EMPLOYMENT TRIBUNALS

Claimant: **GH**

Respondent: UNISON

Heard in Leeds: **On: 19 to 30 June 2023**

Before:
Employment Judge JM Wade
Mr W Roberts
Mr M Taj

Appearances

For the claimant: In person
For the respondent: Ms A Palmer, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claimant's allegations that the respondent contravened the Equality Act 2010 by indirect gender reassignment discrimination are dismissed.
2. The claimant's allegations that the respondent contravened the Equality Act by a failure to make reasonable adjustments are dismissed.
3. Allegations 15, 16, 20, 21, 22, 27, 28, 29, 31 and 34 that the respondent contravened the Equality Act by discrimination because of something arising in consequence of disability succeed as set out below.
4. The claimant's allegations 26, 27 and 28 succeed as disability related harassment.
5. The claimant's Section 15 and disability related harassment allegations which have not succeeded are dismissed.
6. The claimant's allegations of gender reassignment harassment and direct discrimination are dismissed.

REASONS

Introduction

1. The claimant is a member of the respondent union. He brings Equality Act claims relying on Section 57 of the Equality Act 2010 ("the Act"), which gives protection from discrimination and harassment by unions in relation to their members and others. He has the protected characteristics of gender reassignment ("GR") and disability. He is a disabled person by reason of attention deficit hyperactivity disorder ("ADHD").

2. The claimant brought similar proceedings against his employer. The support provided by the respondent in connection with the employer proceedings, and the withdrawal of that support, is at the heart of this case.

3. The findings and conclusions in these reasons deploy the full breadth of our lay members' industrial experience of trade unions. It is almost unavoidable in such a judgment that those involved may find parts unwelcome. These reasons explain our decisions in compliance with the Tribunal's rules.

The complaints and issues

4. The claimant's 29 page pleading, supplemented by 29 pages of particulars, set out around 40 matters in 2020 and 2021 alleged as contraventions of the Act. They are: GR related harassment, direct discrimination and indirect discrimination; and disability related harassment, arising from discrimination - "Section 15", and failures to make reasonable adjustments ("FTMRA").

5. The claimant alleges that features of his different behaviour and communication style were the "somethings" arising from ADHD, as set out in a letter from his treating therapist.

6. In his indirect GR discrimination claim, he alleges that the respondent required members to accept and act according to advice from Union Representatives: "the advice PCP". In his reasonable adjustments case he alleges that the respondent required members to communicate with and/or behave in ways which would maintain a positive relationship with their union representative and agents of the union: "the positive relationship PCP". He further sets out six adjustments or measures which he alleges would have reduced alleged disadvantage to him.

7. The complaints were clarified in a case management hearing by reference to a draft list of issues prepared by the respondent. The draft list also sought further particulars from the claimant. His further particulars and an amended response then necessitated adjustment to the list of allegations and issues. There was no objection to those lists from the claimant and the Tribunal was greatly assisted by them. The list of factual allegations was reduced by the Tribunal to be visible on one side of A4 to assist everyone during the hearing and act as an aide memoire. The headings below reflect the allegations numbered in that list, which itself referenced the paragraphs of the particulars of claim and identified each type of alleged contravention.

8. The claimant acted as a litigant in person in these proceedings, but he had previously had the advantage of his employer claim being drafted by leading and junior

counsel, instructed by the Union. The main focus of those proceedings was GR related discrimination. The employer proceedings were considered to have strategic importance for the respondent. The claimant did a very good job of applying the advice and approach taken in those pleadings to this claim and further particulars, such that the complaints were clear.

9. That approach failed him in the area of reasonable adjustments, because the allegation in the employer proceedings was a late and specific allegation to compliment the GR case. The FTMRA issues in his dealings with the union were potentially more straightforward: the claimant had an ADHD diagnosis; over the years coping strategies had addressed disadvantages he faced; when under stress those strategies could fail him; and there were aspects of working with the respondent (which involved very similar activities to his work activities) which could put him at a relative disadvantage in comparison with members without ADHD. For instance, attending meetings, working through documents, and so on.

10. Unfortunately, the pleaded PCP did not reflect that straightforward case. It is generally not for the Tribunal to suggest amendments to improve a case to a litigant in person, but particularly not at the final hearing stage of these proceedings – it is simply not fair. The respondent was entitled to know the case against it and deal with that and the claimant's alleged PCP was clearly stated. The claimant had four other types of contravention alleged and the Section 15 and disability harassment claims often covered the same factual landscape as the reasonable adjustments case.

11. The respondent's justification defence asserted a legitimate aim of: "preventing the Respondent's representatives from being placed under unreasonable pressure or stress in carrying out their work, to ensure that all members are provided with reasonable support and to allow the effective running of the Respondent's services".

The Law

12. The Act relevantly provides:

Section 57 **Trade Organisations**

(2) A trade organisation (A) must not discriminate against a member (B)
(a) …..by not affording B access to opportunities for receiving a benefit, facility or service;
(d) by subjecting B to any other detriment.
(3) A trade organisation must not, in relation to membership of it, harass -
(a) a member
(6) A duty to make reasonable adjustments applies to a trade organisation.

Section 109 **Liability of employers and principals**
(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2)Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3)It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4)In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
(a)from doing that thing, or
(b)from doing anything of that description.
(5)This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

Section 15 Discrimination

13. Section 15 says:

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

14. The Equality and Human Rights Commission Code of Practice on Employment ("the Code"), at paragraph 5.9, gives examples of common consequences of disability.

15. In T-Systems v Lewis (UKEAT/0042/15/JOJ) His Honour Judge Richardson sets out a four stage test for Section 15 discrimination:
There must be a contravention of Section 39(2)

There must be unfavourable treatment

There must be "something arising in consequence of the disability"; and

The unfavourable treatment must be because of the "something".

16. "Because of" at stage 4 means that the "something arising" operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about. It does not matter whether the putative employer has knowledge that the something arose in consequence of disability, provided there is knowledge of the disability itself - City of York v Grosset [2016] ICR 1492 CA. See also the full guidance in Pnaiser v NHS England [2016] IRLR 710 EAT at 31. "A Tribunal may ask why A treated the claimant in the unfavourable way alleged....alternatively it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment". Motive for the unfavourable treatment (even if benign) is irrelevant.

17. "Stage 5" - assessment of the respondent's "justification" defence in section 15(2) - is common to direct discrimination because of age, and indirect discrimination. Whether the employer's "means" are "proportionate" requires the Tribunal to determine whether they were "appropriate and necessary" (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European

Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence of a legitimate aim and that the unfavourable treatment was a proportionate means of achieving that aim.

Failures to make reasonable adjustments ("FTMRA")

18. Section 20 relevantly provides:

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

19. Section 21 deals with failure to comply with the duty:

> (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.*

20. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement (Schedule 8, paragraph 20 (1) of the 2010 Act). See Ridout v TC Group [1998] IRLR 628 as to constructive knowledge – what an employer could reasonably be expected to know is a finding of fact for the Tribunal on the material before it.

21. As to the type of adjustments that were envisaged by the 2010 Act, the guidance from the 1995 Act is rehearsed in the Code. The Tribunal must take into account those parts of the Code which appear to be relevant:

22. At paragraph 6.33, the following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments:

> *allocating some of the disabled person's duties to another person;*
> *transferring him to fill an existing vacancy;*
> *altering his hours of working or training;*
> *assigning him to a different place of work or training;*
> *allowing him to be absent during working or training hours for rehabilitation, assessment, or treatment;*
> *modifying procedures for testing or assessment;*
> *providing supervision or other support.*

Indirect discrimination

23. Section 19 relevantly provides:

(1) *A person (A) discriminated against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.*
(2) *For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -*
(a) A applies or would apply it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Harassment, direct discrimination and establishing discrimination

24. Section 26 relevantly provides:-

(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.

25. Section 13 relevantly provides:

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

26. Section 136 of the Act states:-
(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

27. This is a two stage process: it is for the claimant to prove facts from which the Tribunal could conclude an act of discrimination has occurred before the respondent is called to provide an explanation. In examining those primary facts, poor treatment is not enough. See in particular Madarassy v Numora International Plc [2007] IRLR 246 para 56, per Mummery LJ: "The bear facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination".

28. The well established principles relating to direct discrimination are as follows. If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, this is sufficient to establish direct discrimination. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome: Lord Nichols in ***Nagarajan v London Regional Transport [2000] 1AC501*** *House of Lords at 512H to 513B.* Significant in this context means not trivial. Where an actual comparator is relied upon, there must be no material difference between the circumstances relating to each case.

29. Direct evidence of discrimination is rare and frequently tribunals have to infer discrimination from all the material facts: Elias J (President) in Ladell: "Where the applicant has proved facts from which inferences could be drawn that the employer treated the applicant less favourably [on the prohibited ground], then the burden moves to the employer" … then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on a prohibited ground. If he fails to establish that the tribunal must find that there is discrimination".

30. Underhill J in Martin v Devonshire Solicitors [2011] ICR 352, para 37 said: "Tribunals will generally not go far wrong if they ask the question suggested by Lord Nichols in Nagarajan, namely whether the prescribed ground or protected act had a significant influence on the outcome". In Igen Limited v Wong [2005] IRLR 258CA the guidance issued in Barton in respect of sex discrimination cases and was said to apply and approved in relation to race and disability discrimination.

Limitation

31. Section 123(1) of the Equality Act 2010: "*Proceedings on a complaint within section 120 may not be brought after the end of - (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.*

32. Those periods are extended by the ACAS conciliation provisions where conciliation is commenced within the relevant time time either by the "stop the clock" provision or providing a further month from the close of conciliation.

33. Section 123(3)(a) provides that: "*conduct extending over a period is to be treated as done at the end of that period".*

34. Time runs from the date of the alleged discriminatory act (but lack of knowledge is relevant to the grant of an extension) - see Mr GS Virdi v Commissioner of Police of the Metropolis and another [2007] IRLR 24 EAT. In the case of a failure to make a

reasonable adjustments, an omission, time runs from the date when a person does an act inconsistent with making the adjustment; or on the expiry of the period in which the person might reasonably have been expected to do it (Section 123(4)). See Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22 on the exercise of discretion in such circumstances.

35. The Tribunal also considers "forensic prejudice" in assessing the prejudice to each party from an extension of time - see Wells Cathedral School Ltd v Souter EA 2020 000801 JOJ.

36. Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 makes clear that the Tribunal is entitled to consider the merits of a claim in the exercise of its discretion.

37. The Act confers the widest possible discretion on the Employment Tribunal in determining whether or not it is just and equitable to fix a different time limit Abertawe Bro Morgannwg Employer Local Health Board v Morgan [2018] EWCA Civ 640. That said the power of the Tribunal is a discretion, to be exercised judicially, assessing relevant factors and the weight to be given in each case. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.

38. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see Afolabi -v- Southwark LBC 2003 EWCA Civ 15.

39. In exercising discretion under the Section 123 (1)(b) the Tribunal must consider the length of and reasons for delay, and consider the prejudice to both parties.

40. Section 33(3) of the Limitation Act 1980 contains a helpful checklist of other matters which might need to be considered (in personal injury and other claims with longer time limits), but also for the Tribunal to bear in mind if relevant:

> the extent to which the cogency of the evidence is likely to be affected by the delay;
>
> the extent to which the party sued had cooperated with any requests for information;
>
> the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
>
> the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Hearing and Evidence

41. The first two days of the hearing were spent on the Tribunal's reading and preliminary matters. The claimant was content that during the hearing we used "he/him" and "Mr". Adjustments to the conduct of the hearing recognised that the claimant acted as a litigant in person with ADHD. In summary we broke every hour for ten minutes or so; and we permitted recording of the hearing by both sides (subject to

a separate order). We had hoped to hear submissions at the close of day 8, but ultimately they were heard on day 9 and decisions on all matters were unlikely to be reached to deliver Judgment on day 10. We let the parties know that Judgment would be reserved, albeit that was not our expectation until day 9. The time taken to produce this reserved Judgment is longer than the parties or the Tribunal would have wished. The delay reflects the volume of multi day hearings over the summer.

42. Our directions at the start of the hearing also included that the Tribunal would not read or admit additional paper documents (we were told around 8000 pages) brought in paper copy by the claimant. We did admit around fifty extra pages which were identified in the claimant's statement, but could not be located in the main hearing file (of 3441 pages).

43. We also admitted, on the claimant's application, an email of 24 February 2021 as rebuttal evidence in connection with whether Mr Cafferty and Ms Sharp had held a meeting that day.

44. Generally the parties cooperated to ensure we could hear the claims within the time estimate, and where a matter required directions, they were given.

45. The claimant was the only witness for his case. We then heard six witnesses from the respondent: the branch secretary, whose involvement with the claimant's case was extensive from April 2020 until December 2020; Mr Cafferty, the previous Regional Secretary, Ms Sharp, Regional Organiser/Manager who instructed lawyers for the claimant, Mr Mahmood, Area Organiser, who supported him from January 2021, Mr Walton, clerical assistant, and Mr Stolliday, Head of Membership Liason Unit.

46. Mr Walton (and Ms Thomas, former Assistant General Secretary) had involvement in one allegation each and their statements were appropriately short. Ms Thomas, now retired, did not attend the hearing.

47. It will be apparent from the findings below where we have rejected one party's case or another's. We do not set out the party's submissions, other than where they appear in the course of our analysis. The reliability or otherwise of witness evidence has largely been addressed by considering likelihood of an account against the relevant documents. It has been a document heavy case where virtually all of the chain of events was corroborated by the contemporaneous material. It is the interpretation of those events about which the parties are at odds.

