EMPLOYMENT TRIBUNALS

Claimant: Mr A Dimaline

Respondent: Heron Foods Ltd

Heard at: Hull (a hybrid hearing) **On:** 25, 26 and 27 January 2022

Before: Employment Judge Miller
Mr D Crowe
Mr G Wareing

Representation
Claimant: In person
Respondent: Mr A Willoughby (counsel)

RESERVED JUDGMENT

1. The claimant's claim that the respondent failed to make reasonable adjustments is unsuccessful and is dismissed

2. The claimant's claim that he was subjected to harassment related to disability is unsuccessful and is dismissed.

REASONS

Introduction and Issues

1. The claimant was, at the time this claim is about, and remains employed by the respondent as a warehouse cleaner. The claimant commenced a period of early conciliation on 27 August 2020 which finished on 8 October 2020. In a claim form dated 28 October 2020 the clamant made claims of disability discrimination.

2. The particular basis of the claimant's claims was not completely clear in his claim form and the respondent requested further details of the claimant's claim but in any event denied any discrimination in their response.

3. There was a case management hearing before EJ O'Neill at which the claimant's claims were clarified and the issues identified. The claimant made applications to amend his claim which were refused by EJ O'Neill and the claimant's claim of victimisation was struck out as having no reasonable prospects of success. The remaining claims were identified as harassment under s 26 Equality Act 2010 and a failure to make reasonable adjustments under ss 20 and 21 Equality Act 2010.

4. In that case management order, EJ O'Neill had set out a list of issues in relation to each of those claims. On reviewing the list of issues, it became apparent that the Provision, Criterion or Practice (PCP) identified for the purposes of the reasonable adjustments claim were unclear. After discussion with the parties, we identified the list of issues as follows:

    4.1. Time limits

        4.1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 27 May 2021 may not have been brought in time.

        4.1.2. Were the complaints made within the time limit in [section 123 of the Equality Act 2010]? The Tribunal will decide:

        4.1.3. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

        4.1.4. If not, was there conduct extending over a period?

        4.1.5. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

        4.1.6. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

            4.1.6.1. Why were the complaints not made to the Tribunal in time?

            4.1.6.2. In any event, is it just and equitable in all the circumstances to extend time?

    4.2. Disability

        4.2.1. Disability is conceded by the respondent.

    4.3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

        4.3.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

        4.3.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

            4.3.2.1. To maintain the claimant in his existing area of work – clarified at this hearing to "a requirement that employees work in their areas of work" (and the claimant further clarified that it referred to the ambient room).

            4.3.2.2. To require the claimant to work with Mr Price without determining each person's share of the workload, i.e. by allowing Mr Price to determine his share of the workload – clarified at this hearing to "a practice of failing to fairly allocate work"

            4.3.2.3. To require the claimant to continue working without access to a safe space at all times (i.e. a private room to retreat to) – clarified to "a practice of requiring employees to continue working without access to a safe space"

            4.3.2.4. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was overwhelmed by the pressure of work generally, and by Mr Price failing to pull his weight and the tension

between him and Mr Price and when he felt overwhelmed the Claimant needed a safe space to retreat to but such a space was not always available [resulting in the claimant potentially going off sick].

4.3.3. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

4.3.4. What steps could have been taken to avoid the disadvantage? The claimant suggests:

4.3.4.1. The provision of a safe space at all times

4.3.4.2. The reallocation of the claimant to an area which was less onerous

4.3.4.3. To intervene with Mr Price to ensure a more equitable distribution of work

4.3.5. Was it reasonable for the respondent to have to take those steps and when?

4.3.6. Did the respondent fail to take those steps?

4.4. Harassment related to disability (Equality Act 2010 section 26)

4.4.1. Did the respondent do the following things:

4.4.1.1. Write to the claimant in unacceptable terms in a letter dated 25 August 2020.

4.4.2. If so, was that unwanted conduct?

4.4.3. Did it relate to disability?

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

4.4.5. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The Hearing

5. The hearing was converted to a hybrid hearing as someone in Mr Willoughby's household had tested positive for coronavirus. All other parties and witnesses attended in person. The claimant attended and was intending to be represented by his wife but, in the event, she provided support and the claimant represented himself.

6. The claimant had produced a witness statement and gave oral evidence. Mr John Joyce, a union representative, also produced a witness statement and gave oral evidence on behalf of the claimant and we had a witness statement from a Mr Philip Crombie on behalf of the claimant, but he did not attend.

7. The respondent produced witness statements from Mr Kevin Sharp, Warehouse Manager, Ms Sarah Pilkington, Retail People Business Partner (HR) and Ms Sarah Daniels, Talent People Business Partner (also HR). They all attended and gave evidence. As a result of remaining covid measures, some of the respondent's witnesses observed the proceedings remotely from another room in the Court from time to time.

8. We are and were conscious that the claimant is agreed to be disabled by reason of anxiety and depression. We therefore sought to take regular breaks throughout the proceedings and intervened where necessary to ensure that both parties had a fair hearing.

9. At the end of the first day an issue about the inclusion of a document (the claimant's grievance appeal letter dated 24 August 2020) arose. The respondent said this had been previously disclosed. The claimant was uncertain about that, but it was not included in the bundle. An issue had come up in cross examination about this letter so that the respondent sought permission to now admit it. A copy was sent to the claimant who stated that as a result of his mental health problems and caring responsibilities he would struggle to consider the document at such short notice. The claimant had said in cross examination that in this appeal letter he challenged the accuracy of another document (the grievance outcome) so we considered that the claimant already had an idea what it was about. We did, however, invite representations the next day from the claimant as to whether he agreed it should be included or not.

10. The respondent sent the claimant copies of his appeal letter and the grievance appeal outcome letter. The claimant did not review the documents and objected to them being admitted. We decided to admit the documents as it was in the interests of justice to do so. They appeared relevant as the claimant had referred to them in answer to a question, it was clear from copies of emails we were shown that the claimant had seen them (and one was a document he had written) and the respondent only referred to short extracts which the claimant was given time to read during questioning. We were satisfied that the claimant was not prejudiced by our decision to admit the documents.

11. The judge also directed at the end of the first day that the claimant was not to discuss the case with anyone and particularly not his wife as he was under oath and in the course of giving evidence. The claimant objected to this, but the direction remained. It was made clear to the claimant that he could discuss practical matters such as identifying how to get the email sent by the respondent but nothing relating to the substance of the case. This is because the evidence he gives must be his evidence, and as far as possible untainted by discussion with another person who might seek to influence what he then says in answer to questions. In the event, nothing further arose from that and the respondent did not make any submissions or applications about it.

Findings of Fact

12. We heard a great deal of evidence, but we have tried to limit our findings to those necessary to decide the issues set out above. It is right to set out at the start that it was at times difficult to follow some of the claimant's evidence. We tried to assist the claimant to give *relevant* evidence while balancing the right of the claimant to present his case in the way he wished. It was therefore, regrettably, necessary to interrupt the claimant on occasions to ensure that both parties had the opportunity to present their evidence.

