance with the guidance contained in the Code (paragraphs 7.7 and 7.8) that this



includes a wide range of conduct including unwelcome or uninvited conduct.

81. The Tribunal is not satisfied on the facts of this case that the claimant has established that Mr Ammour's comment (as recorded at paragraphs 12, 30 and 67.2 above) constituted unwanted conduct for the purposes of section 26 of the 2010 Act as it was the claimant, not Mr Ammour, who initiated the discussion regarding promotion (paragraph 30 above).
82. In case however the Tribunal is wrong on this point, the Tribunal has gone on to consider the remaining elements of section 26 of the 2010 Act. The Tribunal has approached this question by applying the elements contained in section 26 (4) of the 2010 Act as follows: -
83. **The claimant's perception** – this is a subjective test. The Tribunal is satisfied on the facts that the claimant perceived Mr Ammour's reference to his wellbeing, which he interpreted to relate to his diagnosis of depression and recent absence, as a barrier to progression (paragraph 30) and thereby creating a hostile/ humiliating and offensive environment for him.
84. **The other circumstances of the case** – the Tribunal is satisfied that the other circumstances of the case include the following: - (a) the claimant's mental health condition of anxiety and depression and previous mistrust of management (b) the factors identified at paragraphs 72.2 – 72.6 above and (c) that the issue of promotion was raised by the claimant.
85. **Whether it is reasonable for the conduct to have that effect** – the Tribunal is not satisfied that viewed objectively it was reasonable for the established conduct ie the comment made by Mr Ammour referred to at paragraphs 30/ 67.2 above, to have that effect. When reaching this conclusion the Tribunal has taken into account in particular, that notwithstanding the claimant's anxiety and depression / mistrust of management: - (a) it was the claimant who had raised the matter and (b) the nature of Mr Ammour's response which, viewed objectively, was a measured and appropriate response which could not reasonably be construed as going beyond an expression of concern about the potential effects of a possible application on the claimant's wellbeing at that time.
86. For the avoidance of doubt, the Tribunal has also gone on to consider whether the subsequent discussion between the parties (as recorded at paragraph 30), in any event, changes the position. The Tribunal is not however satisfied that even if the claimant had applied for / had been given leave by the Tribunal to rely in addition in support of his disability related harassment claim on the subsequent repetition by Mr

Ammour of his comment during the meeting on 3 July 2020, that this would, in any event, viewed objectively have changed the position.

87. When reaching this conclusion, the Tribunal has taken into account in particular (in addition to its conclusions at paragraph 85 above), its findings of fact at paragraph 30 regarding the nature of the subsequent verbal exchange between the parties on 3 July 2020 including that;- (a) it was initiated by the claimant who became upset and defensive and quoted back Mr Ammour's comment as he understood it (b) Mr Ammour repeated his comment in response and (c) Mr Ammour explained to the claimant that he wanted the conversation to be friendly and that he found the tone adopted by the claimant upsetting.

88. This allegation (regardless of any issues as to time) is therefore dismissed.

**The allegations of direct discrimination and/or harassment (paragraphs 17 and 22 (e) (ii) of the grounds of claim as amended (paragraphs 7, 8 and 12 above) in respect of the meeting on 8 September 2020**

89. There are no time issues with regard to these claims.

90. The Tribunal has adopted the same approach as with regard to the allegations concerning the meeting on 3 July 2020.

**The allegation of direct disability discrimination in respect of the meeting on 8 September 2020**

91. The Tribunal has considered first whether the claimant has established the factual basis for his claim. The claimant's claim for direct disability discrimination in respect of the meeting on 8 September 2020 is as pleaded at paragraphs 17 and 22 (e) (ii) of his grounds of claim (pages 18 and 19 of the bundle) as set out at paragraph 12 above.

92. The claimant has established on the facts (paragraph 40 above) that: -

- (1) Mr Ammour conducted a performance and development meeting (not at return-to-work meeting as contended by the claimant) with the claimant on 8 September 2020 at which the claimant was accompanied by his TU representative.
- (2) During the course of the meeting, Mr Ammour raised his concerns about the effect on the claimant's wellbeing of the claimant's previously stated intention to apply for promotion at 2 grades higher than his current post as the claimant had previously advised him that he was suffering from anxiety and depression.

- (3) There was a further discussion between the parties at the meeting during which Mr Ammour: - (a) stated that the claimant required "line manager sign off "for internal promotions / expressions of interest (b) advised the claimant that he would not recommend the claimant to apply because of his current mental health conditions and the stress this would cause and (c) raised concerns about the effect which a jump between grades would have on the claimant's wellbeing.
- (4) The claimant was upset by Mr Ammour's comments and perceived his comments as a barrier to his promotion. The claimant has not however established on the facts (paragraph 40) that he was told by Mr Ammour that he was not suitable for promotion because of his disability. Moreover, Mr Ammour offered the claimant an opportunity of a discussion outside the meeting about job applications and offered to support the claimant.
- (5) The Tribunal is also satisfied on the facts (paragraph 40 above) that the primary purpose of the meeting was to discuss the claimant's work and performance and as part of which Mr Ammour :- (a) informed the claimant about the negative feedback which he had received regarding the claimant's performance and (b) discussed the claimant's ongoing failure to complete flexi records / use of Clarity (c) advised the claimant that in the light of such work related concerns he did not consider that the claimant had reached any of the required competencies or expected behaviour to fulfil his current assignments.
- (6) The Tribunal is further satisfied (paragraph 40 above) that Mr Ammour's comments regarding promotion were made in the context of: - (a) his serious concerns relating to the claimant's work performance (including in particular with regard to flexi time sheets) and (b) his concerns about the effect that an application for promotion for a post that was 2 grades above the claimant's existing grade would have on his wellbeing.