48. As with all allegations of discriminatory conduct over time (other than where a just and equitable extension is given at a preliminary hearing) we have to decide whether we could or would uphold complaints, subject to limitation, and if we find discriminatory conduct, whether it extends over time such that an extension is not required, or whether to grant an extension. We express our preliminary conclusions below as "would/would not conclude' or "could/could not conclude", accordingly until we address limitation.

<u>Findings of fact and preliminary conclusions subject to limitation</u>
<u>Background</u>

49. At all material times the claimant was employed as a Trial Management Assistant contracted to work full time. His work included administering clinical trials of interventions for patients.

50. He joined the respondent union on commencing this latest employment in June 2019. He has a degree in English Literature, and had previously worked in childcare in different settings. He had also worked in an administrative role in manufacturing, developing administrative skills.

51. On 29 July and 14 August 2019 the claimant attended the NHS adult ADHD (attention deficit hyperactivity disorder) service and was assessed to meet the criteria for adult ADHD, presenting with a combination of inattentive and hyperactive/impulsive symptoms, of a moderate severity. By his thirties, when this assessment was carried out, the claimant had developed coping strategies to address symptoms of ADHD. His coping strategies had meant he had experienced little in the way of functional issues in his work life. He was further supported by suitable specialist treatment.

52. After disclosure to the employer of his disability in 2019, adjustments were put in place including regular line management meetings to discuss workload demands, and the discussion of work prioritisation and allocation.

53. The claimant identifies as “non binary trans” and prefers the pronouns they/ them or he/him. In July 2019 he had let the employer know his preferred first name. He accepted that in some documentation (passport/driving licence) his registered name was necessarily used, indicating his sex at birth. He later accepted that in some of the employer’s IT systems, which depended on government identification, such as payroll and pension, his registered name was necessarily used. ”Dead name” describes that former registered name and indicates the negative emotion for the claimant connected with its use.

54. From August 2019 and into early 2020, the claimant experienced use of his dead name at work, other than for payroll and pensions, including on 5 March 2020, on a travel IT system.

55. The subsequent onset of pandemic measures later in March 2020 meant that most or all colleagues at the employer were sent home, and contact with colleagues moved to Microsoft Teams. It quickly became apparent that Microsoft Teams, as well as other of the employer’s IT systems, identified the claimant by his dead name (“the dead name issue”).

56. This was very upsetting for the claimant. It potentially “outed” him to anyone viewing the systems, at a time when Teams was in universal use by colleagues. He reasonably perceived that his risk of trans related ill treatment or violence was increased.

57. His fear brought on acute anxiety symptoms and reduced his ability to access his ADHD coping mechanisms. His mental health deteriorated. It became clear that resolving the dead naming issue was taking time and was not straightforward. The employer agreed in April 2020 to provide counselling, permitting the claimant to source his own counsellor.

58. In early May 2020, Dr Gamwell, a psychotherapist with counselling qualifications and a PHD in Industry and Business, provided a letter for the claimant describing their counselling work together and the profound feelings of distress experienced by the claimant at this time. This included noting that the claimant had joined the employer knowing it had an equality charter mark, or certification. That contributed to his upset because the impact of dead naming on him did not appear to be recognised by the employer.

59. Dr Gamwell's letter also identified the impact of anxiety and work related stress on the claimant's ADHD coping mechanisms, such that he had much more difficulty focussing, moving between tasks, getting through work, sleeping, regulating emotions, and that he experienced rejection sensitive dysphoria. She made practical suggestions for how best the employer could support the claimant (including providing a single point of contact), but noted that for as long as the claimant was likely to experience dead naming at work, his progress through counselling would be limited. The therapy, she explained, was therefore targeted at preventing long term decline in mental health.

60. Through these difficulties the claimant had received the support of the local union equality officer, including to present a grievance which was sent to the employer on 21 April 2020. The equality officer sought support from the branch secretary, initially on an anonymous basis, to help tackle the issues the claimant was facing.

61. The claimant had the respondent's full support in the branch to challenge the employer's position. Its initial position was that it was for the claimant to change his name by deed poll to address some of the dead naming issues. The claimant completed a union form to seek legal advice at the end of April 2020.

PCP 1 – for indirect GR discrimination

62. The Conditions of Service for representation of members included several unsurprising provisions pursuant to which representation could be withdrawn, including where a member: failed to treat a representative with respect, failed to be honest and frank with the representative; or gave information which was misleading.

63. Paragraph 8 of the terms sent to the claimant said this:

"*At all times, action taken on your behalf will be based on agreement reached between you and your representative about how best UNISON can assist you. Throughout the procedure you will be kept informed and no decision will be made without first consulting you. Should you decide at any point not to accept the advice of your UNISON representative, then you are free to proceed without UNISON assistance. Please inform UNISON if you no longer require UNISON's assistance in these circumstances."*

64. The binary implication of the underlined section above, was not, in practice, applied. In day to day work, branch and regional officers worked with members, regularly giving advice. Support was only withdrawn if the member's decision not to follow advice was considered unreasonable. In many circumstances the member's decision would be respected and assistance would continue. A representative might

say, “my advice is this, but it’s up to you”. In effect the representative and member would agree that a decision was properly the member’s decision, and support and representation would continue whether the member followed advice or not. In particular, where the employer offered a termination of employment settlement, and the member did not wish to leave employment, the decision was typically left to the member, and union assistance was not withdrawn, if the member wished to continue being supported.

65. The UNISON representation guide runs to some 67 pages. It confirms that the conditions of representation are not binary. It expands on those conditions still further in Section 4.1 - “*when it is not appropriate to provide representation” – “where the member will not accept our advice”.* It goes on to set out detailed provisions for where a member disputes the representation offered or refused, providing that it is important the member be given a right of appeal, and recommends that a special sub-committee of the branch be called to hear and decided upon the dispute in private. This mirrored the conditions of service provision, paragraph 15: “*In the event of UNISON support being withdrawn you have the right to appeal to your branch secretary in the first instance unless notified otherwise.”*

66. Furthermore, there is no basis to find that the pleaded provision, the advice PCP, as operated by the respondent, or at all, put members with the protected characteristic of gender reassignment, of whom there were many at this branch, at a particular disadvantage. The claimant’s indirect gender reassignment complaint (put as an alternative to his direct complaint) is misconceived. There was no evidence that advice to trans members at this branch or generally was more or less likely to be disagreeable to them (other than in the claimant’s particular case), nor that they were more or less likely to have support withdrawn. The indirect discrimination cannot succeed, whether affected by limitation or not.

PCP 2 – the reasonable adjustments case

67. Members were not required to ‘communicate with, or behave in ways, which would maintain positive relationships” with representatives and lawyers/agents of the union. There was simply a requirement for respectful treatment. The requirement did not extend further than respectful treatment, and indeed a part of the culture of the respondent was one of respectful **disagreement** in that members and representatives had diverse views and priorities and frequently disagreed. In this finding we accepted the evidence of Ms Sharp, but it was also inherently likely and born out the industrial experience of the Tribunal.

68. The claimant’s reasonable adjustments allegations, relying as they did on this PCP, cannot succeed. The claimant’s ADHD, and some of the challenges arising from that, were known by the respondent - but the PCP on which he relied was not present and could not be a source of relative disadvantage in respect of which the duty arose.

69. The claimant was universally acknowledged by the respondent witnesses as someone who was courteous and respectful. That too is how he conducted these proceedings. Had he pleaded the requirement for treating each other with respect as the PCP, his reasonable adjustments case would also have failed on these findings.

70. The result of that conclusion is that FTMRA allegations 3, 5, 19, 24 and 33 cannot succeed, and those where FTMRA is an additional or alternative cause of action – 1, 4, 5, 6 (and its sub allegations), 15, 16, 21, 22, 26 and 28, remain to be determined only as other contraventions - direct GR, Section 15 and harassment allegations. We have taken a chronological approach.

Allegation 6.1: April-May 2020: advice that leave should be classed as sick leave instead of medical suspension – said to be unreasonable advice, direct GR, Section 15

71. The claimant's distress and the volume of his email communication to the Equality Officer, was such that by May 2020, the officer was also struggling. Around this time there were sixty or so pages of emails concerning the claimant's difficulties in just a few days; the vast majority of that volume was generated by the claimant.

72. The claimant frequently expected an urgent response to his emails, and/or for the respondent union to press for responses from the employer. The equality officer had a day job with the employer. He did not want to upset the claimant further by letting him know of the difficulties he had with the claimant's volume of contact and persistence. The officer was very responsive, giving prompt answers when he could. It was also clear that the claimant could access employment law and how to proceed with the employer from his own research or other sources – he suggested a subject access request to the employer in April 2020 and the officer advised him that was fine.

73. The claimant, the officer and the branch secretary discussed obtaining "garden leave" for him with the employer, while the dead naming issues were unresolved. At one point, on or around 11 May, the officer suggested that although the claimant did not want to take sick leave, the claimant could consider it for a short spell to recover his equilibrium – not the officer's words, but this was the gist of the advice. The claimant suggested instead a Section 44 Employment Rights Act (health and safety) withdrawal from the workplace – he was adamant that he was not prepared to take sick leave; he was not sick; he was being injured by the employer's failure to put in place a safe system of work by failing to deal with the dead naming issue.

74. The officer's advice was not unreasonable in the circumstances of the claimant's obvious distress and the impact on his sleep. The officer knew that occupational health advice was being sought and that it was hoped garden leave would be recommended and/or granted by the employer – he recommended sick leave to give the claimant some short term respite.

75. The officer then stepped back from being the first or main point of support for the claimant and the branch secretary, agreed to look at different branch or regional support for the claimant. The branch secretary pressed the employer for garden leave (that is special leave which did not impact the claimant's sickness absence record), and that was agreed by the employer from 18 May 2020.

76. The branch secretary had also advised at one point that the claimant could take sick leave, pending the matter being resolved, because it was her experience that leave taken as sick leave could later be converted into special or garden leave in such circumstances. Again, there was nothing unreasonable about this advice.

77. There is a difference between being legally or morally or strategically right about a decision in employee relations, and recommending practical solutions and compromises which work. The branch secretary had knowledge of the practical solutions that had worked in the past with this employer. In the event, no sick leave was taken by the claimant because garden leave was secured.

78. The respondent did not subject the claimant to "any other detriment" by providing this advice in good faith; both the branch secretary and the officer were working hard to achieve the outcome the claimant wanted – leave with pay which would not affect his sickness record. These are not facts from which we could conclude a contravention by section 15 or direct GR discrimination: the advice was not unreasonable; the claimant has an unjustified sense of grievance about it.

Allegation 1: Emails from the branch secretary to the claimant on 8 June and 18 June, said to be harassment related to disability
Allegation 2: Thomas Walton using incorrect pronoun to refer to the claimant in an email of 17 June 2020 to the branch secretary
Allegation 6.2 unreasonable advice in not sharing all information with the claimant regarding conversations with agents of the employer about their case

79. On 19 May the claimant sent the branch secretary the occupational health report that he had approved, and Dr Gamwell's letter (referred to above). The occupational health report endorsed Dr Gamwell's recommendation for a single point of contact to resolve issues, recommended further counselling, and maintenance of the claimant's previous adjustments, namely planned meetings to discuss workload demands and discussion of workload allocation.

80. The branch secretary and the regional officer, Ms Sharp, supported the claimant's referral to solicitors to consider bringing a Tribunal claim against the employer in connection with the dead naming issue, given that the grievance was unresolved. Advice about time limits was given on 4 June 2020.

81. In early June the claimant had provided to the union a great deal of information for his grievance meeting with the employer and to inform advice on a Tribunal claim. Grievance meetings were scheduled for 9 and 12 June to allow sufficient time to discuss the issues and the branch secretary was to attend with the claimant. There was to be an employer investigation with witnesses to interview.

82. The claimant also required support from the branch secretary about his line manager's approach to probation and he sought advice about the travel system dead name issue. On 5 June they emailed back and forth because the claimant wanted to see the branch secretary's communications with the employer about the travel system dead naming, and progress on that. He had gone to the supplier directly and been told (whether through subject access request or otherwise) that there was no record of communications to the supplier from the employer; whereas the branch secretary was relaying to him that the employer had contacted the supplier to correct the claimant's name. The branch secretary pasted the contents of an email from the employer into an email to the claimant. She had also spoken to the employer about it. The claimant wished to see the full contents of any emails and to understand precisely what the

employer was saying because he suspected bad faith. This was time consuming and challenging for the branch secretary.

83. These matters culminated in the claimant wanting to speak to the branch secretary and his communications about it did not subside; the branch secretary accommodated a teams call, but was only able to allocate time between other meetings. It was not unreasonable of the branch secretary to cut and paste employer communications; at times they would contain reference to other members and issues. As to verbal communication, the claimant simply needed to explain in an email why he was suspecting no action by the employer, or by sending to the branch secretary the email from the supplier. He has an unjustified sense of grievance about this matter. There was no detriment to him in the way the branch secretary dealt with the issue and she put in place arrangements to make sure all information was shared. These are not facts from which the Tribunal could conclude direct GR discrimination or Section 15 discrimination.

84. These events meant that the branch secretary had also reached a point where the volume and type of communications from the claimant were overwhelming; she sought support from Ms Sharp, the regional organiser. Ms Sharp provided her with some draft language to email to the claimant, and attached the conditions of service for representation of members.