13. The chronology of this case really starts in 2019. By that time the claimant was employed by the respondent as a warehouse cleaner. He worked in the respondent's warehouse which was divided into three areas: frozen, chilled and ambient. The claimant worked in the ambient section.

14. The claimant says that he worked as part of a small team undertaking tasks. At some point in 2018 the claimant started working with Mr Des Price. It is extremely clear that the claimant was unhappy about working with Mr Price because he perceived him as not undertaking his fair share of the work. The claimant says in his witness statement that he first started to report issues with Mr Price to a manager, Mr James Morton, from May 2019. The claimant's issues at that time were that Mr Price did nothing but sweep and he was not a team player. This continued, the claimant says, for some time until Mr Morton said he would implement a plan involving Kerry Portas (team leader) and Paul Cooper (supervisor). The line management structure at that time in so far as it applied to the claimant was as follows:

    14.1. Claimant/Mr Price
    14.2. Kerry Portas - team leader
    14.3. Paul Cooper – supervisor
    14.4. [Operations manager]
    14.5. James Morton - ambient warehouse manager

15. The plan that Mr Morton suggested was that Ms Portas and Mr Cooper would oversee the claimant and Mr Price and ensure that there was an equitable distribution of work. It is relevant to note that the claimant was working 24 hours a week which resulted in a later start than Mr Price. This change to the claimant's hours had been made in response to the claimant's caring responsibilities at home. From the claimant's perspective that meant that when he came into work Mr Price was already there and sweeping and continued to do so throughout the whole day whereas the claimant was given all the other jobs to do.

16. The claimant's evidence about this is that while Ms Portas did seek to distribute the cleaning tasks equitably between the claimant and Mr Price, this was undermined by Mr Cooper in that the claimant believed Mr Price would approach Mr Cooper who would then allow him to return to his preferred activity of sweeping despite Ms Portas' instructions.

17. Given the apparent conflict between Ms Portas and Mr Cooper, we think it likely that Mr Morton was as good as his word and did attempt to implement at this time a process for the fair distribution of work between the claimant and Mr Price. The respondent has never agreed that Mr Price in fact did only sweep and was not doing his fair share of the work. However, we do find that the claimant genuinely perceived, from May 2019, Mr Price to not be doing his fair share of work and instead to be spending the whole of his time sweeping.

18. In this period, the claimant had been having welfare meetings with Mr Morton (sometimes referred to as "welfares"). These were regular meetings every 4 to 6 weeks as we understand it with the purpose of checking how the claimant was doing at work in light of his health problems and disability. Mr Sharp says that Mr Morton was appointed as the claimant's welfare contact, a role he described as being a port of call for the claimant to reach out if he was having problems and to hold regular welfare meetings to help support the claimant at work. Mr Sharp said, and it wasn't disputed, that Mr Morton had been the claimant's welfare contact since about halfway through 2017.

19. The claimant had a welfare meeting with Mr Morton on 8 January 2020. At that meeting Mr Morton informed the claimant that management responsibility for the claimant would be moving from Mr Morton to Mr Stuart

Morris and that Mr Morris would be taking over the claimant's welfare meetings. This appears to be as a result of a restructure in which the claimant's job was transferring to the facilities department rather than the ambient warehouse department. Mr Morris worked in a different department to Mr Morton – in the facilities department. In terms of seniority, he fell somewhere between Warehouse Manager and Team leader.

20. More or less straight after that meeting, on 8 January 2020 the claimant sent an email to Mr Morton. In that email the claimant explains that he is concerned or worried about the transfer of his welfare support from Mr Morton to Mr Morris. He says, specifically,

"Having partially reflected on what was said in regard to future welfare meetings I feel a major part of my support and recovery has been taken away. Let me explain why in the 30 months plus of support from you I have talked to you in way that I would not normally talk to others. It is really only in the last 9 to 12 months that I have trusted you to talk about personal and family matters which for me is and was a major step forward in my recovery".

21. The claimant then concludes:

"I would like makes (sic) a couple of suggestions for going forward.
To extend the period of transition for welfares to at least 6 months where both you and Stuart are both involved or have my welfares still conducted by you and Claire can liaise with Stuart. My preferred option is the first one".

22. We conclude from this contemporaneous letter that the claimant had been happy with the welfare support provided by Mr Morton. We also note that the notes of the welfare meeting of 8 January 2020 include the claimant's expression of gratitude to Mr Morton for his support over the previous couple of years. In evidence, the claimant said that he felt in retrospect that he had opened up too much in the welfare meetings – that they should have been more about work related issues and less about his mental health and private life.

23. We were not referred to any policies in relation to these meetings. However, it appears to us from the notes of the welfare meeting on 8 January 2020 that the purpose of the meetings was as the name suggests to discuss the claimant's welfare in the context of work and this appears to be what Mr Morton was doing in that meeting. He asked how the claimant was in the context of previous conversations and ongoing issues and then spoke about work. In our view, it appears that the welfare meetings whose notes we have seen were conducted appropriately.

24. We note here that although Mr Morton did not attend to give evidence, the other evidence we have seen and heard about Mr Morton's involvement with the claimant suggests to us that he provided a high level of genuine and compassionate support to the claimant over an extended period of almost three years. The provision of regular welfare meetings with senior manager every 4 – 6 weeks is an intensive and time-consuming resource. It appears to have achieved its aim as the claimant was pleased to have maintained his attendance at work during the period of those welfare meetings, but we particularly want to recognise the efforts and good practice of the respondent in this respect. Regrettably, (and probably for obvious reasons) this is the sort of respondent behaviour we do not see often enough in the Tribunal and it is right that we explicitly recognise and condone it when we do.

25. On 9 January 2020 the respondent confirmed in writing the change of management structure – including that the claimant would still report to Warehouse Supervisors on a daily basis for general tasks such as spillages. On 29 January, the respondent (Claire Townend of HR) wrote to the claimant to confirm that there would be a 6 month transition period during which time the welfare meetings would be conducted by Mr Morton, Mr Morris and Ms Townend (who attended the meetings previously).

26. The claimant's evidence, which was not contradicted, was that he never in fact had any contact from Mr Morris.

27. It was put to the claimant that he had a good relationship with Mr Morton at this time, and the claimant disputed that in oral evidence. This was one of the parts of the claimant's evidence that was unclear. He said that the relationship started to change and then he referred to the mediation meeting, which was on 24 June 2020, when he suggested that Mr Morton and Ms Townend walk away from (i.e. stop doing) the welfare meetings. We think this is in fact a reference to the email from the claimant dated 11 June 2020 when he asked Mr Morton and Ms Townend to step away from any future meeting as the claimant had raised a grievance which he believed caused a conflict of interest.