93. The Tribunal has considered the allegation of direct disability discrimination in respect of the meeting on 8 September 2020 in accordance with the approach adopted previously at paragraph 70 onwards above in respect of the meeting on 3 July 2020 save that: -

- (1) The Tribunal is satisfied that some adjustments are required to the hypothetical comparator in order to reflect the changes in the situation by 8 September 2020

- (2) The Tribunal is satisfied that the established treatment identified at paragraphs 92.3 (a) and (b) above, (requiring manager signs off for internal promotions/ expressions of interest/ that Mr Ammour would not recommend the claimant to apply for promotions because of his current mental conditions) are capable of constituting less favourable treatment for the purposes of section 39 (2) (b) and/or (d) of the 2010 Act ( access to opportunities for promotion) / subjecting the claimant to a detriment) as amounting to treatment which a reasonable employee could regard as a disadvantage (even if only applied on a temporary basis).

94. As far as a hypothetical comparator is concerned the Tribunal is satisfied, in the light of the change in circumstances by 8 September 2020, that an appropriate hypothetical comparator is someone: -

- (1) Who had made a previous positive application to the TSP training programme (paragraph 30).
- (2) Who had commenced his / her duties in a promoted HO role in February 2020 (paragraph 16).
- (3) Who had made an unsuccessful application for a grade 6 post (3 grades higher than the existing post) in or around February 2020 (paragraph 18).
- (4) Who had previously indicated a wish to apply for a grade 7 role, which was 2 grades above their existing role (paragraph 30).
- (5) Who was in attendance at a performance and development meeting (paragraph 40).
- (6) In respect of whom Mr Ammour had concluded that he/ she had not achieved any of the competencies or expected behaviour (including had exhibited serious failings with regard to the completion and submission of flexi time sheets which was an important requirement of their role) to fulfil their current assignments (paragraph 40).

95. Having given careful consideration to all of the above, the Tribunal is not satisfied that the claimant has established facts from which the Tribunal could conclude that an employee who did not have the claimant's disability of anxiety and depression, but who would otherwise have shared the above characteristics, would have been treated differently by Mr Ammour in such circumstances at the performance and development meeting on 8 September 2020 in respect of the established treatment.

96. The Tribunal is satisfied, in the absence of any evidence to the contrary from the claimant, that Mr Ammour would, on the balance of probabilities, have made similar comments to those at paragraph 92(3) above at a performance and development meeting to an employee who did not have the claimant's disability of anxiety and depression but who had not, in Mr Ammour's view, achieved the basic competencies of his existing role including that he could not have recommended them for promotion at that time. The Tribunal is further satisfied, on the balance of probabilities, that Mr Ammour would, in the light of the performance and associated work related issues identified at the meeting, have questioned the effect of an application for a post two grades higher on their health and wellbeing / whether it was in their best interests to make such an application at that time.

97. This claim is therefore dismissed.

**The allegation of disability related harassment in respect of the meeting on 8 September 2020**

98. The Tribunal has adopted the same approach as in respect of the meeting on 3 July 2020 as set out at paragraphs 77 onwards above.

99. The claimant has established the facts at paragraphs 40 and 92.2 – 92.4 above.

100. As a starting point, the Tribunal has considered whether the claimant has established on the facts that the respondent engaged in unwanted conduct for the purposes of section 26 (1) of the 2010 Act. The Tribunal has reminded itself of the guidance contained in the Code as referred to paragraph 80 above.

101. The Tribunal is satisfied on the facts of this case, that Mr Ammour's comments at the meeting on 8 September 2020 relating to the claimant's mental health condition and the associated effects thereof on the process for promotion as recorded at paragraph 92.2 – 92.4 above, were unwanted and uninvited comments relating to disability.

102. When reaching this conclusion, the Tribunal has taken into account that the meeting was a performance and development meeting and further, that the claimant had previously expressed a wish to apply for a grade 7 post. The Tribunal has however balanced against this, that the claimant did not raise the question of promotion at the meeting on 8 September 2020 and that it was raised by Mr Ammour without prior reference to/ the agreement of the claimant. Further it was raised

by Mr Ammour in the context of his serious concerns regarding the claimant's performance and competencies (paragraph 40 above).