85. The branch secretary then emailed the claimant on 8 June in very friendly terms setting out what would happen at the grievance meeting, and their preparation for that. She also wrote: "*On another note, I'd just like to discuss what happened on Friday regarding our communications about a last-minute meeting. I can appreciate that the issues at work are causing you anxiety and UNISON will provide you with support through this however it needs to be manageable at our end. I therefore need to remind you of the Terms and Conditions on which we provide support to our members".*

86. She then cut and pasted the respondent's conditions of service for representation, in bold type running to about one page, with a link to the respondent's complaints procedure. She did so on the advice of Ms Sharp, and indicated that requests for meetings needed to come by email only. She asked for agreement to the terms of representation.

87. The branch secretary had never previously sent these conditions to a member. She did so because it was Ms Sharp's advice to manage the intensity of the claimant's communications.

88. On 9 June 20203 the claimant sent the first page of an NHS ADHD diagnosis to the branch secretary and to the employer, supplementing the occupational health report and the Dr Gamwell letter. He also said that the following pages of the diagnosis letter contained personal information, but he was happy to share that if it was needed. The respondent did not ask for the remainder of the letter.

89. On 17 June the claimant had called the regional office and left a voicemail. When picking that up and emailing the branch, Mr Walton, a clerical assistant had asked the branch to contact the claimant, saying "would someone from the branch be

able to contact her please". The reason he did so was because he believed that "she" was the right term of address for the claimant, on the basis of the voice he had heard on the voicemail. The email subsequently came to light as a result of a subject access request from the claimant to the respondent.

90. The claimant accepted this was not less favourable treatment related to gender reassignment, because the clerical assistant did not know of his protected characteristic.

91. As to harassment, while unwelcome for the claimant to discover this mistake, this was not, reasonably, Section 26 harassment. The claimant accepted the mistake was unintentional, and accepted the apology of the witness at the hearing. This would not reasonably be perceived as having the Section 26 effect.

92. On 18 June the branch secretary sent the claimant a weekly update by email. They had agreed this would be the expectation for communication. She said this:

"*To confirm, we agreed that I would send you a weekly update on what is happening per your grievance and the name change on Thursdays. If outside of this you require a meeting to discuss something, please email me. If you have further details which you believe pertinent to your case, you can email them to me, as I require all information to be able to represent you to the best of my ability. Due to the nature of my role, I cannot always arrange to meet with your on the day you request a meeting, nor can I always be available to receive a phone call or act on an email, but I will endeavour to reply to you as soon as I am able if you leave a message. If there is anything which is not clear, I would encourage you to look back on the points of representation I sent you on 8 June which outlines how Unison gives support to members and the expectations for both the rep and the member."*

93. The claimant considered that attaching the terms and conditions on 8 June, and reminding him of them on 18 June, was disability related harassment and/or unfavourable treatment because of something arising in consequence of disability.

94. The branch secretary's objective, supported by Ms Sharp, was to limit the claimant's demands of her. Those demands were caused by his often exhibited extreme impatience, "hyperfocus" on resolving the dead naming issue, and profound sensitivity to injustice in connection with it, which could produce intense cognitive and emotional responses – including long and intense emails.

95. The purpose of including the terms was to remind the claimant that he was free to proceed without UNISON help, if they could not agree manageable workload for the branch secretary. The context included that the claimant had, several times, demonstrated that he was leaving no stone unturned in seeking to resolve the dead naming issue and was understandably pursuing different ways to solve the problem himself – in short he could focus on little else but getting the dead name issue put right and he expected his representative to have the same approach.

96. The reference to the union conditions in both emails was unwelcome to the claimant; it felt like coercion or being told off and it was upsetting. In our judgment his

feelings and perception about it are to be balanced with the context and whether it was reasonable to have the Section 26 effect. The branch secretary was providing him with considerable support, had achieved success with the garden leave issue, was responding to him, and was very supportive of his legal claim against the employer. Her purpose was to sustain and manage her support to him, it was not to harass him related to his ADHD. Later on in these proceedings the claimant complains as part of a disability related harassment allegation that he was not warned about the consequences of not taking the union's advice on settlement; that too informs our decision that these emails are not reasonably to be perceived as meeting the Section 26 test.

97. As for Section 15, the branch secretary knew of the claimant's disability; she may not have fully appreciated that impatience and hyperfocus and justice sensitivity were symptoms, but we find they were - they were somethings arising from ADHD in the circumstances the claimant faced – a situation of high stress when coping mechanisms were degraded. The issue for the Tribunal is whether including the conditions of service was unfavourable treatment, and we draw on the same analysis above – objectively viewed we consider it was not detrimental treatment amounting to a contravention. If we are wrong about that, we consider it was a proportionate means of achieving a legitimate aim.

98. The respondent did need to prevent its representatives being placed under unreasonable pressure or stress, it did need to ensure all members were supported; and it did need to effectively run its services. A branch secretary has to attend to all these matters and all members and that was her purpose in sending the email. The claimant's suggested less discriminatory means would have been for the emails to have been sent but omitting the conditions of representation or reference to them. He had, in any event signed up to those when submitting his application for legal assistance.

99. Balancing the discriminatory effect of being "told off" and coerced, which was the sense of the claimant's evidence about this, with the respondent's legitimate aims, we consider that a balance had to be struck; the branch secretary had attempted agreeing a way of operating – weekly updates and scheduled meetings – to limit communications from the claimant; but that had failed on 5 June; it failed again when the claimant could not wait for her reply and called the regional office on 17 June. In that context, we consider it was proportionate to alert the claimant to the option of continuing without union representation if his condition meant he was unable to wait for his representative to respond at the agreed time. The justification defence succeeds on these matters, if required.

<u>The commencement of proceedings</u>

100. On 19 June comprehensive legal advice was provided to the respondent about its member's claims in connection with the dead naming events and time limits. That was passed by Ms Sharp to the branch secretary and on to the claimant. There was a strategic issue which the respondent wished to support. There was no advice about a reasonable adjustments claim or disability discrimination.

101. The letter was accompanied by an offer of legal assistance from the union. The

terms of that assistance provided: "*Every grant of assistance shall be on the understanding that the National Executive Council in its discretion may withdraw legal assistance if the member does not follow the advice of the Union or its appointed solicitors.....or if in its view the continuance of legal assistance is unreasonable".*

102. Ms Sharp took the lead on instructions to the solicitors appointed in the case against the employer. She took notes of meetings with the claimant conducted on 25 June, 6 July and 26 August. The branch secretary was also present, other than on 26 August. At the earlier meetings ACAS conciliation was discussed, the claimant's grievance was still ongoing with the employer, and there was discussion of desired outcomes. The claimant was seeking redeployment and wished to work with Stonewall on the employer's policies and in the employer's Equality Policy Unit, or similarly some area which was meaningful to him. There was also a discussion of the claimant's belief that the employer had breached trust and confidence – although this was in the claimant's grievance, the claimant did not consider matters irrecoverable and believed the employer's actions over the next two months were crucial to maintaining or repairing relationships with the employer. The advice of Ms Sharp was that the claimant should tread carefully because if the employer agreed trust and confidence had broken down, it could dismiss for that reason.

103. On 26 August Ms Sharp explained to the claimant that under Covid, Tribunal claims were delayed, often a settlement is reached, but usually they include a payment to leave employment which was not ideal under the current jobs climate. The claimant's desired outcome was recorded as: compensation, formal apology and a public statement. He wanted to return to work without harassment, but he doubted whether his then role could work, as there had been "too much bad blood". He wanted to consider redeployment in a role with the employer and contributing to society. The claimant was also due to attend an employer return to work meeting on 3 September with the branch secretary. The action items Ms Sharp recorded from the 26th meeting included liasing with lawyers and lodging the claim.

104. ACAS conciliation had been undertaken. The day after the meeting, on 27 August, draft particulars of claim, settled by counsel, were went to the claimant by the solicitor appointed to act for him and he was asked to answer a few questions, including whether to pursue a reasonable adjustments complaint because counsel had picked up on the medical evidence from Dr Gamwell, included within his papers. The claimant returned his comments by 10 am the next morning.

105. At this time the claimant was also working with the employer on measures to lessen the impact on him of the dead naming issue, such as a communication to staff, and the agenda for the return to work meeting.

106. On 2 September further draft particulars of claim were sent by the solicitors to the claimant for approval that day, with an additional short reasonable adjustments pleading settled by counsel. At around 10am that morning, the claimant emailed to explain his unhappiness with the lack of time to discuss matters and/or liason with him. After discussion or further changes, he confirmed that the particulars looked "right to me now" by 2pm and the claim was lodged that day, including setting out a full list of the dead naming occurrences at the employer, about which he sought a remedy.

107. That expectation by the solicitors of a short turn around by the claimant, including to pursue a different type of claim, did not appear to recognise that he might struggle with that task in the time available. He was being asked to approve starting a Tribunal case which could lead to his GR status being put in issue, which was upsetting, and at the last minute to approve a new reasonable adjustments case. Nevertheless, he did so, having expressed his unease.

108. The respondent knew that the employer had in place arrangements to address ADHD difficulties, including providing the claimant with plenty of time to see meeting agendas, for example. This need had either not been communicated to solicitors or more likely was overridden by the time pressure to submit the claim and include within it the new reasonable adjustments case which counsel considered wise. Circumstances were not ideal but the purpose was to put forward the best claim on behalf of the claimant.

Allegation 4: the branch secretary's email of 14 September 2020, said to be section 15 discrimination/disability related harassment.
Allegation 6.3: unreasonable advice in how to communicate with the employer in September 2020 about/accept its decision not to carry forward annual leave; and
Allegation 6.4: unreasonable conduct/advice in connection with a phased return to work plan, both said to be direct GR discrimination/section 15 discrimination

109. During August the branch secretary had, reasonably, felt overburdened by the volume and type of communication from the claimant about the ACAS process, the grievance process, and the employer's wish for the claimant to return to work, his phased return, and the involvement of occupational health. The weekly update framework for communication did not lessen that burden. They did not speak by telephone (contrary to the impression given in the branch secretary's evidence), but they did on occasion have a "virtual call" on line, in addition to communication by email. Emails from the claimant were always polite and thoughtful and often friendly, and on occasions short and transactional. That did not mitigate the volume of others, on subjects where the claimant was emotionally disrupted, which demonstrated "hyperfocus", or put in lay terms, intense and lengthy.

110. An employer meeting to discuss the claimant's return to work at the end of August was put back because the branch secretary was on holiday; it was rescheduled for early September. The branch secretary found it difficult to put the claimant out of her mind while she was on holiday. She had begun to experience anxiety when seeing yet another lengthy email from the claimant; she worried because the claimant often described the impact on him of these events. She wanted that distress to end for him and she was compassionate about his position.

111. On 7 September the claimant met with an IT person from the employer to try to address the systems issue. The claimant had asked the IT person to keep their communications confidential from HR because he felt uncomfortable HR knowing all details, or words to that effect. The employer complained about that to the branch secretary and she raised it with the claimant – in short, in deleting the claimant's old profile and creating a new one, HR needed to know from IT the same advice as that given to the claimant, and particularly the efficacy of those measures, in order to know how feasible a return to work for the claimant would be, and when.

112. The branch secretary sent an email to the claimant on 14 September which again included reference to withdrawal of support: "I *have noted that on several occasions, I offer advice on a situation and you reply with a long description as to why you don't agree, but end the email saying that you will follow my advice as I have more experience. I am keen to help facilitate your return to work and the outcome of your grievance and I offer advice based on the information I have and my experience as a rep. If you are unhappy with my advice, UNISON can withdraw support, as outlined in the case form you signed earlier this year, although I hope it will not come to that. …..... I hope that IT are now able to share the information you discussed last week, with HR, to ensure the continued planning for your return to work."*

113. The claimant replied to the email from the branch secretary, in copy to Ms Sharp, on 15 September in apologetic and appreciative terms. He explained matters at length from his point of view and he agreed to updates on the IT issue going to HR.

114. We apply the same analysis as that above concerning the branch secretary's communications on 8 and 18 June. Writing in these terms on 14 September was unfavourable treatment and it was because of something arising in consequence of the claimant's disability. The need for the branch secretary to manage her own welfare was a legitimate aim, and this was her aim, and a proportionate means of doing so. Less discriminatory means would have been to stay silent about the claimant's lengthy and intense communications and look again, perhaps, at who else could have supported the claimant and relieve the burden on the branch secretary by a transfer of support. That may not, in fact, have served the claimant well. The branch secretary was doing her best for him on all fronts, but she could see things from the employer's point of view, and she advised accordingly.

115. The claimant's case on discriminatory effect was that the branch secretary put him between a rock and a hard place – either he accept advice with which he did not agree, or he lost union support. This is informed by hindsight. At the time the claimant had been deeply grateful for the garden leave negotiated by the branch secretary, and that other progress had been made. He ultimately accepted advice and took a step which he did not want to do (for example let IT tell the employer of the IT related discussions), which in any event appeared necessary not least to maintain trust and confidence. On balance, on 14 September, the discriminatory effect on him was not great and the respondent has justified this further reminder. Again the Tribunal does not consider these are facts from which we could conclude contraventions of Sections 15/39 or 26/40 applying the analysis as above.

116. The issue about annual leave, being discussed in September, was the claimant's position that he had, arguably, accrued holiday leave during "garden leave" and should carry this forward. The branch secretary suggested that using accrued holiday, if the employer permitted it, to take Wednesdays off during a phased return, may be sensible. Her original explanation of, "garden leave" back in May was as follows: "this will be a period of leave which is paid as normal but for which you don't have to complete any work and is not capped on the amount of time you have worked for the [employer] nor is it logged as sickness absence". There was no analysis or discussion of holiday rights at the time the leave was granted. The employer's holiday

year ended on 30 September.