28. It was then put to the claimant that the claimant's relationship with Mr Morton had become strained because the agreed transition arrangements had not worked out and the claimant said that the relationship had never been strained.

29. We conclude, on the basis of the contemporaneous evidence, that at this time, and up to 29 January 2020, the claimant's relationship with Mr Morton was still good. If it changed, it did so later, and the claimant is mistaken as to the time period.

30. On 30 January 2020 the claimant went off sick. Although it has not been made explicit, we conclude that the claimant's absence was related to an exacerbation in his mental health problems. He did not return to work until 14 July 2020. The reason for the claimant's absence was furlough from 19 April 2020.

Informal Grievance

31. On 25 February 2020, the claimant submitted an "informal grievance". The grievance is long but, in our view, it is really a continuation of the claimant's complaints about Mr Price and a related request for reasonable adjustments.

32. He starts by recognising that the respondent has made a number of adjustments to help him maintain his role in the workplace (some related to his health, some related to other personal circumstances). He then says:
"However should reasonable adjustments been made in the terms of my Job Role and Duties especially when and after I raised concerns about my duties. My issue is Des Price and his role within the ambient store and his daily duty which appears to be Sweep, Sweep and more Sweeping and empty a bin.
There was no issues surrounding my Job Role and Duties until Des Price was moved into the Ambient Store. I have mentioned my concerns to The Ambient Team Leader, Supervisor and Warehouse Management on several occasions and over a period of time nothing really changed. He was given a work sheet at some point but I was not privy to the contents and I would

presume the Warehouse Cleaner Job Description applied to him but nothing has changed in the way he works. My question is should there been a Reasonable Adjustment made at the time of my concerns to my Job Role and Duties and have I been but at a disadvantage in my Job Role and Duties over and above another employee with no disabilities that I am aware off. The lack of a reasonable adjustment has not helped my disability within to the workplace."

33. In oral evidence, the claimant was unclear about exactly what this meant – what a reasonable adjustment would look like. We conclude that what the claimant really wanted was for someone to ensure, to his satisfaction, that he and Mr Price were sharing the workload equally.

34. The claimant has never really been explicit about what the problem was with Mr Price not taking his fair share of the work (in the claimant's perception) beyond common problems arising from perceptions of unfairness in the workplace. However, we conclude that the issue for the claimant was that he believed that he ended up being asked to do various jobs rather than Mr Price because, he believed, Mr Price would not do them. This potentially increased the claimant's workload and increased his feelings of being under pressure. This is based on:

    34.1. The claimant's assertion in his informal grievance that "if reasonable adjustments had been suggested and made could the situation I find myself in today been avoided. The reasonable adjustment of a shared workload would have no extra cost to the business and would just require monitoring by the management team to make sure it was been adhered to and put into practice".

    34.2. The outcome letter of that informal grievance in which it is recorded that the claimant feels under pressure when he does not feel supported by Mr Price

    34.3. The claimant's formal grievance (to which we will come) where he says "It would support me with managing my workload which at present and in the past has been difficult for a range of reasons and I have a tendency to take on too much. I will benefit from having extra support on a ongoing basis. It will be helpful to allow me to focus on fewer and manageable pieces of work".

35. There was no dispute that the claimant experienced panic attacks at work and we heard little evidence directly about the effects of the claimant's disability. We conclude, however on the basis of the evidence we have heard and our experience that it is likely that the claimant's perception of the unfairness and the resulting pressure did have a greater impact on the claimant because of his mental health problems than it would otherwise have done. This is in part reflected in the very persistent way that the claimant continued to raise this issue.

36. In the informal grievance the claimant also explained the impact of being told about the management restructure on him – in summary it was upsetting and caused him to become visibly upset at work. He also explained other circumstances in which he found it difficult to remain at work, resulting in him wanting to isolate or work away from others.

37. The claimant did not, in the informal grievance, explicitly state that he needed somewhere to go when upset or having a panic attack at work, but he did say (in reference to the meeting with Mr Morton):
"On the day in question I was unable to work and recall crying in the warehouse l was very upset. This was witnessed by Kerry/Team leader. I spent the rest of the shift outside on the benches and in the canteen".

38. There was no suggestion that the claimant was sanctioned or criticised by Kerry or anyone else for this. We find, therefore, that as at 8 January 2020 (the date of the meeting with Mr Morton) the claimant was able to leave his workplace and sit on the benches outside, or on that occasion in the canteen, if and when he became upset at work.

Informal Grievance Meeting – 5 March 2020

39. There was a meeting on 5 March 2020 between the claimant and Mr Morton to discuss the claimant's informal grievance. The claimant was accompanied by his wife at the grievance meeting. The claimant agreed that the outcome letter dated 18 March 2020 was a fair reflection of what was discussed at that meeting. In respect of the shared workload, Mr Morton records the claimant's concerns about Mr Price and concludes:

"Going forward, as workload priorities are dictated on a day to day basis, we would ask you to continue to report to your supervisors for allocation of tasks. They will ensure and monitor that the workload is shared between yourself and your colleagues".

40. The claimant said, in oral evidence, that he was happy with that, but it did not come to fruition. He said, as he did on a number of occasions, that if Ms Portas tried to implement this, Mr Price would simply go to Mr Cooper who would let him return to sweeping. The claimant did, however, agree in oral evidence that he was prepared to try Mr Morton's proposed resolution. The claimant was not at work at this time, so was not in a position to say what actually would have happened – he was speculating. We find, therefore, that as at 18 March 2020 the respondent had taken steps to overcome the problems that claimant said he had about Mr Price's working practices (as the claimant perceived them), namely Mr Morton had implemented arrangements to allocate work fairly each day between the claimant and Mr Price.

41. We also find, on the balance of probabilities, that there was some truth to the claimant's perceptions. Mr Morton did not give evidence to the tribunal but at no point in any of the documentation (up to this date) is there anything from the respondent refuting the suggestion that Mr Price does nothing but sweep. We conclude, therefore, that this is because there was, at least, an element of truth in this allegation and Mr Morton was aware of it.

42. We find, therefore, that up to 18 March 2020 the respondent had a practice of not ensuring that the work of cleaning in the ambient section of the warehouse was equally distributed.

43. Mr Morton was not prepared to provide written details of the claimant's reasonable adjustments as part of his job description, although he did confirm that the respondent was aware of the adjustments in place at the time and would take them into account. We find that this was a reasonable position for Mr Morton to take. There was, to this point, no suggestion that the respondent

had failed to comply with any of the previously agreed adjustments so no need for a re-written job description that we can see.

44. In the informal grievance outcome letter, Mr Morton also refers to the claimant's request for a safe space to go to if he is feeling upset. The claimant refers in his witness statement to needing the space because of panic attacks. As there is nothing specific in the informal grievance, we conclude that this issue came up at the meeting potentially in consequence of the problems the claimant had set out in his email. Mr Morton said:

    "Unfortunately we are not able to accommodate a separate facility for you to use as a "safe place". However if a warehouse meeting room is free when you require it, then you may use a meeting room for this purpose. We ask if possible for you to inform a supervisor or Team Leader if you are leaving the shop floor so we are aware of your location for welfare purposes and health and safety".