103. As stated previously above, the claimant has confirmed that his harassment claim is limited to the discriminatory "effect" of any established conduct and the Tribunal has therefore gone on to consider the remaining elements of section 26 (4) of the 2010 Act accordingly.
104. **The claimant's perception** – this is a subjective test. The Tribunal is satisfied on the facts that the claimant was upset and worried by Mr Ammour's references at the meeting on 8 September 2020 to the claimant's anxiety and depression/ the effects thereof on his previously expressed wish for promotion and Mr Ammour's comment that he would not recommend the claimant for promotion because of his current mental health condition/ the need for manager sign off. The Tribunal is also satisfied that the claimant regarded such comments as a barrier to promotion and which created a hostile, intimidating and offensive environment for him.
105. **The other circumstances of the case** – the Tribunal is satisfied that the relevant "other circumstances of the case" include the following:- (a) that Mr Ammour was aware when he conducted the meeting on 8 September 2020, that the claimant had become distressed on 3 July 2020 in response to the discussions at that meeting concerning the claimant's stated wish to apply for promotion and the associated observations made by Mr Ammour relating to the claimant's disability (b) that the claimant's mental health condition of anxiety and depression and previous mistrust of management had increased/ deepened following the meeting on 3 July 2020 and (c) the discussions regarding promotion and the claimant's wellbeing were initiated by Mr Ammour in the context of Mr Ammour's serious criticisms of the claimant's performance and capabilities.
106. **Whether it is reasonable for the conduct to have that effect** – Having given careful consideration to all of the above, the Tribunal is satisfied that, viewed objectively, it was reasonable for the conduct complained of in paragraph 17 of the claimant's grounds of claim to have had the effect of creating a hostile and intimidating environment for the claimant related to disability when considered in the context of the associated comments of Mr Ammour referred to at paragraphs 92.2 – 92.3 above together with the further circumstances identified at paragraph 105 above.
107. When reaching this conclusion the Tribunal has also taken into account the observations contained in the deliberation outcome document from the claimant's grievance at page 229 of the bundle namely, that the comments made by Mr Ammour at the meeting on 8

September 2020 explained the claimant's perception that Mr Ammour saw the claimant's health condition as a barrier to progression at that time and further that it was reasonable that the claimant's confidence was impacted by such comments (paragraph 45 above).

108. This complaint is therefore upheld.

## Remedy

109. As agreed, the Tribunal has gone on to consider remedy on the basis explained above.

110. The claimant has confirmed that he does not wish to pursue an order for recommendations and has limited his claim for compensation to injury to feelings plus interest.

111. The claimant places his claim for injury to feelings in the middle band of **Vento** and is seeking £16,000 in respect of all claims.

112. The respondent places the claimant's claim in the lower band of **Vento** and contends that any award should be limited to £1,000 to £2,000.

113. The Tribunal is satisfied that this claim falls within the lower band of Vento which, at the relevant time, was £900 - £9,000. When reaching this conclusion, the Tribunal has taken into account that it is a single act of discrimination relating to potential access to promotion.

114. Having given careful consideration to our findings of fact and to the submissions of the parties the Tribunal is satisfied that the appropriate award in this case is £4,500 plus interest.

115. When reaching this conclusion, the Tribunal has balanced the following factors: -

- (1) The respondent's comments in respect of the meeting on 8 September 2020 constituted an act of harassment which the Tribunal accepted :- (a) had caused the claimant to be upset and worried by Mr Ammour's comments which he perceived as a barrier to promotion (paragraph 40) (b) created a hostile and intimidating environment for the claimant and (c) the claimant subsequently had a period of sickness absence from work from the end of September 2020 until the beginning of January 2021 (paragraph 43 above).
- (2) The Tribunal has however balanced against the above that it is clear from the finding of facts that prior to 8 September 2020:- (a) the claimant had a longstanding history of anxiety and depression (the occupational health report dated 9 January 2020 – paragraph 15 above) (b) that there were other issues (historic and ongoing)

relating to the claimant's dealings with other managers/ other matters which had/ were causing him difficulties (the claimant's Workplace Adjustment Passport at paragraph 42 above and pages 117-119 of the bundle and the claimant's grievance statement dated 14 October 2020 at paragraph 44 and pages 173 – 182 of the bundle) and (c) the occupational health report dated 28 September 2020 (at paragraph 43 above) confirmed the previous medical history and made no specific reference to the incident on 8 September 2020. Further, the claimant has not adduced any further medical evidence in respect of the effect of the incident on 8 September 2020.

- (3) Having weighed all of the above, the Tribunal is satisfied that is appropriate to award the claimant an award for injury to feelings near the middle of the lower band of **Vento**, which it has fixed at £4,500.

### Interest

- (4) The Tribunal is further satisfied (including in the absence of any objections from the respondent) that it is appropriate to exercise its discretion to award interest in accordance with the Interest Regulations at the Judgment rate of 8% which the Tribunal has calculated as set out below.
- (5) (a) the date of act – 8 September 2020 (b) days from 8 September to 20 January 2022 = 134 days (c) daily rate of interest - £0.99 per day (£360 /365) and (d) total interest therefore £132.66 (134 x £0.99).
- (6) The total award which is awarded to the claimant and which the respondent is ordered to pay to the claimant is therefore £4, 632.66.

Employment Judge Goraj  
Date: 20 January 2022

Judgment sent to parties: 21 January 2022

FOR THE OFFICE OF THE TRIBUNALS