117. The claimant's position was that his accrued holiday of 15.5 days should be permitted to be carried over, the branch secretary's position was that the employer had not permitted that in garden leave cases, furloughed employees had not been permitted that, and only long sick leave cases had exceptionally been permitted carry over. Employees were permitted 5 days' carry over if special approval was given, but the employer refused that for the claimant on 24 September.

118. The branch secretary then had some ideas about the annual leave position and it continued to be discussed. Ultimately on 1 October the branch secretary advised the claimant that he should accept the employer decision on holiday carry over because it would not be changed. Ms Sharp also gave the same advice at a meeting on 22 October when the parameters of settlement of the claim were discussed. She was clear the union would not negotiate for that item to be granted to the claimant as part of settlement negotiations, and the claimant agreed, reluctantly. Again he took a step on union advice which he did not believe was helpful to his case or his interests.

119. As to phased return advice, the claimant says his ultimate phased return was unsuitable and stressful and damaging, and he lays that at the branch secretary's door. He started a phased return on 19 October 2020.

120. After discussions in August, the claimant had set out a six week phased return plan, initially commencing on two hours a day with Wednesdays off until the sixth week, and each week rising by an hour a day. He told the branch secretary that the pace of return was the advice of his counsellor Dr Gamwell, because it was important he was not overwhelmed by ADHD traits interacting with the dead naming upset.

121. His communications about phased return again demonstrated hyper focus. He wanted Wednesdays off as a break from work in the middle of the week. Discussing his phased return with the branch secretary took up inordinate "mail space" over several weeks. The claimant's first draft could have been sent by the branch secretary to the employer in early September, but she did not do so simply because she considered it would not be acceptable to the employer and she proposed a shorter phased return. She then worked with the claimant to try and agree something more likely to be accepted, which proved difficult.

122. The Tribunal finds that the claimant's lengthy communication on phased return and holiday carry over were manifestations of the claimant's hyperfocus, and injustice sensitivity, both somethings arising from ADHD or "his ADHD traits".

123. The claimant says the holiday advice and phased return conduct/advice was unreasonable, and less favourable treatment because of GR status and unfavourable treatment because of his ADHD traits. These claims would not succeed.

124. There are no facts from which the Tribunal could conclude that the branch secretary would have advised, in comparable circumstances, a non GR colleague more favourably. The claimant's case on comparator is a woman fleeing domestic abuse from an ex-husband who does not know where she works, but has access to the same IT systems, who had changed her name and made the same request that

the married name be entirely removed from the IT system. The Tribunal considers that such a comparator, to comply with the Act, must also have the claimant's ADHD traits, and must have exhibited them in the way that he did, in the dealings with the branch secretary and others ("the hypothetical comparator").

125. We find the advice, and indeed the circumstances generally, would have been no different at this stage, save that the respondent may not have seen a strategic issue in supporting the comparator's claim to the Employment Tribunal.

126. As for the Section 15 complaint, the advice was not unreasonable, and the claimant has an unjustified sense of grievance about it. There were occasions when he was at leisure, during his garden leave, and the branch secretary knew that. This was during a pandemic/furlough and the branch secretary believed the employer had taken a line on carry over of holiday beyond September 30 that year for all staff. After sending the 14 September email, the branch secretary continued to press for holiday use – she did not give up on those 15.5 days, until she finally recommended the acceptance of the employer's decision. There was then advice from Ms Sharp not to pursue it as part of Tribunal negotiations in October – that advice was also reasonable, objectively.

127. The circumstances included the claimant's objective of seeking to negotiate an injury to feelings award, redeployment and other outcomes at that time, before a preliminary hearing, and before a schedule of loss - achieving those objectives at that time was going to require pragmatism in sensitive negotiations. Furthermore, the claimant's belief that the leave was in fact "medical suspension", or could be retrospectively characterised as such, was likely to fail as a negotiating position: he had been very appreciative of achieving "garden leave" as explained, and that was the term used in virtually all communications. Good faith is required in negotiations and the branch secretary's judgment on this issue was wholly reasonable.

128. As to the branch secretary's phased return advice, that too was in good faith and based on experience. It was not given because of the claimant's ADHD traits. It was a judgment of the branch secretary about likely acceptance by the employer in these circumstances, which in the end, proved well founded.

129. The two aspects of advice (holiday carry over and phased return) from the branch secretary were not unreasonable, nor subjecting the claimant to a detriment: the claimant has an justified sense of grievance about them, no doubt informed by the employer's stance subsequently hardening. That was not because of unreasonable advice to the claimant from the branch secretary. These two allegations of unreasonable advice as Section 15 discrimination, would also fail.

<u>Allegation 6.5 Unreasonable advice on how to ensure the data breach was dealt with by the employer and what was reasonable in terms of how the employer was acting Direct GR discrimination and Section 15</u>
<u>Allegation 7: 6 October 2020 email branch secretary to Ms Sharp direct GR discrimination and Section 15</u>

130. On 6 October 2020 the branch secretary emailed Ms Sharp to update on the claimant's case and to see if she could offer any further advice. The two headings

were “Data breach email”, and “return to work”.

131. “Data breach email” was an agreed communication to colleagues within the employer to explain the employer’s failure in relation to the claimant’s dead name, and to require colleagues to keep matters confidential. It had not yet been sent out and the claimant had been very upset about that. There was not yet agreement about recipients. The employer wanted a targeted distribution, at or near the time of the claimant’s return to work, and the claimant thought a broad distribution was necessary and as soon as possible.

132. On return to work, the branch secretary described the putting in place a new Teams account for the claimant, but she had been told by the employer that removal of every historic instance of deadnaming was being discussed with Microsoft but was unlikely. The employer considered the risk of staff seeing historic instances unlikely. She had not yet relayed that information to the claimant.

133. She then set out other concerns including that the claimant was acting in a way which may cause the employer to end their contract. Two instances described were the volume of communication/corrections on the claimant’s probationary sign off, and the confidentiality issue with IT/HR discussed above. Another concern was that the claimant “believes they have the moral high ground on this whole issue and so the [employer] should be doing whatever they ask”.

134. She concluded the email saying she would update the claimant as usual on Thursday and suggest a return to work quickly and with compromise. She said, “from what I can see the [employer] are being reasonable (new [Teams] account, paid leave, 20 sessions of external counselling and I don’t want [the claimant] to talk themselves out of a job”.

135. The claimant did not see this email at the time; it was not intended for him. He later obtained it in a subject access request. Its purpose was to seek advice. Relaying the employer’s concerns about the claimant’s behaviour (accepting that behaviour was something arising from his disability) for the purpose of seeking advice, are not facts from which we could conclude a Section 15 contravention. Even if we found unfavourable treatment/detriment (which we do not), the later discriminatory effect on the claimant was a proportionate means of achieving the pleaded legitimate aim – the branch secretary need to be able to speak candidly about the employer’s view and to seek advice about it.

136. As to the branch secretary’s position on the data breach, reflecting the employer position and agreeing it was reasonable. This was potentially unfavourable treatment and detrimental to the claimant, because he could have a reasonable expectation that his union would be on his side in maintaining that a data breach was a legal and not a moral issue. The breach/requirement to delete was later before the Information Commissioner.

137. The branch secretary had been very much on the claimant’s side in rejecting the employer’s position that a name change by deed poll was the solution to dead naming. Was her view that the employer’s position was now reasonable - on return to

work despite there being an outstanding data breach - because of the claimant's ADHD traits – the something arising – or because of or materially influenced by his GR status?

138. Again the claimant's case requires us to consider whether the branch secretary would not have characterised the employer's position on data breach/return to work as reasonable,at this stage, for the hypothetical comparator. There is a limit to hypothetical speculation, but deploying all our industrial experience, we cannot make that finding. The branch secretary was sympathetic to the claimant's distress – no doubt she would have been sensitive to the domestic violence fearing colleague; but she would have also recognised the limits to an employer's ability to remedy such a breach in these circumstances. She knew that the claimant (and would have known the hypothetical comparator) wanted to remain employed (and potentially that a legal claim was being advanced in parallel).

139. In short the reason why the branch secretary considered the employer's position reasonable was because this was her good faith view of matters, in the knowledge that there were technical problems in fully resolving the data breach at this stage. It was not because of the claimant's ADHD traits, or GR status, but because she considered, pragmatically, that the claimant's interests were best served by a return to work. These allegations would not succeed.

<u>Allegation 8: email branch secretary to Ms Sharp on 13 October 2020, Direct GR discrimination</u>

140. The branch secretary then did send her Thursday update to the claimant on 8 October and the claimant replied by annotating comments under each part of the update on 10 October. Under return to work he included this:

"*I hope that I have shown willingness (and in fact eagerness) to return to work by proactively agreeing to work on setting up the new profile before I was given a date for the return to work. I have also never sought to drag this situation out – on the contrary, it has been my desire from the beginning to be able to get on with my job, free of harassment and the real (or risk of further potential) psychological harm which I have been unfortunate enough to have experienced. It is the removal of that risk of harm (which is not in my power to do) which has cause such a long delay in my being able to safely be at work. Being awa from the routine and carmaradarie of the officer (whether cyber of physical) for such an extended period has taken its own toll on my mental health. It is incredibly lonely (and frankly boring) being suck at home with nothing much to do other than wait and worry, and I very much want to be able to contribute to my trials and to the general office communcity with my colleagues again. I feel guilty that my colleagues are having to pick up the extra work that my absence must have caused'.*

141. He then set out the different phased returns discussed and offered to obtain a letter from Dr Gamwell setting out her advice about the phased return to support his position (rather than when it was first discussed in early September). That letter was never obtained.

142. The branch secretary sent the claimant's return to work plan to the employer

on 12 October but before she could do so the employer had sent the claimant a letter detailing its position on all matters ("the position letter"). In short, the claimant was required to return to work on 19 October on a five hours per day phased return for two weeks, and then back to 7 hours. The letter detailed that the employer's occupational health advice did not consider a phased return necessary in the circumstances, but the two weeks was offered none the less; that the employer considered the work environment safe because of measures to correct the data breach; and that it would pay for no more counselling sessions.

143. The claimant forwarded the position letter to the branch secretary and Ms Sharp and sought a meeting, which the branch secretary said would be arranged. His comments included that he felt the only step now was to report the employer to the Office of the Information Commissioner - the ICO. He said the letter had brought panic attacks and left him hugely distressed. The branch secretary discouraged an ICO complaint because she felt it was inflammatory and that the claimant should await the grievance outcome.

144. The branch secretary emailed Ms Sharp to arrange to discuss these developments and in addition a preliminary hearing in the proceedings had been postponed (from mid October until the 15 February 2021) She said included this comment: "*Off the record, HR are getting very impatient with the member and want them to return as they believe they have done all that can reasonably be expected. I think that if they don't return, they are skirting close to frustrating their contract. I don't know if Thompsons have been in touch to discuss potential settlement".*

145. The branch secretary was expressing her good faith view of her discussions with HR, in confidence and for the purposes of seeking advice from Ms Sharp. There is no evidential basis to conclude that her expression of discussions with HR would have been any different or more favourable in comparable circumstances affecting the hypothetical comparator. This allegation cannot succeed.

Allegation 9: On 15 October 2020 comments in a meeting "*assurances have been given ...that [the employer]..continue to do everything they possibly can [about the data breach issue] ...the [employer] will say you will be frustrating the contract, may be a moral argument but not a legal one" :* less favourable treatment because of GR

146. The claimant met with the branch secretary and Ms Sharp over Teams on 15 October. The first part of the meeting was to discuss the employer's settlement overtures in the case and the sums to be sought – around £20,000. Ms Sharp took notes of that meeting. The claimant was told he needed to take the union's advice otherwise he could put the case at risk – essentially a repeat of the conditions of representation.

147. There was then discussion of the communication to staff about the data breach and the technical steps being taken in relation to historic incidences and liason with Microsoft. In the course of the discussion Ms Sharp said the words above. This was followed by strong advice to return to work, and brief discussion of the phased return, including that the claimant had to do what was best for his health (the employer had stated that if the claimant was not well enough to return on the 19th he would need to take sick leave).

148. There was a legal issue of unresolved data breach, and in that sense the advice was not correct that there was no legal argument to be had, but ICO complaints were outside the experience of Ms Sharp or the branch secretary.

149. Incorrect advice does not suggest that the hypothetical comparator would have received different advice. In essence the advice was, there is no legal basis to remain away from work, albeit the claimant might have the moral high ground because of the data breach.

150. These facts are not such that we could conclude direct GR discrimination.

Allegation 10: on 16 October Ms Sharp wrote to the branch secretary to say "i know they won't be happy with the outcome but we can only advise in their best interest and not what they want to hear. The issue with the counsellor making suggestions on work matters is they do not have the knowledge of the employment law aspect of suggesting less than reasonable solutions" - less favourable treatment because of GR

151. Again this was a short email written about the 15 October meeting outcome, and seen by the claimant after a subject access request. He considers the comments about his best interests infantilising. These are not facts from which we could conclude less favourable treatment because of GR. We find in comparable circumstances the hypothetical comparator would have been given the same or similar advice in comparable circumstances.

152. As above the claimant started a return work on 19 October; a meeting on 22 October agreed that his settlement negotiations would include seeking: a lump sum, further payment of counselling costs; and measures/outcomes to correct the issue for others - "SMART" targets. Ms Sharp agreed to start those negotiations.