45. We conclude from this paragraph that Mr Morton explicitly stated that the claimant could use a warehouse meeting room as a safe space if one was free at the time, he needed it. It is implicit from this that the claimant would be permitted time away from the warehouse floor when the need arose in response to becoming upset.

46. In oral evidence, the claimant said that the problem with this was that he could not know when he would need it and the room might not be free. There was some dispute between the parties as to how often the particular room was used. We find that the room clearly was used on some occasions. Firstly, because there was a dispute about how often the room was used, implying that it was used sometimes, and secondly because Mr Morton said that he could not make a room available at all times for the claimant.

47. We also find that the first time the claimant explicitly raised the issue of needing a safe room to go to when having a panic attack or other difficulties, must have been in the informal grievance meeting on 5 March 2020, but that the respondent was aware from 25 February 2020 (by virtue of the informal grievance email) that the claimant was likely to need time away from the warehouse floor in the event that he became upset (there is no mention of panic attacks as far as we know at this point).

Formal Grievance

48. On receipt of that grievance outcome, on the same day (18 March 2020), the claimant raised a formal grievance in response to the informal grievance outcome.

49. As far as is relevant, he raised the following issues. The claimant requested a defined written work schedule that will remove the barriers of the claimant being in a vulnerable position in the workplace. This was slightly different to what the claimant had requested in the informal grievance. He says it would support him in managing his workload. The claimant explained in oral evidence that this was to alleviate the issues with Mr Price. The claimant disputed that this was what had been suggested by Mr Morton in the informal grievance outcome.

50. We find that in substance it was the same – a defined allocation of tasks – with the added detail that it be a written schedule. The claimant said that he lodged the formal grievance because the suggestions provided by Mr Morton

had not worked out. However, the claimant had not been at work since the lodging of the informal grievance and, in any event, lodged the formal grievance the same day he received the written outcome of the informal grievance. We find that the claimant had not at that stage given Mr Morton's proposed adjustments a chance.

51. In respect of the problems with the shared workload issues, the claimant again in that grievance refers to the problems he was having in 2019. He is critical of Mr Morton in that email (his response to the informal grievance outcome that he sent on 18 March 2020) and says "Your way of thinking failed in regard to a shared work place work load and because of lack of managerial checks and reporting the desired effect of said meeting was that I still had a greater work load other and above (sic) said employee. As we have working CCTV in the warehouse, I think this would prove beyond reasonable doubt that the shared workload was not happening when both of us where (sic) on shift".

52. The claimant is also critical of Mr Morton in that email in reference to the change in management and welfare support. He says:

"You state you are a trained mental health first aider.
Question - : If this is the case why was it thought that a person with mental health issues that I have would have been able to handle the change that was One more welfare meeting with yourself and then pass me on to Stewart Morris.
For a person to understand mental health goes beyond a mental health first aid course and it was clear to me that there was no thought for my mental health at that meeting. Yes we have changed the transition but it has left me feeling that it lacked empathy and no serious consideration was taken to my mental health even though you was well aware of what was told on the 17/10/2019 in regards to my mental health". (our emphasis)

53. We find that in this email the claimant is accusing Mr Morton of failing to think of the claimant's mental health and lacking empathy and thereby directly criticising him as an individual.

54. The claimant also specifically suggested that the benches outside in the car park would be a safe space for him to go for a time out to avoid him going off sick. We note, again, that the claimant had previously used the benches outside without any criticism that we are aware of and had, at this point, been out of the workplace since 30 January 2020.

55. On 11 June 2020, the claimant emailed Mr Morton and asked him and Ms Townend to step away from any future meetings as mentioned above. In oral evidence the claimant said that the email concerned a different conversation – a telephone welfare meeting the previous day. He said that Mr Morton had asked about the grievance and the claimant said it would be dealt with when he returned (the claimant was furloughed at this point). In any event, the claimant had clearly asked Mr Morton not to be involved in any more meetings with him.

Claimant's Return to Work 14 July 2020

56. On 14 July 2020 the claimant returned to work. On 20 July 2020 the claimant had a meeting with Mr Morton. It is not clear what the meeting was for or about, although it does appear that the claimant went home on that day.

There is in that meeting no reference to any problems with Mr Price and relevantly, the claimant says the following:

"You and Claire have done a lot for me. Everything gone wrong since January".

57. He then asks Mr Morton "Can you or are you ok to work with me?" to which Mr Morton replies "Yes". It was not disputed that this was an accurate record of the meeting and we find that it was.

Grievance Meeting

58. On 31 July 2020, the claimant's formal grievance of 18 March was heard following the claimant's return to work from furlough. The delay (from March) was because the claimant had been absent through sickness and latterly furlough. We make the following relevant findings about that grievance meeting:

    58.1. The claimant refers to Mr Price doing nothing but sweeping on page 109. We find that that relates to 2019.

    58.2. By the time of that meeting, Mr Cooper had left his role as supervisor.

    58.3. The claimant refers to a "duty of care failure since 2019". The claimant's evidence about this was confusing – he was both critical of Mr Morton and complimentary of his support. Later on, the claimant explicitly says, "Think Claire and James should have done more and better duty of care and reasonable adjustments to be made". On balance we find that the claimant was accusing Mr Morton of breaching the duty of care or, at the very least, the claimant can reasonably be perceived as accusing Mr Morton of breaching the duty of care. The claimant also said at that point that he was devastated by the decision to remove Mr Morton as his welfare contact. Subsequently he accused Mr Morton and Ms Townend of being complacent about incidents that had happened at work.

    58.4. In that meeting, Mr Joyce said that he had seen Mr Price going to Mr Cooper and undermining Ms Portas. However, we note that Mr Joyce also confirmed that he works in a completely different area to the claimant and his day to day knowledge of the activities of the claimant and Mr Price is therefore, we find, limited.

    58.5. The claimant confirmed in the meeting that things were better now. He said that adjustments to the work were not required now as it was working but he would prefer something in writing; there had been a "sea change" – his colleague was doing more, things were good and he confirmed that the reasonable adjustments were in place. We find, therefore, that by the time of this meeting on 31 July 2020, the claimant's work was being adequately fairly distributed between him and Mr Price to the claimant's satisfaction.

    58.6. The issue of using the benches in the car park as a safe space was not specifically discussed in that meeting. Neither the respondent nor the claimant (or his representative) raised it. The claimant said that that was because he was responding to questions. However, he was given an opportunity at the end of the meeting to raise anything else and he did not do so. The issue of a safe space is discussed substantially in the complaint about the occupational health provider so that if that continued to be an issue, we would have expected the claimant to raise

it then. We find that the claimant did not raise any complaint about the room he had been allocated to use as a safe space.