153. On 27 October the claimant sent a document to Ms Sharp setting out the SMART targets/outcomes he sought to be passed to the employer, essentially because he did not want future staff or users at the employer to have the experience he had. He recognised that the following would involve collaboration and further work but this was his first draft:

"[*1] A commitment from the [employer] to work with Stonewall in order to reflect honestly and transparently on this case and draw conclusions on training, policies, and a strengthened commitment to LGBTQ+ inclusion from it. A commitment from the [employer] to take all reasonable action upon conclusions and recommendations drawn from this process. Stonewall should be approached to begin this work within a reasonable timescale (to be agreed).*

[2] A commitment from the [employer] to adequately support required improvements on a financial level.

[3] A commitment from the [employer] to actively promote trans inclusion, for example by setting up a trans-specific network and/or by providing additional funding for the existing LGBTQ+ network, ring-fenced for trans-specific equality and inclusion work. (These are some suggestions and are by no means the only ways the [employer] can actively promote trans inclusion.) Subsequently, evidence at review point (measured against SMART goals) of improvement of trans inclusion in the [employer], particularly in the Faculty of Medicine, within a reasonable timescale (to be agreed).

[4] Development and implementation of a new procedure, to be used by all faculties etc., whereby trans staff

and students will reliably be able to have their names updated and/ or showing accurately on the [employer]'s computer systems. This procedure to include a section on ensuring trans staff and students are entered into these systems correctly when they begin working/ studying at the [employer].

[5] Sufficient testing and relevant training of the new implementation process (as mentioned in [4]) (to include being measured against SMART goals/actions identified during the grievance investigation into where things have gone wrong in my case) as assurance that this will never happen to any other trans person.

[6] A new trans policy/guidance document to be produced and published that is robust and fit for purpose. [Part of this work is already ongoing through the Athena Swan Committee and my work with the member of the Equality Policy Unit who is updating this guidance document; I would ask that my active involvement continue and my input be acted upon in this process of updating the guidance document, as well as my work with the Athena Swan ISAT committee to similarly continue.]

[7] A commitment to actively and effectively review this (and all equality-related) document/s and related procedures on a regular basis and to allocate paid hours to trans (and/or other relevant minority) staff to review and provide insight and feedback. Production and implementation of a policy on how to review these documents (with SMART goals) would be my ideal outcome for this aspect of the process.

[8] Evidence of development and implementation of an effective process to prevent deadnames being visible on documents which are sent through the internal [employer] post system.

[9] In the case of staff and/ or students who have a 'legal name' and also a 'preferred name' (i.e. affirmed name) stored on the computer systems, evidence of an effective process that prevents deadnames (i.e. in this context, legal names) being disclosed via computer systems, for example in staff lists or via Key Travel, or indeed to anyone (including direct managers) other than those who strictly need to have access to this information for pensions/ HMRC related purposes.

[10] Improvements to [employer] processes and procedures must include mandatory, fit for purpose, and ongoing training for all staff. This training must include the importance of using the correct pronouns, gendered terms, etc. for trans people. A commitment from the [employer] to develop this training in collaboration with key stakeholders, and to begin implementation of mandatory training within a reasonable timescale (to be agreed under SMART goals)."

154. Settlement was not reached and the Tribunal proceedings were maintained; the grievance outcome was awaited, and the claimant did not seek ICO involvement at this time.

<u>Allegation 11: On 1 December 2020 the branch secretary wrote to Ms Sharp about the grievance outcome saying she: "felt that the outcomes were on the whole fair" - said to be less favourable treatment because of GR and GR harassment.</u>

155. On 30 November the branch secretary emailed the claimant because the grievance outcome letter from the Director of HR had been received with an investigation report. The branch secretary had not read the report in full. She identified that there were 15 days to appeal - by18 December - in an email to the claimant that day - and sought a meeting. The claimant, also, had not read the outcome, wanting time to be mentally prepared to do so. He also asked if he could ask his line manager for flexibility on deadlines to review the grievance fully and the branch secretary was supportive on that and clarifying the deadlines.

156. The branch secretary wrote this to Ms Sharp on 1 December: " [the *claimant] and I have received the grievance outcome letter. I had an off the record with the investigating HR officer before the report was submitted to get some info and felt the outcomes were on the whole fair. However, [HR director] has not upheld a couple of the outcomes the investigators upheld, which I think will understandably upset [the claimant greatly. I've briefly spoken to Nick about this and he has confirmed he is not aware of any other case where [HR Director] has overruled the investigating team on their findings, so this is pretty contentious. Would you have time to discuss this or meet CH with me to discuss. I am expecting CH will want to appeal at least some of the findings. I can send through the relevant documents to you if you're able to look through them".*

157. The claimant did not explain his case on this in his statement. When the claimant was asked why this communication was less favourable treatment or harassment because of GR, he described the branch secretary saying that the overturning of the investigator's findings was fair. That is precisely the opposite of her email communication, and her oral evidence. She considered the original investigation findings, about which she had prior notice, overall to be fair, but the outcome letter to be unfair, in overruling the investigators, and unprecedented, and she was fully supportive of the claimant about this.

158. These are not facts from which we could conclude that her email to Ms Sharp was less favourable treatment because of GR or harassment related to it.

Allegations 12: <u>On 7 December 2022, the branch secretary wrote to the claimant to advise him that she would not advise going to the ICO with this. She thought there was likely a way forward that can be worked out. Less favourable treatment because of GR</u>

159. Since the claimant's return to work he had been working with IT to sort out the dead naming issue. On 2 December IT confirmed that Microsoft had said there was no way to delete the historic dead naming and that the employer could submit a design change (for Teams), but there was no timeframe for that to be resolved.

160. On 4 December the branch secretary was granted an extension for the claimant's grievance appeal to be submitted – this was sought on the basis of the claimant's ADHD and concentration problems.

161. On Monday 7 December 2020 at 14.21 the claimant sent the branch secretary a three page email explaining further information with the subject "disappointing IT update and my thoughts". He ended it saying his patience was exhausted, as was he, because instances of dead naming were still occurring. He said there were two key things: *I hope this helps to explain my rationale behind victimisation for your draft letter [the grievant appeal letter];* and, *please could you help me to finally get this deadname deleted from Teams.* He thanked the branch secretary for ongoing support.

162. The branch secretary's advice was that further victimisation (by failing to arrange Teams deletion) was not properly an appeal point, but a new grievance; and

IT issues should be raised with the employer; she also explained that the issue was not now the employer's, but Microsoft's (in summary).

163. After a further email from the claimant she advised emailing the employer contact to require Teams deletion before contacting the ICO. The claimant then sent the email to the employer contact, copied to the branch secretary and emailed back saying he would contact ICO for advice if he had no response. The regional secretary then emailed: "please await []'s response and I would not advise going to the ICO with this. I think there is likely a way forward that can be worked out". The claimant's reply included that he had set a timescale for employer response and then: "I *support the concept of resolving things without third party involvement, but I cannot see a route to resolution and I need to seek advice on how to get there. I would really prefer to seek this advice with your support. At this point, I am merely seeking advice and I will share this with you once I get it. I hope this makes sense and that can rely on your support in this*".

164. The chain of communication had gone on for several pages.

165. The key question is why did the branch secretary advise against ICO contact before contact with the employer, when the employer had not, after many months, been able to make progress with Microsoft on historic instances of dead naming within Teams? Would she have advised the hypothetical domestic violence fearing colleague differently? Was she materially influenced by the claimant's GR status in her advice?

166. The branch secretary's oral evidence was, in summary, as follows. She believed the risk of harm to the claimant was minimal (although throughout she recognised his distress because he did not share that belief and suffered the anxiety that it could happen at any time). She believed that to see the claimant's dead name involved users scrolling back through many pages of historic Teams conversations. She believed that the employer would consider dismissing the claimant (although she did not say this to the claimant), because of the volume and tone of emails that he sent to the employer on this matter. In those circumstances she believed to go to the ICO would inflame the employer. That is the reason she gave the advice not to do so at this time at the end of their back and forth on the matter.

167. The claimant's position, in summary, is that the branch secretary's advice was so illogical and wrong on this, that she must have been influenced by his GR status, and it is inconceivable she would have given the same advice to the claimant's comparator. He said at least two people (but we were not told who they were) had said they would not have given that advice to his comparator.

168. At this time matters had moved on from October - the claimant had eturned to work. He was entitled to seek advice from the ICO. Given the impasse where a provider as large as Microsoft required a systems change to facilitate deletion, advice from the ICO may well have been helpful. The branch secretary knew that the employer's policy had over promised on this issue, when in fact it seemingly could not deliver dead name deletion in a reasonable time.

169. There is a difficult line between pragmatic advice, seeking to preserve the claimant's employment, and recognising that this was the claimant's right: to approach

the ICO for help in all these circumstances. We proceed on the basis that by this stage the advice can be described as unreasonable for all the reasons the claimant explains. Nevertheless, unreasonableness does not, in our judgment, support a finding that the claimant's GR status played any part, even subconsciously, in the branch secretary's thinking. It is wholly unlikely. She had supported the claimant's initial position on deed poll; she had secured several significant positive outcomes for him at various stages; and her communications were respectful and sympathetic. She acted wholly in good faith. We accept her oral evidence, which was straightforward and compelling.

170. As to the anecdotal mention of two others who would have given different advice to the claimant's comparator, this was not evidence; nor was it tested. Had it been evidence, the witnesses would have had to consider the fully developed hypothetical comparator - who had also exhibited hyperfocus and persistence to the employer in the way the claimant did on this issue, and with similar risk perception and anxiety, such that the employer was considering the sustainability of employment. Without that consideration, the anecdotal mention can have no bearing on our acceptance of the branch secretary's evidence. We cannot find that the branch secretary's advice to the fully developed hypothetical comparator would have been - "yes go to the ICO" at this time. These are not facts from which we could conclude allegation 12 amounts to direct GR discrimination, notwithstanding that by this stage the claimant's wish to seek ICO advice was entirely reasonable and the respondent's advice, unreasonable.

Allegation 13 : the withdrawal of local support on 11 December - Section 15

171. On Tuesday 8 December the branch secretary replied to the claimant's last email above that she would reply and update on Thursday, as per their agreement. After their exchanges on 7 December she was extremely weary and at the end of her capacity to support the claimant – her own resilience was low and she was becoming mentally unwell. She spoke to Ms Sharp who agreed on 10 December that she could transfer the case to the regional office.

172. On 11 December she wrote to the claimant as follows: " I am writing to you to confirm that as you have not adhered to the previous discussions about your representation, the decision has been made to withdraw local support. However, as you have an ongoing legal claim, the regional office will now advise you. This decision is based on the view that you have been unwilling to accept the advice offered to you on how UNISON might represent you. This decision is final and does not affect potential support to you in any future matter, so long as you remain a member. If you believe that the branch has acted unfairly in reaching this decision you may appeal against the decision by writing to [Ms]Sharp, UNISON Regional Organiser....".

173. The letter went on to set out the appeal process, namely the claimant must set out his reasons to believe the branch had acted unfairly, the branch would set out its reasons, and he would be further informed if an appeal panel was to be convened. That is not necessarily the process set out in the rules, which mandates a branch committee being convened, but nevertheless it was offering an appeal process. The letter went on to deal with the extended deadline for the grievance appeal and what needed to be done and that region would be in contact about that appeal.

174. The reason for the branch secretary's decision was the claimant's unwillingness on the 7th to accept advice on contacting the ICO and appeal points, on a Monday, in contravention of the once a week Thursday contact (other than for very urgent matters). These were further manifestations of the claimant's hyperfocus and injustice sensitivity, on top of the cumulative weight of dealing with the volume of the claimant's communications over many months. The claimant, with reason, could not understand why the branch secretary advised against advice from the ICO, when data protection law, as he saw it, was on his side.

175. To withdraw local support in a letter which criticised the claimant was unfavourable treatment. It was because of something arising in consequence of his disability. Was it a proportionate means of achieving the respondent's legitimate aim, that is appropriate and reasonably necessary? The branch secretary reasonably needed to be relieved of supporting the claimant. Was it appropriate to do so in this way? In our judgment, we find it was. We repeat our comments above about the discriminatory effect of being told off for doing something wrong, which was the effect of this letter, which is to be weighed against the respondent's need to address the reasonable request of the branch secretary to protect her own wellbeing.

176. It is clear from the branch secretary's communications about the claimant's ADHD that she and Ms Sharp some knowledge of his difficulties - and that they had discussed such matters by email or otherwise. It is also clear that the claimant had emailed the Equality Officer back in April 2020 about his specific difficulty in regulating emotions in connection with injustice, but neither Ms Sharp nor the branch secretary appeared to have considered that his behaviour was to be explained by ADHD. The branch secretary found it, at times, "passive aggressive". By that she meant that while the claimant would express himself in lengthy, considered and polite terms, in reality he was disagreeing with her and putting her under pressure. She held that view in good faith as her experience of matters over many months.

177. These were complex issues to unravel and the branch secretary was clear that she was at the limit of her capacity. The mitigation put in place was regional office representation, and the claimant knew this and at the time, or certainly by January 2021, was sympathetic to the toll the case was taking on the branch secretary.

178. On balance, and recognising the unpleasant and upsetting nature of being criticised for behaviour arising from ADHD, weighed against the respondent's need to relieve the branch secretary, and the mitigation put in place, we would find this letter withdrawing support was a proportionate means of achieving a legitimate aim, in all the circumstances.