59. The claimant disputed that he agreed at this meeting that his required reasonable adjustments were in place to his satisfaction. He said that he understood they would be discussed, together with a risk assessment, at a subsequent meeting the following week with Mr Morton and Jeanette Makey. There was a meeting on 6 August with Mr Morton and Ms Makey. However, this was about a different issue. The notes of that meeting start by saying "Just wanted to catch up regarding Tuesday, you raised some names which we are in the middle of investigating. We sent you home and you (sic) wife Diane contacted me, and you have"

60. From the context of that meeting, we conclude that in the interim the claimant made a complaint about a colleague which then became the focus of the meeting. Ms Makey refers to a delay in the risk assessment.

61. We conclude, therefore, that a meeting had been planned to discuss a risk assessment for the claimant and, conceivably, that would have included further discussions about adjustments the claimant required.

62. We prefer the claimant's evidence about this and we find that the reference in the grievance meeting to reasonable adjustments being handled correctly was, as the claimant said, a reference to the adjustments being the subject of ongoing discussions and including a risk assessment between the claimant, Mr Morton and Ms Makey outside of the grievance process. We think it likely that this might have included further discussions about a suitable safe space, but it is unlikely that it would have included discussions about Mr Price as this was now resolved.

Grievance Outcome Letter

63. On 4 August 2020 the claimant went off sick and did not return to work again until 28 September 2020. During this period of the claimant's return to work – from 14 July to 4 August 2020 – the claimant was at work for a period of 3 weeks. However, at this time the claimant also took some leave so that, according to the claimant, he worked for a total of 10 or 11 days in this period.

64. The grievance outcome letter was sent to the claimant on 14 August 2020. This dealt with the following issues:

65. A complaint about the respondent's occupational health provider. That is not part of this claim.

66. That the claimant did not feel that Ms Townend and Mr Morton had fulfilled their duty of care to the claimant since May 2019.

67. The respondent's summary about this in the outcome letter was that it had been confirmed at the grievance meeting that reasonable adjustments were now being handled appropriately and the allocation of tasks between the claimant and Mr Price was also being handled appropriately. This is the point (in this hearing) at which the claimant introduced the grievance appeal letter which had not formed part of the bundle. He said that he had challenged this statement in his grievance appeal letter – and he did not agree that he had agreed in the grievance meeting that he was happy the reasonable adjustments had been done.

68. As set out above, we have found that the claimant did agree in the grievance meeting that things were now better, and adjustments were being dealt with outside the grievance process. Specifically, it says,

    "You returned to work on 14th July 2020 and since then James and Jeanette are trying to support you with reasonable adjustments discussed via the workplace stress risk assessment process".

69. The grievance outcome letter, we find, accurately reflects that. In his appeal against the grievance the claimant says

    "Des Price was allowed for a prolonged period of time to falsify company records in that he signed for jobs he was not doing.

    He was allowed to do as he wanted up to my point of sickness January 20.

    The change I noticed was upon my return in July 2020 Paul Cooper had left and Matthew Parkes also a supervisor was delegating cleaning jobs to Des Price.

    Kevin states I was happy with what was said and at the time of the welfare's I was and why wouldn't I be. James and Claire had listened and put a plan in place I gave reasonable time for the plan to be executed but nothing changed in what Des Price was doing.

    Over a period of time I did complain to both Paul and Kerry but nothing changed and when I did complain Paul Cooper would say the following things will change watch this space, he has got issues to deal with, he will be attending his review meeting soon we will speak to him then or I have tasked him with one job".

70. It can be seen that this is confusing. On the one hand the claimant refers to things improving from July 2020 as Paul Cooper had left, and on the other hand he talks about Paul Cooper doing nothing when he complained.

71. We conclude that the claimant was, in his appeal letter, continuing to refer back to 2019 and before his absence commenced in January 2020. This is consistent with the appeal meeting and outcome that by the time of the grievance meeting, the work allocation between the claimant and Mr Price was no longer causing any problem for the claimant on a day to day basis.

72. In respect of the grievance outcome relating to Mr Morton and Ms Townend, Mr Sharp sets out the chronology of Mr Morton's involvement with the claimant and the claimant's complaints. He concludes:

    "I therefore cannot uphold your second grievance that James Morton and Claire Townsend have failed in their duty of care to you. I find on the evidence before me that a substantial amount of James' management time is spent dealing with you personally despite being responsible for the whole running of the warehouse. You may believe that your continued ill health is because of a lack of support, but on balance I believe that your ill health continues despite significant support given to you by both James and Clare".

73. In our view, this was a conclusion to which Mr Sharp was fully entitled to come.

74. Mr Sharp also sets out a list of adjustments that he says have been put in place for the claimant:

    74.1. adjustment to your hours

    74.2. an additional break per shift

74.3. agreement you can have your mobile phone on you, and you are able to make phone calls on occasion when required off the shop floor

74.4. ad hoc additional breaks when required

74.5. reporting each morning to your supervisor for allocation of tasks

74.6. use of the warehouse meeting room as a ‘safe place' when it is available and when required

74.7. authorisation of leave on short notice

75. The grievance outcome did not address the claimant’s suggestion that he be able to use the benches in the carpark as a safe space. The claimant confirmed that any person can use the benches at any time – he said his issue was that he needed permission to leave the shop floor. We have found that on the only occasion we heard about in evidence, the claimant was able to leave the shop floor without consequence.

76. The only evidence we heard about any occasions when the claimant was unable to access a safe space was in response to a question from the Tribunal. The claimant said that from May 2019 up to January 2020 on some occasions he became upset. On those occasions he would speak to Mr Cooper or Ms Portas, and sometimes Mr Morton, and they would spend a couple of minutes with him and see if he was ok to carry on or go home.

77. We accept the claimant’s evidence of this.

78. We also did not hear any evidence of any occasions when the claimant was either refused permission to leave the shop floor because of a panic attack or other mental health problem or disciplined (to any extent) for leaving the shop floor without permission.

79. The claimant’s grievance was not upheld, but Mr Sharp says

“I feel in order to support you moving forward it is important to set out a support plan. I am aware you are currently going through the process of completing a workplace stress risk assessment. This will be a very useful tool to establish and, agree a support plan going forward. I also you feel (sic) an occupational health assessment referral to another provider would be appropriate to support your risk assessment and will inform Jeanette of this. I would encourage your continued engagement with that assessment”.

80. The grievance outcome letter concludes by suggesting that the respondent meets with the claimant to go through the grievance outcome face to face, given the level of detail in the outcome. Again, we find that this was a reasonable and, in fact, supportive approach for the respondent to take. The claimant appeared to raise an issue with the fact that the letter is said to be from Mr Sharp but was in fact written by Ms Daniels. This is not ideal, we agree – it should be clear who the letter is from. However, we accept Mr Sharp’s evidence that the letter reflected his decision as a result of discussions he had with Ms Daniels and in the Tribunal’s experience, it is reasonably common practice for HR to draft letters for managers.

81. We also note, and again condone, the respondent’s supportive approach in this letter. Notwithstanding that the grievance was not upheld, the respondent (in the person of Ms Daniels or Mr Sharp) offered continued support in the form of a stress risk assessment and a further, different, occupational health referral.

82. On 22 August 2020, the claimant declined a meeting to discuss the grievance outcome.

Grievance Appeal

83. The claimant appealed against the grievance outcome in an email dated 24 August 2020. In that appeal, the claimant does not mention using the benches – either by raising it as a potential adjustment or by complaining that it was not addressed in the grievance outcome. He appears to accept the list of reasonable adjustments but his problem with them, as it appeared to be in the tribunal, was that not all of the adjustments were made either specifically for the claimant or specifically in respect of his disability. That is to say, he did not dispute that the measures (to use a more neutral term) were in place for him but some of them were because of factors other than his disability, and some were measures that were also available to other people.

84. We therefore conclude that the list of "adjustments" set out in the grievance outcome letter were actually in place for the claimant.

85. As mentioned above, in the appeal the claimant does again refer to his issues with Mr Price which as we have concluded were no longer, by this time, an ongoing problem at work – the issues were purely historic.

Next Steps Letter

86. On 25 August 2020, Ms Daniels sent a "next steps" letter to the claimant in lieu of the meeting to discuss the next steps which the claimant had declined. Ms Daniels says in her witness statements that the purpose of the letter was to set out how the respondent would support the claimant going forward.

87. This letter forms the basis of the claimant's claim of harassment. Mr Willoughby clarified with the claimant that it was one particular paragraph with which he took issue which is underlined in the extract below. It is important to set out the whole relevant section to see the context. It says:

> **"Moving forward**
>
> We will continue with the workplace stress risk assessment for you and will commission a new occupational health report with another provider to understand your current health and any further reasonable adjustments that may support your return to work.
>
> Following the grievance investigation into the alleged lack of duty of care from James Morton, we feel it is no longer appropriate for James to continue to support you with welfares and the workplace stress risk assessment for the following reasons.
>
> - Although you have indicated that you wish for James alone to continue to be involved in your welfare issues, unfortunately the company does not believe that this is tenable.
>
> <u>- It has been extremely difficult professionally and personally for James over the last few months to continue with supporting you via welfares, when you have raised fundamental criticism of his duty of care towards you. James was upset at the criticism. James feels he has always tried his best. We found on investigation into your grievance that he has, in fact, gone above and beyond his role and duty towards you as he genuinely wanted to support you. We found him to be professional at all times. Under these circumstances and bearing in mind the contradictory nature of your request to be supported by</u>

someone who you believed has failed you, it is not appropriate for James to continue supporting you in this manner.

- As well as wanting to support you and your mental health, we need to ensure we are supporting the mental wellbeing of all colleagues. The company must consider the continued impact on James in supporting you going forward both emotionally and in management time.

- James' role has changed recently therefore his position is now more senior. The company needs him to concentrate on the core elements of his new role. Your welfare support took up a substantial part of his time. It would often be unscheduled which has become increasingly difficult for him to manage alongside his more senior and demanding management role.

- To support you moving forward, we believe day to day issues should be addressed and managed as they occur. The best way to do this can be considered as part of your stress risk assessment but the company believes that a manager closer to your day to day activities would be more appropriate to understanding any day to day stressors and how they could be overcome.

88. The underlined paragraph is the part with which the claimant particularly takes issue. We do understand that the claimant found it upsetting. In his witness statement, the claimant explains his problem with this letter as follows:

88.1. The wording of the letter, the claimant said, could in his opinion be viewed as bullying and harassing

88.2. That it implies that only the claimant wanted Mr Morton to continue to support him, whereas the claimant says (we think) that Mr Morton agreed to support him at the meeting on 20 July 2020. The notes of that meeting do record the claimant as asking Mr Morton "Can you or are you ok to work with me?" and Mr Morton's reply as "yes".

88.3. Mr Morton was not removed from supporting the claimant previously or even once the claimant brought his claim in the Employment Tribunal.

88.4. Mr Morton did not previously decide that he was unable to continue supporting the claimant.

88.5. The claimant perceives the paragraph of accusing the claimant of causing Mr Morton extreme difficulty in his personal and professional life. If this was the case, the claimant says, Mr Morton should have said no in response to his question in the meeting on 20 July (above).

88.6. The claimant perceives Ms Daniels in the letter as suggesting that the claimant has been critical of Mr Morton by raising grievances. The claimant says he was raising grievances as is his right. He was not criticising Mr Morton but asking for help.

89. He also says, and we record, that Ms Daniels said that Mr Parkes would be taking over, but he did not do so until June or July 2021. The claimant says since then he has enjoyed a long period of mental health stability in the workplace and has the use of a safe room.

90. Fundamentally, we have no criticism of this letter at all. The carefully chosen words of Ms Daniels do not amount to bullying.

91. The claimant did in his grievance make a fundamental criticism of the way Mr Morton was discharging his duty of care towards the claimant.

92. The claimant might distinguish between criticising the respondent and criticising Mr Morton, but the reality that the claimant seems to have forgotten is that Mr Morton was the person who was carrying out the tasks on behalf of the company. Mr Morton very obviously went to great lengths to support the claimant and the relationship he had had with the claimant was, as set out above, good. In our view, Mr Morton does appear to have gone above and beyond his obligations as a manager in his support for the claimant.

93. We have made no findings about whether Mr Morton did breach any duty of care to the claimant. We have not, however, seen any evidence of *anything* that Mr Morton has done in respect of the claimant that can reasonably be criticised.

94. We find, therefore, that Ms Daniels was entitled to conclude that the claimant's criticism of Mr Morton in this context would be personally and professionally difficult for Mr Morton.

95. We think it likely that it was in fact emotionally demanding to provide the level of support to the claimant that he required. We reach this conclusion from seeing the claimant's correspondence and reading the notes of the meetings. We do not criticise the claimant for this but owe observe that his actions and behaviour have an impact on other people. Although we did not hear from Mr Morton, we would not be surprised if in fact it was upsetting (as it says in the letter) and frustrating to be subject to such criticism from the claimant when Mr Morton had been supporting him so intensively for so long.

96. Even if Mr Morton *was* willing to continue to support the claimant, the respondent and its HR team had a duty of care to Mr Morton. It was perfectly reasonable, in our view, for someone else at the respondent to take the decision to remove Mr Morton from that role in exercise of the respondent's duty of care towards him.

97. We accept that the claimant was upset by the relevant paragraph in the letter. We think it likely that he was surprised and disappointed that Mr Morton would no longer be supporting him. The claimant said he felt he had been too open and shared too much information with Mr Morton.

98. Nonetheless, we find that this is a sensitively written, wholly justifiable letter that does not in fact criticise the claimant at all. We note that the respondent also goes to some lengths to set out the support they will provide.