179. The claimant wrote on the same day seeking further clarification about the practical implications of the letter, and the appeal process against the respondent's decision. He wrote to Ms Sharp again on 14 December, being without a response, apologising for chasing a response but setting out that he did not understand what he had done wrong and asking questions about the progression of various matters, including his grievance appeal and Tribunal case. He also explained again his position on ICO advice and sought Ms Sharp's advice on that.

<u>Allegation 14: Ms Sharp's reply (below) on 15 December - less favourable treatment</u>

because of GR

"*It has been necessary for us to withdraw local representation because you have repeatedly challenged and not followed the advice given by [branch secretary] on how to proceed with your case. For example, in relation to how to proceed with the appeal, [branch secretary] has said it needs to be concise and you have disagreed with this. She has advised against bringing up the current issues with your IT into the appeal and you have disagreed with this. She has offered to contact HR in relation to IT and dragging their heels on the deletion of your data on Teams but you have said you wish to go to HR direct. You have said you were approaching the ICO and she has counselled against this. Furthermore you are not respecting her time and ability to provide representation by overloading her with text messages and emails directly to her or copying her in which is causing her undue stress. As you know we agreed that contact should me manageable and limited and to Thursdays."*

…..
…..

In terms of providing you with regional support on this and ongoing issues I will be reassigning your case to a member of regional staff who will be in contact as soon as possible. Please keep a log of data protection breaches in the meantime".

180. In the email above, Ms Sharp also addressed settlement of the proceedings, saying there had not been a further approach, indicating she considered the employer was not inclined to settle. She indicated cases were reviewed for union support on the basis of reasonable prospects of success, and referred the claimant to the agreement for representation. She explained if legal support was withdrawn the claimant would be allowed to appeal, and would be encouraged to seek his own legal advice. She also confirmed advice to keep the grievance appeal short.

181. The claimant had never sent the branch secretary texts; and he considered that he had only copied her in when required to. The implicit criticism from Ms Sharp about the claimant wishing to contact the ICO, was, as above, by this stage unreasonable. Nevertheless, there is nothing in these facts from which we could sensibly infer or conclude that the hypothetical comparator would have received a different reply in comparable circumstances. This allegation too, would fail on its facts.

Allegation 15: not sharing the offer from the employer on 20 January 2021 with the claimant at that time
Allegation 16: Ms Sharp telling counsel and solicitor that the claimant was comfortable with an offer including termination – the claimant denies ever making such a statement
Allegations 20 and 22: telling the claimant the purpose of a meeting on 4 October was "to further discuss your legal claim with Ms Sharp, Mr Mahmood and the solicitors", when instead it was to discuss settlement and advice from Counsel
Allegation 21: Sending the settlement offer and associated advice from Counsel less than two hours before the meeting
Allegation 24: agreeing in the meeting on 4 February that a further meeting would be held to support the claimant in the decision making process for whether or not to accept the offer – not arranging such a meeting

The above allegations are all advanced as unfavourable treatment because of something arising in consequence of disability.

Allegations 23/30: recommending the claimant should accept the settlement offer when it included the implementation of detrimental and regressive changes to the employer's Trans Equality Policy, and it was known by the respondent from October discussions that the claimant wanted to stay in employment - direct GR discrimination and/or for allegation 30, GR harassment

182. After local representation was withdrawn Ms Sharp and Mr Mahmood met the claimant on 6 January 2021, and Ms Sharp wrote up, as she usually did, clear notes from their meeting with action points. The data breach issue was to be referred to the respondent's solicitors; the claimant was to have regular Monday meetings with Mr Mahmood and boundaries were set for email and other communications - essentially Mr Mahmood was not expected to respond outside Mondays; the grievance appeal was to be prepared; and there was to be regular liason with Mr Mahmood to make sure anything at work impacting on the legal proceedings would not be missed. Victimisation by requiring the claimant to provide a fit note to his manager was also to be explored. The claimant said in an email to Mr Mahmood about these arrangements: "*I remain eternally grateful for any time Unison are able to allocate to this case and am really glad to have [Mr Mahmood] on board as well. I'm sorry that it is so complicated and time-consuming to deal with. I look forward to working together to get this resolved, and will take on anything Unison deem appropriate that would release any time for you."*

183. Also in January the claimant provided his lengthy instructions for the preliminary hearing in the case. He wished his claim to be amended and he had reviewed the grounds of resistance points and provided points for the agenda. He had, with Mr Mahmood's involvement, also written a short email to his manager saying he wished communication only by email (rather than telephone calls or Teams calls) as a reasonable adjustment. On 12 January Ms Sharp said to Mr Mahmood that it was totally reasonable for the employer to contact the claimant by telephone and the claimant needed to comply with a request for a call, as it was a reasonable management instruction, and he risked being considered not fit for work.

184. Also on 12 January, Mr Mahmood had responded to an email from Ms Sharp about the claimant using the wrong pronoun. Ms Sharp had warned him to take care with his use of pronouns on this case, but on this occasion he sent the email using his phone and he made a mistake. We accepted his evidence on this after lengthy cross examination on it by the claimant. We found him generally straightforward; he was not prepared to give evidence about matters beyond his recollection – for instance on discussions about settlement with the claimant. The claimant saw the email after a subject access request. It was not alleged as an act of harassment. It gives rise to no inference that Mr Mahmood harboured transphobic feelings towards him; he supported the claimant in a warm and friendly way, in difficult circumstances, and the claimant was appreciative at the time.

185. The claimant was demanding of Mr Mahmood's time as he was of the branch secretary's. The claimant was delighted when, on 20 January 2021, Mr Mahmood

relayed that solicitors had confirmed they could write to the employer to say it was legally obliged to delete the historic dead naming instances and confirm when this had been done. Mr Mahmood sent a short email to that effect on 25 January 2021. Various subsequent communications said that the claimant would approach the ICO unless he had a reply from the employer by 5 February, then extended to 12 February.

186. Also on 20 January the employer emailed Ms Sharp with a settlement offer, which involved ending the claimant's employment with payment of a year's salary. This offer and its lengthy rationale was not communicated to the claimant. It included that "*their relationship with us is challenged on every front – which is just not sustainable; moreover we are worried about what they have been saying about their health".* The offer put was this:

Given all of the above we think that it might be the better outcome all round if we were to look at addressing both the ET and the ongoing issues together by offering a severance package. To explain:

- *we are prepared to make an offer for injury to feelings (in line with our view above [£10,000]) combined with an offer of severance which would, taken together, give [the claimant] a significant financial cushion*
- *the severance element would equate to a year's salary ([the claimant] earns £19612, grade 4). That would exceed what we might ordinarily pay in voluntary severance or redundancy terms for someone with [the claimant]'s service as they only started with us in June 2019.*
- *[the claimant] could have a fresh start when they are ready and able, without the stress and delay inevitably arising from any further internal or external proceedings given that we essentially accept that our systems caused the problem in the first place we'd of course be willing to apologise in writing and we'd be happy to offer an agreed reference*
- *we'd continue to make the changes that we have already committed to in Francesca Fowler's letter as well as looking into how else we can address the lessons learned from [the claimant]'s case in practical terms- thus reflecting how [the claimant]'s experience led us to revise our approach*
- *we'd continue to explore solutions to the IT systems issues- we are currently in the midst of massive project to update our HR systems*
- *obviously this would all need to be subject to our typical settlement agreement or COT3 terms and I'd be happy to provide a draft in due course.*

187. Rather than tell the claimant of the offer made to her on 20 January, Ms Sharp asked the union solicitors to seek a conference with counsel (without the claimant present) to discuss the settlement offer. The reason she went to that expense in that way was because the claimant had repeatedly challenged union advice; the offer (including termination of employment and comments about his conduct within it) would be upsetting; and that if the offer was just put on the table the claimant would challenge it because "pre empting" was part of his disability.

188. At that conference on 27 January (from which the claimant was excluded), the offer of a year's salary was said by counsel to be generous; she further advised, "[the] problem is the condition about termination of employment. It's a matter for the member...generous....but clearly a matter for them".

189. The note of the conference then recorded Ms Sharp saying that "the IT issue was going to arise again and again, but also arises because the member hasn't used their legal name for HMRC and pension purposes so the system draws up on that information.. I don't know why they haven't".

190. She went on: "*I have spoken to the Organiser who reports that the member says that if an offer was put that included termination that they would be comfortable with it as long as it went some way to avoiding these issues arise for others in the future. Member doesn't know about this offer yet".* Counsel advised that "in light of what the organiser reports [that the claimant would be comfortable with termination] his willingness to leave employment may be less of a stumbling block.

191. Counsel was then asked if the offer could be recommended then, and she advised it could. She offered a written advice to that effect. It was agreed then there would be a meeting with the claimant, the following week on 4 February, to present the offer in context.

192. The next day Ms Sharp's pa sent an invite to a Teams meeting to the claimant for 4 February. The claimant said he was anxious and asked what the meeting was about and the pa replied that the meeting was "to further discus your legal claim with [Ms Sharp] [Mr Mahmood] and the solicitors". That reply was true but was misleading in its silence about the offer, of which the pa knew. She had been asked by Ms Sharp on 21 January to forward the offer to the union solicitors and to work to set up the meeting with counsel. This finding is made from documents within the claimant's supplemental bundle. Ms Sharp's evidence that she suspected the pa knew nothing about the meeting's true purpose was plainly not right. We did not hear from the pa about why she did not tell the straightforward purpose of the meeting or provide him with the relevant offer. We find her failure to indicate the true purpose of the meeting was a deliberate decision or instruction by Ms Sharp, or the pa's understanding of the strategy: to provide the documents and advice with little time to consider them.

193. Ms Sharp knew that at least one adjustment had been made by the employer at the respondent's request, because the claimant's ADHD meant they could struggle to concentrate – the grievance appeal submission – and as above that meeting agendas needed to be provided well in advance. To operate different standards to that required of the employer, and give the claimant so little time to know what was on this meeting agenda and consider the underlying papers, was at best a very surprising state of affairs. It was also a very unhelpful approach to take with a disabled member, whose disability was known, and formed part of the pleaded employer proceedings. ADHD and some of its effects had been evidenced to Ms Sharp in the documents provided for the proceedings (although she appears to have been oblivious to that evidence).

194. The written advice from counsel contained the following: "I am instructed by the claimant and their Union UNISON in this case". It recorded that UNISON had requested advice on the offer and that she, counsel, had been instructed that the claimant was willing to consider an agreement that would lead to the termination of employment. Those instructions had come from Ms Sharp as recorded in the note above.

195. The claimant had the advice, which described the offer as reasonable and that counsel recommended acceptance, and the offer itself, about two hours before the meeting - which he had previously understood was a general meeting about his case. Ms Sharp's email said this: please find attached a proposed settlement agreement from the [employer] for us to discuss at today's meeting with [the solicitor] present. There is no obligation on you to make any decisions at this stage and we should have a full discussion about the proposal and give it full consideration today".
196. The claimant had previously asked for three items to be added to the agenda including the ICO. At the start of the Teams meeting it was clear, in the solicitor's note, that the claimant was angry, upset and emotional. He asked why he was not given the offer sooner. He said he did not need to go through counsel's advice because he disagreed with its characterisation of him – it was libellous and he did not want a termination settlement. He asked who had told counsel he was comfortable with termination, and neither Ms Sharp nor Mr Mahmood replied; he asked for a copy of the instruction ("referral") documents and it was agreed they would be provided. He said he would not leave (the employer) until he was satisfied the problem was fixed.

197. The claimant said, with reason[1], the employer was "rolling back" the trans policy, and Ms Sharp said settlement was only looking at the ET claim. She was not abreast of the detail in a commentary the claimant had produced for the Equality Officer about the proposed policy changes.

198. Closing down a discussion of policy ignored the information she had given counsel about the claimant's position, namely he was comfortable with termination "so long as any settlement went some way towards avoiding the issue for others in the future". It is therefore, again, surprising that she closed down discussion of how the offer achieved the future position for others in policies of the employer.

199. Ms Sharp and the solicitor then recommended the offer. Ms Sharp also said it could be rejected and the "ball put into the employer's court". Later in the meeting the claimant was recorded as rejecting the offer, because he did not trust the employer to fix the issue for other trans people; then not rejecting it, and being "wildly unreasonable". This was in stark contrast to the claimant's typically respectful, polite and courteous way of conducting himself, which was universally acknowledged to be his usual approach.

200. Towards the end of the meeting the claimant was advised again about the wisdom or effect on the relationship with the employer if he went to the ICO; and the claimant advised he considered he had suffered a personal injury by discrimination. He was advised to set that out in writing.

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1. [1] In the outcome to his grievance (which was under appeal) the Director of HR had undertaken to review the employer's Trans Policy (which had previously been discussed with the respondent). By 20 January that review had been undertaken, the removal of various commitments was regressive, and the claimant had produced an 18 point analysis identifying the regression. In Spring 2021 the new draft was withdrawn after it was disavowed in a survey and by the respondent.

201. At the end of the meeting it was agreed that the meeting could (rather than would) be reconvened in the week commencing 8 February. We make that finding because we accept the claimant's evidence about it, as put to Mr Mahmood and Ms Sharp. They were not clear in their evidence. They could not recall, but Ms Sharp believed the meeting had ended with the claimant being given a week to consider the offer; Mr Mahmood said he was given more time. In contrast, the claimant had recorded the agreement for a further meeting in an email he wrote on 12 February (to which there was no contemporaneous contradiction).