99. On 27 August 2020, the claimant raised a grievance against this letter. Ms Daniels said it was investigated but not upheld. The claimant says there was no grievance meeting. We did not hear any more evidence about that, and it is not material to the issues for us to decide.

100. The claimant returned to work on 28 September 2020 but was absent again from 8 October 2020.

101. We heard no evidence of any occasion in the period from 28 September 2020 to 8 October 2020 when the claimant was unable to leave the shop floor because he was upset or had a panic attack, or any further issues in relation to Mr Price. The claimant did not return to work again before submitting his tribunal claim on 28 October 2020.

102. The claimant appears to have returned to work in or around January 2021 and it was agreed that from around February 2021, the claimant did have access to a dedicated safe room in the warehouse.

Additional Findings

103. We heard no evidence about the claimant wanting to be moved out of the ambient area and the claimant confirmed in oral evidence that he had not to his recollection said anything to the respondent about wanting to move out of the ambient area. He said that he was unable to work in the freezer area and that another person works in the chilled area. The claimant was of the view that the ambient area was his area.

104. We find that the claimant had never identified any problems to the respondent with working in the ambient area per se. Further, the claimant did not tell the tribunal what problems, if any, he had working in the ambient area specifically.

105. We also make the following findings about the claimant's perception of Mr Price's work after 18 March 2020. It was wholly unclear how often the claimant worked with Mr Price after his informal grievance – and we particularly note that between 30 January 2020 and the claimant submitting his claim he was only in work for a maximum of 5 weeks – if that. We think it is very unlikely that even if the claimant was working with Mr Price, Mr Price was *only* sweeping. We think it much more likely that the only occasions the claimant *remembers* seeing Mr Price are the times he saw Mr Price sweeping.

106. The claimant was clearly fixated on this issue – continuing to raise it in grievances long after it had ceased to be an ongoing issue. It is highly probable, in our view, that the claimant remembers the occasions when he saw Mr Price sweeping as it confirmed his entrenched beliefs but forgot the occasions when he saw him doing other things. To this extent, the claimant's evidence about Mr Price in this period is not reliable.

Law

107. Failure to make reasonable adjustments

108. Section 20 – Duty to make adjustments says, as far as is relevant:

(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.'''

109. A provision, criterion or practice (PCP) must have an element of repetition about it, or at least the potential to be repeated. It cannot be a one off act applied solely to the claimant. In *Isola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal said:

"In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things

generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one".

110. The court went on to further hold that

"the function of the PCP is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee.. the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply".

111. A PCP must also be capable of being meaningfully applied to a person who does not share the protected characteristic of the claimant. In *Rutherford v Secretary of State for Trade and Industry (No.2)* [2006] UKHL 19 Baroness Hale explained that a claimant, in the context of indirect discrimination, cannot rely on a PCP in which people who do not share the relevant protected characteristic can have no interest.

112. Section 21 – Failure to comply with duty says

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

113. Paragraph 20 of Schedule 8 – Lack of knowledge of disability, etc provides that

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

114. This requires both knowledge of the fact that the claimant is disabled **and** knowledge of whether the disability is likely to put the claimant at a disadvantage.

115. In Secretary of State for the *Department of Work and Pensions v Alam* [2010] IRLR 283, [2010] ICR 665, the EAT held that the correct statutory construction of s 4A(3)(b) involved asking two questions;

(1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then there is a second question, namely,
(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

116. It was further held that, once a potentially reasonable adjustment has been identified, the burden of showing why that proposed adjustment is not reasonable falls to the respondent.

117. Harassment

118. S 26 Equality Act 2010 says, as far as is relevant,

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

119. Subsection 5 lists the relevant protected characteristics, and they include disability.

120. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the EAT analysed this provision. There are a number of elements to this provision

(1) The unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test
(2) The purpose or effect of that conduct: Did the conduct in question either:
(a) have the purpose or
(b) have the effect
of either
(i) violating the claimant's dignity or
(ii) creating an adverse environment for her 2 ? (We will refer to (i) and (ii) as 'the proscribed consequences'.)
(3) The grounds for the conduct. Was that conduct on the grounds of the claimant's [disability]?

121. If the conduct had the effect of violating the claimant's conduct or creating an adverse environment, was it reasonable for the claimant to have felt that way. It is clear from subsection 4 that all the circumstances must be considered. In Richmond Pharmacology, it was said that

"…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if [he] did genuinely feel [his] dignity to have been violated, there will have been no harassment within the meaning of the

section. Whether it was reasonable for a claimant to have felt [his] dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt".

Conclusions

122. We set out our conclusions by reference to the list of issues.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

123. There was no real dispute that the respondent had knowledge of the claimant's disability. In any event, there was a letter from an occupational health doctor dated 4 October 2018 which says that it is likely in his opinion that the claimant is disabled within the meaning of the Equality Act 2010. Subsequently, the respondent has agreed that the claimant was disabled by reason of a depressive disorder.

124. In the absence of any argument to the contrary we find that the respondent either knew, or ought reasonably to have known on the basis of this letter, that the claimant was disabled with the impairment of depressive disorder from at least 4 October 2018.

125. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

125.1. To maintain the claimant in his existing area of work – clarified at this hearing to "a requirement that employees work in their areas of work" (and the claimant further clarified that it referred to the ambient room).

125.2. There was no dispute that it was the claimant's role to work as a cleaner in the ambient area of the warehouse. We find that this was a PCP.

To require the claimant to work with Mr Price without determining each person's share of the workload, i.e. by allowing Mr Price to determine his share of the workload – clarified at this hearing to "a practice of failing to fairly allocate work"

125.3. We find that up to 18 March 2020 (at the latest) the respondent did not always fairly allocate work between the claimant and Mr Price. This related to allocating work fairly between Mr Price and the person with whom he worked. It was never suggested that this issue was specific to the claimant. If anything, it was particular to Mr Price. Therefore, we think that the same practice would have occurred as between Mr Price and any other person with whom he worked in the ambient area. It therefore had the characteristics of the way things were, or would be, done and amounted to a practice.

To require the claimant to continue working without access to a safe space at all times (i.e. a private room to retreat to) – clarified to "a

practice of requiring employees to continue working without access to a safe space"

125.4. This is not, in our judgment, a PCP. A person without a mental health problem that gives them a need for a safe space would have no interest at all in whether the respondent required them to continue working without a safe space. (See the case of *Rutherford* referred to above).

125.5. If we took a wider interpretation, having heard the evidence, that the PCP, could be a requirement to not leave the shop floor at short notice then it is likely that the respondent did have this PCP. However, for reasons that we will set out below, this was not applied to the claimant even if there was such a PCP.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was overwhelmed by the pressure of work generally, and by Mr Price failing to pull his weight and the tension between him and Mr Price and when he felt overwhelmed the Claimant needed a safe space to retreat to but such a space was not always available [resulting in the claimant potentially going off sick].