202. The solicitor's note did not mention an arrangement to meet again, but nor did it mention other action items, which may or may not be surprising. Ms Sharp's notes had always recorded action items, but her note of this meeting was not before the Tribunal and there was no explanation for that. Mr Mahmood did not answer directly whether he kept notes, but said he was there only to observe. Furthermore such an arrangement - that the meeting could be reconvened - was consistent with Ms Sharp's earlier email indicating the claimant did not need to make decisions at that stage. It is highly likely, given the claimant's unsurprising upset in this meeting, and the respondent's understanding of his ADHD, that a further meeting would have been agreed if the claimant had sought it, or other opportunity for him to have more information and ask more questions.

203. Ms Sharp's 12 January letter did not say, "we agreed you would have a further week to think about the offer and give your decision" - it was silent about what had been agreed at the end of the meeting. In all other meetings with the claimant, care had been taken to set out the agreed next steps. At this very important stage, it was not.

204. That said, the claimant, Ms Sharp and her pa were all very busy w/c 8 January, and concerned with the claimant's request for documents. We find the meeting did not re-convene because the claimant did not ask for it to be re-convened that week, or remind Ms Sharp or Mr Mahmood or the solicitors to the effect that he would find that helpful, by which time, 12 January, the window had passed. Of itself then, we do not consider the failure to re-convene the meeting to be an act of Section 15 discrimination – but the fact there was no further meeting, and no setting out of next steps towards responding to the offer, are part of the circumstances in which we find the letter of 12 January to be an act of disability related harassment (see below).

205. As to the oral instructions to counsel from Ms Sharp, the evidence from Mr Mahmood and Ms Sharp was unclear about this. In her statement she said Mr Mahmood may have been mistaken in his understanding, which must mean his understanding of a conversation with the claimant. There were no contemporaneous notes, emails, texts or other documentary evidence to assist either Ms Sharp or Mr Mahmood, which is surprising. Mr Mahmood did not address it at all in his witness statement, and it is a matter at the heart of the claimant's Section 15 case. Ms Sharp described it as her understanding of what had been said to her by Mr Mahmood, namely that he believed the claimant may agree to an offer including termination if it went some way to avoiding issues for others in the future. That is not, though, what she said to counsel, but rather "*the member says... they would be comfortable with it as long as it went some way to avoiding these issues arising*"..., rather than "the organiser believes the member would be comfortable....".

206. The limit of Mr Mahmood's evidence on oath was that he recalled a telephone conversation with the claimant, when the claimant was stressed. Out of compassion he raised the prospect of whether the claimant would consider settlement, and the claimant had said he would, if things were put right for others or words to that effect. That is a likely conversation in context, when that had always been the claimant's position because he simply wanted matters put right. Ms Sharp knew that, because of their discussions in October, and the length of the claimant's wish list of practical measures. The January context giving rise to the claimant's stress included:

206.1. The claimant was trying to finalise his grievance appeal;
206.2. He was working on and considering the employer revisions to its policy on trans issues with the Equality Officer (which were lengthy);
206.3. He was still trying to ensure a letter was written on legal advice to require deletion of dead naming, and a date for that to be confirmed (in default of which he would approach the ICO);
206.4. He was preparing for the preliminary hearing in the case, had taken a day or two off sick with stress and considered he was being victimised by being asked to provide a fit note to the employer.

207. Mr Mahmood did not ask if the claimant would consider "a termination settlement" or was "comfortable with one". Had he done so, it is very unlikely the claimant would have said "yes". The claimant was committed to improving matters for others who found themselves in his position at the employer, and he wanted to be involved with that process and with policy issues. He had been previously praised for his work and promoted and he did not want to leave this employer.

208. The fact that in 2023 the claimant did agree to leave this employer, does not displace all the other factors suggesting his evidence about settlement discussions in January 2021 is accurate. The fact that he remained with the employer so long, despite proceedings, suggests, again, that was his wish throughout – to stay employed. The claimant did not say to Mr Mahmood that he would be comfortable, or might agree – there was no mention of termination of employment in their discussion.

209. The claimant's case on allegations 15, 16, 20, 21 and 22, in summary, is that the respondent excluded the claimant from advice seeking, reduced his preparation time to be minimal, and misled counsel to obtain a recommendation of the settlement offer - to enable it to cease acting. This unfavourable treatment was alleged to be because of the claimant's ADHD traits.

210. He has proven that case on these allegations. He was subjected to unfavourable treatment in the way alleged because of something arising in consequence of his disability - his communication style, the time he took up when hyper focussed, and his justice sensitivity which led him to challenge and "pre-empt", as Ms Sharp put it, advice which he considered unjust. The wrong instructions to counsel arose, on the respondent's case, from misunderstanding or mistake, and on the claimant's case from deliberate misrepresentation. The instructions concerned a critical matter, on which there should have been clear and direct communication from the claimant, properly recorded by solicitors or counsel or the respondent's officers. It was unfavourable treatment because of the claimant's ADHD traits as above. On our

finding it was deliberate conduct – representing the member's position as the union wanted it to be, to help gain the advice it wanted.

211. The discriminatory effect on the claimant was that he was manipulated into a position in which he experienced obvious upset and his usual demeanour was disrupted. He considered he had been libelled in the meeting on a matter which was very important to him, and in relation to which he could reasonably have expected very different treatment in accordance with the respondent's rules of representation. This would have been upsetting for any disabled member, but for the claimant at this time given the matters on his mind above, it was extremely distressing. The discriminatory effect was clear, even without the later withdrawal of union support for his legal claim.

212. A less discriminatory approach would have been: to promptly provide the employer's offer to the claimant with some pastoral support from Mr Mahmood or other appropriate person; allow him more time to read and process the information; ask him if he wished to seek further legal advice about it; if so, involve him in discussions/instructions to solicitors or counsel; give him more time to consider matters before discussing how to respond to the employer; leaving it as a matter for him to reject, as was the norm in offers including termination, without withdrawing support. The large part of these less discriminatory means were pleaded by the claimant as reasonable adjustments which should have been made.

213. The course of conduct adopted by the respondent was neither necessary, nor appropriate as a means of achieving its legitimate aim. The course of conduct was wholly at odds with: "*Throughout the procedure you will be kept informed and no decision will be made without first consulting you".* The offer was delayed by more than two weeks, counsel was instructed (and given wrong information), and those instructions were without informing or involving the claimant. These complaints would succeed subject to limitation.

214. Allegations 23 and 30 concern the respondent's recommendation of the offer on 4 February, said to be less favourable treatment because of GR status and harassment.

215. The recommendation amounted to unfavourable treatment, objectively, in the light of the wrong instructions to counsel and other circumstances, but evidence of actual or hypothetical less favourable treatment was not sufficiently developed. Actual comparators were limited to a description of the usual position when termination was offered to a member – from Mr Mahmood; and counsel's comments that agreeing to termination (or not) was a matter for the member. The hypothetical comparison would have to be the hypothetical comparator who also wanted the issue fully corrected for the future benefit of similarly affected colleagues, and did not want regressive policy change (affecting, say, data protection rights). Whether such a person would have been treated more favourably by the respondent, becomes a very difficult speculation.

216. In our judgment the main reason why the termination offer was recommended was because of the burden of the claimant's communications to his union representatives when hyper focussed and perceiving injustice. In our judgment, this is the only reason why wrong instructions were given to counsel, leading to a change from the normal position that it was a matter for the member. To the extent that Ms

Sharp's fears of dismissal played a part in the recommendation, they also arose from the same ADHD traits – the volume and type of the claimant's communications to the employer and his inability to accept the employer position - that everything that could reasonably be done, had been done - which he considered unjust.

217. Closing down discussion of the regressive nature of the changes to the trans policy was unwelcome to the claimant, and unfavourable, in all the circumstances, but the claimant has not established facts from which we could conclude that recommending the offer was direct GR discrimination. That involves speculation: had the hypothetical comparator also wanted involvement in policy change the comparator considered negative, unrelated to GR, and exhibited the claimant's ADHD traits in the way the claimant did, Ms Sharp, with solicitors, would also have recommended the settlement. These are not facts from which we could conclude GR less favourable treatment, nor harassment. The recommendation was unwelcome to the claimant, but it was not related to his GR status, but to his ADHD traits – the subtleties of his position on trans policy regression played no part in Ms Sharp's thinking or consideration - she was not involved in that work.

Allegation 25: On 10 February, the solicitor emailed counsel to say "I've just checked [with the Union] and we do need to carry on [with the case] for now (although I doubt it will go much beyond the telephone preliminary hearing)."

218. The reason this email was sent is obvious. The solicitor had attended the meeting with the claimant; he had recorded the claimant as, "wildly unreasonable"; he knew the settlement offer was being considered; and he could discern (even if not explicitly told) that the respondent could well withdraw from further representation, given the unusual step of obtaining counsel's advice before informing the member. He also knew that if the offer was accepted, the case would come to an end.

219. Putting to one side whether the respondent can be liable for the acts of the solicitors it instructs, this email does not amount to unfavourable treatment in itself. The claimant did not see it until he obtained the document in March or April 2021 after a subject access request – it was not intended for him. Even if it was sent because of the claimant's ADHD traits, the time he took up when hyper focussed and challenging/questioning advice due to justice sensitivity, it was appropriate and reasonably necessary for a solicitor to confirm the instructing union's instructions and relay them to counsel. Acting proportionately he needed to let counsel know whether representation was required at the hearing, and whether the case was likely to continue. The doubt he expressed could not have properly been relayed to the employer (and there is no evidence it was). The claimant was not prejudiced by the expression of doubt. The solicitor turned out to be wrong about the case itself continuing, but not about the firm's representation of the member. This allegation would not succeed.

Allegation 26: disability related harassment in that
On 12 February 2021, LS wrote to the Claimant with an email entitled 'URGENT' saying:

"*I write further to our meeting with Iain Birrell of Thompsons with myself and Sultan*

Mahmood present held via MS TEAMS on 4th February 2021. At that meeting we discussed the Without Prejudice offer made to you by [the employer] along with the advice from Counsel on that offer. I enclose copies of both again here and note you had these on 4 February 2021.
"You have now had more than a week to consider the offer and the advice and heard from Iain and myself on the merits of the claim and consideration of the offer. I need for you to give me instructions as to whether you wish to accept that offer or not by replying to this letter in writing
…....
…....
…....

"Please therefore reply:
1 as soon as possible with your instructions on the offer made to you by the [employer]" and
[2 immediately as to whether you wish [solicitors] to represent you at the CMD on Monday.]

No explanation of any consequences of not accepting this offer, in terms of Union support, were mentioned or explained to the claimant in this correspondence or in the meeting on 4 February 2021.

220. Since the meeting on Thursday 4 February, the claimant had continued to work with Mr Mahmood on the Teams deletion issue with the employer. He had previously submitted his grievance appeal. He had also requested all documents or communications concerning him, within the respondent, from Ms Sharp's pa. It was clear he suspected error or worse in obtaining counsel's advice recommending a termination settlement. Ms Sharp expected him to say he no longer wanted union assistance.

221. The claimant was signed off work for four weeks at this time. Ms Sharp wrote to him on 12 February in the terms above, and also included that her pa could not deal with his more extensive documents request and it would be dealt with by the respondent's GDPR team in accordance with the relevant timescales.

222. The claimant's reply to Ms Sharp on 12 February noted that it appeared a meeting in w/c 8 February was no longer possible, and he went on:

Unfortunately, as I have not yet been able to seek sufficient advice on the [employer's] offer, I feel that I am not in the position to make a formal, informed, and full response to the [employer] at this time. Of course, I would still like to do my very best to provide you with a response as you have made a clear indication that there is an element of time pressure on this matter, and I would like to be as helpful as I can be – therefore, please see below:
"I do not feel that any form of settlement can be reached or agreed upon whilst [the employer]has not adequately resolved the issues which I have raised with them.
"I had hoped to consider the most helpful way to phrase this, with support from yourself and Iain, but I hope that this is still somewhat helpful in its present form."

223. That response was copied by the claimant to Mr Mahmood and he continued to support the claimant in dealings with the employer.

224. Ms Sharp's requirement for a response to the offer was also alleged as a failure to make a reasonable adjustments, which would fail for the reasons above. As disability related harassment, we ask, was it unwanted conduct by Ms Sharp related to disability? Was it conduct which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? Her conduct was unwanted to the claimant at that time because he did not feel fully equipped to answer. There was no documentary evidence – in a case where very much is documented - that the employer was chasing for a reply - the instruction had already been given that the preliminary hearing would need to be attended. We repeat the findings above about the failure to set out the next steps for responding to the offer – whether through further meeting or otherwise. The urgency of the letter was very unhelpful.

225. Ms Sharp's oral evidence was that the employer was pressing for a response and was extending a deadline by 24 and then 48 hours. There may well have been discussions undertaken by telephone, but there was no deadline before the Tribunal expressed by the employer, nor communicated by the respondent to the claimant as the employer's deadline for a response. It was Ms Sharp's view that eight days was sufficient to consider the offer. If the employer was pressing, that would have been unsurprising, but the delay from 20 January to 12 February lay primarily with the respondent's conduct which we have found to be discriminatory above. Having received the claimant's response, there was then no evidence about how and when that was relayed to the employer.

226. The claimant's case was also that he was not warned in that letter that if he declined the offer the respondent may or would cease support. The claimant had been reminded of the conditions of service the previous year (and he complains about that), and he had also been told by Ms Sharp in October that ceasing to act was a possibility if a reasonable settlement offer was refused. His case was that if a clear warning had been given, he would have simply replied he needed more time and help and would have asked more questions.