125.6. The first PCP (a requirement to work in their areas of work) did not cause any disadvantage to the claimant, regardless of whether it would cause disadvantage to people with the claimant's disability generally.

125.7. The claimant accepted that his work area was the ambient area and he raised no complaints about that at work, in his grievances, in his claim or at the hearing. We conclude, therefore, that it did not cause him any substantial disadvantage.

125.8. The second PCP (failing to fairly allocate work) did put the claimant at a substantial disadvantage up to, at the latest, 18 March 2020. The claimant said, and we accept, that having to do all the work that Mr Price did not do caused him a great deal of stress. We accept that the claimant's perception of this unfairness impacted on him more because of his disability than it would otherwise have done.

125.9. This, we think, is reflected in the way in which the claimant continued to fixate on this issue past the point where it was still in reality a problem.

125.10. The third proposed PCP is not a PCP. However, even taking the more generous interpretation, the claimant was not subjected to any disadvantage because in reality he was always able to leave his working area. He spoke to his managers or found somewhere to go.

125.11. The claimant said that the disadvantage arose from not having a safe space in that he had to instead go home sick. This did not happen after 30 January 2020 (if it happened at all – we heard no direct evidence). This disadvantage is directly linked to the failure to provide a safe space, not the potential alternative PCP (which, we emphasise was not pleaded) of not being able to leave the workplace.

125.12. Either way, the claimant was not subject to a disadvantage by the application of the PCP as set out in the case management order (as it is not a PCP), or the PCP as tentatively emerged from the hearing.

Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

125.13. The only disadvantage we have found was related to the PCP concerning Mr Price. We find that the respondent did know of this disadvantage. The claimant had been raising it since May 2019 and the respondent had been seeking to address it. If they did not actually know, they ought reasonably to have done so. The claimant made his feelings clear on many occasions from his informal grievance onwards.

What steps could have been taken to avoid the disadvantage? The claimant suggests:

125.13.1. The provision of a safe space at all times

125.13.2. The reallocation of the claimant to an area which was less onerous

125.13.3. to intervene with Mr Price to ensure a more equitable distribution of work

125.14. The only disadvantage the respondent was required to take steps for the claimant to avoid was in respect of the issues relating to Mr Price. The respondent did so from 18 March 2020 and thereafter, we have found, there were, objectively viewed, no more occasions of disadvantage to the claimant.

125.15. We record, for the avoidance of doubt, that it was never suggested that the claimant's sickness absence from 30 January 2020 was related to his issues with Mr Price.

125.16. From 18 March 2020 the respondent introduced a daily allocation of work between the claimant and Mr Price. This was a step that was taken which avoided the disadvantage, objectively. There were no occasions after then, that we heard evidence about, when work was allocated unfairly to the disadvantage of the claimant and that then caused him substantial stress.

125.17. As we understand it, any residual feelings of stress remained from the allocation of work in 2019, not the ongoing allocation of work.

Was it reasonable for the respondent to have to take those steps and when?

Did the respondent fail to take those steps?

125.18. It can be seen from our findings and conclusions that the respondent did not fail to take any steps they were required to take and for those reasons the claimant's claim that the respondent failed to make reasonable adjustments is unsuccessful.

Harassment related to disability (Equality Act 2010 section 26)

Did the respondent do the following things:

Write to the claimant in unacceptable terms in a letter dated 25 August 2020.

126. The letter of 25 August 2020 was not written in unacceptable terms. It was a wholly appropriate letter in the circumstances.

If so, was that unwanted conduct?

127. The relevant parts of the letter were obviously unwanted by the claimant. That is what he says, and we do not doubt his feelings about it.

Did it relate to disability?

128. We think that the paragraph did relate to disability. It concerned the impact of managing and supporting the claimant on Mr Morton and the only reason Mr

Morton had to support the claimant was because of his disability. "Related to" is a wider test than because of and we think that the letter was related to the claimant's disability.

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

129. In our view, it did not. The clear purpose of the letter as a whole was to explain the support that would be given to the claimant and the reasons for the change. This was intended to be a wholly supportive letter.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

130. Objectively, if the letter did have that effect on the claimant (of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant) it was not reasonable for it to do so.

131. We do not know if the letter did actually have this effect, although we fully accept that the claimant was upset by the letter. However, the test is not being upset, but the violation of the claimant's dignity, or the creation of an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

132. Even if the letter did actually have that effect, however, it was not reasonable for it to do so. Viewed objectively, this is a clear, carefully written and supportive letter. It expressed concern for both the claimant and Mr Moton and it set out the support to be offered to the claimant.

Time

133. Finally, we consider the issue of time. The claimant's claim that the respondent failed to make reasonable adjustments is potentially successful up to 18 March 2020.

134. We have found that the respondent did not finally address the PCP of the unfair allocation of work until 18 March 2020.

135. We did not hear any direct evidence about the problems before that date. The claimant gave a lot of evidence, but it was non-specific and often difficult to follow. We did what we could to obtain clear evidence from the claimant by rephrasing questions and seeking clarification, but ultimately, we could only take account of what the claimant said.

136. The claimant did not provide any explanation as to why he did not make a claim earlier.

137. A claimant must bring a claim within three months of the last date of alleged discrimination (subject to extension for early conciliation). The last date which the claimant could have been subject to any disadvantage by the unfair allocation of work was 30 January 2020. The claimant started early conciliation on 27 August 2020 and that ended on 8 October 2020. The claimant brought his claim on 28 October.

138. The last date for bringing a claim, or starting early conciliation, in respect of any allegations on 30 January 2020 was 29 April 2020. The claim is therefore 6 months late.

139. The tribunal may extend time for bringing a claim if it is just and equitable to do so. The burden is on the claimant to show that time should be extended.

140. In our view, there is no good reason to extend time. The claimant has offered no explanation why the claim was late. The difficulty we have had hearing relevant and coherent evidence predominantly about the period from 30 January 2020 demonstrates that it would not be in the interests of justice to extend time to deal with matters preceding that date.

141. The evidence would be even more unreliable, and the respondent would be put to an unfair disadvantage.

Final Comments

142. We make two general comments. Firstly, we do not doubt that the claimant experiences the problems he has described at work in the way he says he does. However, despite the claimant's views of the respondent, we wish to record that in our view and on the basis of the evidence we have seen, the respondent has behaved in a helpful, kind and supportive way towards the claimant. As mentioned above, the tribunal does not see examples of good practice by respondent employers as often as it might (for obvious reasons) and we think it is important to recognise good practice where we see it.

143. The respondent appears to have been supportive of the claimant and demonstrated patience and flexibility in addressing the claimant's issues. Both Mr Morton specifically and the respondent generally have gone to significant lengths as far as we can see, to accommodate the claimant's needs.

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Employment Judge **Miller**
16 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
22 March 2022

Olivia Vaughan
FOR EMPLOYMENT TRIBUNALS