227. The relationship of the pleaded content of the letter to the claimant's disability is not straightforward. Ms Sharp wanted an answer to the employer's offer which the union and solicitors had recommended. The context was that the claimant's trust in the respondent seemed to be under strain (unsurprisingly given the way the offer was handled) and he had made the subject access request. At this time the union solicitor knew that the respondent ceasing to support was a possibility, even a likelihood, if the recommended offer was rejected. Ms Sharp wanted to know the claimant's position to understand for how much longer the respondent would likely be supporting him. The relationship of an urgent response to the offer, in writing, to disability is this: the manifestation of ADHD traits had caused the unfavourable treatment above, the purpose of the unfavourable treatment was to put the respondent in a position to withdraw support because of the strain of the claimant's ADHD traits, and having the claimant's decision was a necessary step in that process.

228. Without that background and purpose, asking a member to give instructions on

an offer as soon as possible could not amount to harassment; but given the previous course of conduct, we find that it was in this case. A union must not harass a member in relation to membership of it. In our judgment (there were no authorities to help us) that ought properly to cover dealings with members in these circumstances. The 12 February email was unwanted conduct related to disability for the reasons above, and it is reasonably to be perceived as creating a hostile environment for the claimant's membership and dealings with his union in relation to a very significant matter – the continuation, or not, of his employment and ongoing working with the union in that place of work. This complaint would succeed.

Allegations 17 and 19: the respondent's counsel and solicitors failed to ensure that incorrectly gendered terms used by the employer were permitted to be included in the ET documents – counsel using incorrect pronouns in her notes of the hearing on 15 February - GR direct discrimination and harassment;

229. Meanwhile, in the preparation for the preliminary hearing on 15 February the employer's solicitors had provided to the respondent's solicitors the first draft of an agenda for that hearing, to be agreed. It contained a wrong pronoun for the claimant. The respondent solicitor did not pick that up, but the claimant did when he saw it; he asked the solicitor to correct it; it was corrected in the final version sent to the Tribunal; he also had a short conference with counsel before the hearing and asked counsel to raise a further issue with the Judge: that the employer's grounds of resistance also contained a pronoun error.

230. At that hearing the Judge also used the wrong pronoun on two occasions and that was noted by counsel. Counsel raised the matters as instructed and asked that any misgendering in tribunal documents be redacted – that application was granted. The claimant was present during this telephone preliminary hearing with counsel, and reasonable adjustments were also discussed.

231. Counsel provided a written attendance note of this hearing, and on a later subject access request her manuscript notes were provided to the claimant. Those notes contained an arrow on the first page above the employer's name, with "they/she" noted above it. The claimant alleges this is his counsel misgendering him. We did not hear from his counsel. On balance, from the pictoral nature of the note, considering the manuscript notes as a whole and the written attendance note, and the context and instructions given, we find that this was counsel's note to herself to remind her to raise at the hearing that the employer had used the wrong pronoun in its response.

232. The claimant does not allege his counsel used the wrong pronoun about him in the course of the hearing, and it is inconceivable that she, counsel, would have noted the wrong pronoun as a reminder to herself of the correct pronouns. If it was such a wrong reminder, she did not adopt the wrong pronoun in the hearing. The claimant's factual case on this fails.

233. Putting to one side whether the respondent can be liable for the conduct of solicitors or counsel as its agents (much less they for their opponent's conduct), the claimant has an unjustified sense of grievance about these matters - they do not amount to actionable detriment in all the circumstances for the purposes of direct GR discrimination. They cannot reasonably be perceived to cross the section 26 threshold

in relation to the claimant's membership of the respondent. The mistakes were raised and addressed. The fact that the claimant, rather than the solicitor, or counsel first identified them is not surprising – clients often do pick up typographical or other errors. Counsel's note was for her own purpose as a reminder and was not a mistake. None of these matters could amount to harassment or less favourable treatment by the respondent of the claimant. These complaints would fail.

Further matters before the respondent withdrew support

234. On 15 and 18 February, the claimant's counsel had emailed solicitors to the effect that three matters needed addressing reasonably quickly: an amendment to case management orders to give the claimant more time to prepare for a Judicial Mediation, because of his ADHD, and a conference to discuss amendment of the claim given recent actions by the employer; both of these to be arranged before counsel went on maternity leave and arrangements for her replacement also needed to be made in advance of the JM. The failure to arrange these matters was alleged to be a failure to make a reasonable adjustment, but is dismissed for the lack of proven PCP described above.

235. On 17 February a new employer contact, an in house lawyer, became involved to address the claimant's data breach/GDPR complaint. He wrote to the claimant and Mr Mahmood setting out his involvement and that he was applying an extension of time of two months to address the claimant's objection to processing of his dead name. He also sought detailed further information. The claimant had also raised the matter with the ICO around this time, with Mr Mahmood's support (or without him counselling against it). On Monday 22 February the claimant asked Mr Mahmood for his help with responding to the GDPR letter.

236. At 8.30 am on 24 February the claimant sent Mr Mahmood an eight page response and at 9.06 he messaged him the password, saying he was looking forward to meeting him that day, a Wednesday, to discuss it. Mr Mahmood told Ms Sharp of the eight page letter that same day. He and the claimant had had previous discussions about keeping communications short, but the detail of the GDPR issue was explained by the claimant - he also apologised for its length. It was a reply to a request for information from the employer to address the data breach complaint; and it needed to be sent quickly because the essence of the claimant's complaint to the ICO was that the employer had taken too long after he had notified his objection to processing his dead name. In that context we consider it was likely Mr Mahmood simply agreed it should be sent, and we find he did say,"let's get it sent", at the conclusion of their conversation.

237. Also on 24 February, at 9.31am Ms Sharp told Mr Mahmood and the solicitors in an email with subject, "legal representation" that she had a meeting that afternoon with Mr Cafferty, the Regional Secretary, "to make a decision" in "that matter where we are considering legal representation". The email did not mention the claimant by name.

238. We find a decision was made, in principle, to seek a National Executive Council decision to withdraw legal representation at that meeting, at which a Mr Johnston also attended – he was regionally responsible for liason with the respondent's solicitors. The recommendation was subject to having legal advice and following due process,

which was the advice of Mr Cafferty. Mr Cafferty's evidence was that neither he as Regional Secretary nor Ms Sharp had power to make such a decision, and that it was one for the Chair of the Services to Members Committee of the National Executive Committee ("the CSMC").

239. At 18.37 that day, Ms Sharp sought legal advice via the respondent's in house solicitor and head of legal. The respondent waived privilege in that document, providing it in unredacted form. The first part of the letter set out the background to the dead naming dispute. It went on:

" *We are representing the member both in Tribunal but also with their internal negotiations with the employer on a day to day basis. It is our view that the member repeatedly does not accept UNISON advice, is potentially seeking advice elsewhere (I set this out below) and is not accepting a reasonable offer from the employer. To continue to progress the representation will cost astronomical amounts to the union, will see the Employer withdraw a reasonable offer, and is causing great stress and anxiety to branch representatives and our Organiser.*

The employer has made an offer of £10,000 injury to feelings, 12 months salary for which they are seeking a termination agreement, a full written apology and an agreed reference and commitment to audit their internal procedures and policies to ensure they are more compliant on trans issues.

The member has said: [Ms Sharp quoted the claimant's reply above and went on].

We sought advice from the Counsel engaged in the matter who has said under all the circumstances the offer is a reasonable one. In case conference with the member and [solicitor] we recommended the offer and cautioned that the employer indicated in their offer that the employment relationship was strained which concerned me that the Employer may seek to pursue a dismissal in any event: The member said that they wouldn't be able to accept a termination offer because that would not be acceptable or a just outcome for 'their community' i.e the trans community. I said that when their employment ended then there would be no potential for any further discrimination. The member said that their records will be held on file for 7 years and therefore continuing the deadnaming. I believe the member will not be satisfied with any outcome and is on a relentless 'pursuit of justice' for a wider issue beyond their employment and about the trans community. Iain's words were that they are on a campaigning crusade.

This from the Employer's Solicitor:

- *"it doesn't appear that there have been any "fresh" incidences of deadnaming since changes were made*
- *BUT, since March [claimant] has been (pretty much) constantly emailing colleagues, usually with unreasonable demands or expectations and in an "unfortunate" (to be frank unacceptable) tone. This has been extremely difficult for those in receipt of the emails, resulting in significant stress to managers (who are not at fault in any of this)*
- *their (previously good- hence being promoted back in February) work is not getting done and they are now indicating that they cannot engage with anyone about work other than by email..*

- *we're at a point where it seems that [the claimant] cannot be satisfied, and they seem unable or unwilling to see anyone involved in a good or even realistic light and their relationship with us is challenged on every front - which is just not sustainable;"*

I have repeatedly written to the member to caution that they are not taking our advice and in so doing are potentially at point of us withdrawing representation. This has been in meetings and also by email / written communication. They have repeatedly sent emails and communications to the branch representatives, myself, the organiser etc to the extent that I have had to impose an agreement we will only contact the member on a one hour basis per week to address the emails but not to respond to their relentless communications. I am told today by the Organiser that they are intending on submitting an 8 page letter to the employer. The employer has recently said they are considering this is harassment now. We have cautioned against submitting this. We have had an SAR request submitted by the member against UNISON which we are complying with. They have also submitted one to the employer and also a complaint to the ICO.

I have highlighted above two important issues, 1. They seem to be taking advice elsewhere although I have no evidence of this, they are very well researched in trans legal issues which has made me strongly suspect they have an organisation behind them giving them advice and 2. The employer is seeming to indicate the employment relationship is not sustainable – and may therefore go down a dismissal route.

I note the counsel's advice that the ET will not award an apology, that the 10k injury to feelings is reasonable. Counsel didn't go so far as to say they should accept the offer but it was a reasonable one.

The only other thing I need to add is that the member says they suffer from ADHD which requires them reasonable adjustments to consider everything with much more time to consider anything. They said so at the Tribunal as well. I do not have any medical evidence of this but it will need to be factored in if we withdraw representation. They have said to the employer recently that because of their disability they can only communicate with the employer on normal day to day activities by email and not phone so as to be able to have sufficient time to digest what the employer is saying. I have said this puts them at significant risk with the employer to say that they cannot fulfil their employment contract. There is no Occupational Report that backs up this as a reasonable adjustment.

I believe that the member has breached the terms of our representation, that the employer has acted very reasonably in all the past year and has made a reasonable offer, that the member is behaving unreasonably against the employer and the union in their demands, that the employer has taken all reasonable steps to rectify the situation and where they haven't it is beyond their control. (i.e Microsoft) and needing to retain records for 7 years)

Please can you provide advice on whether we can withdraw representation, both in terms of the ET but also internally through the internal processes with the employer? Happy to talk if needs be."

240. The next day Ms Sharp's email was sent for referral to the CSMC and on 1 March 2021 the CSMC decided to withdraw legal representation. This was an exercise of discretion pursuant to Rule K.6 "if the member does not follow the advice of the Union or its solicitors, ..or if in its view the continuance of legal assistance is unreasonable". As to local representation, Ms Sharp was told that branch and workplace representation should continue until such time as the branch or region completes the correct process – in accordance with the Code of Good Branch Practice. This was communicated to her at around lunch time.

Allegation 27: withdrawing legal support on 1 March 2021
Allegation 28: withdrawing workplace support on 1 March 2021
Both section 15 and disability related harassment

Allegation 29: lack of an offer of appeal in respect of withdrawing legal support – section 15

241. On the evening of 1 March Ms Sharp wrote to the claimant notifying immediate withdrawal of legal assistance and local representation by Mr Mahmood. The grounds given for the removal of legal assistance were as follows: "The reason behind this decision is that you have not followed the advice of the Union and our appointed solicitors and it is the view of the Chair that the continuance of legal assistance is unreasonable."

242. The letter then set out that counsel had advised that the offer from the employer was reasonable and she would advise the claimant to accept (despite Ms Sharp saying counsel had not gone that far in the letter for CMSC); and that at a case conference on 4 February the respondent and solicitors had also advised that offer be accepted. The letter then set out the terms of the claimant's rejection: "I do not feel any form of settlement can be reached or agreed upon whilst the [employer] has not adequately resolved the issues which I have raised with them." The letter recorded that the Chair had therefore taken the decision to withdraw legal representation and that there was no right of appeal concerning that decision. The letter also recorded that solicitors had been informed and would be in touch directly; and the claimant was given information about outstanding matters in the litigation he must address himself.

243. As to the removal of local support the reasons given in the letter were: it was the responsibility of the member to accept the advice of the representative unless that advice was unreasonable; and the claimant had repeatedly failed to follow that advice. The claimant was told he could appeal to Mr Cafferty, setting out the grounds of appeal.

244. The claimant quickly emailed Ms Sharp and the solicitors to acknowledge receipt of this letter, and to communicate that he would be appealing, and in the meantime, he wished the employer not to be told of this decision in case it harmed his case. In that he relied on an earlier assurance in writing from Ms Sharp on 15 December that there would be an opportunity to appeal the decision on legal assistance. At around half past four the next day the solicitor informed the Tribunal and the employer that it was no longer instructed. She also confirmed to the claimant various matters including that the firm still considered his claim had reasonable prospects of success. Her immediate communication to the employer and the Tribunal

was despite Ms Sharp saying "the claimant needs much more time to consider things", because of his ADHD, and that he had requested delay; The withdrawal had also been immediate and with no right of appeal, despite the claimant's ADHD related challenges.

245. It is clear that the claimant's rejection of the offer, against the advice of the respondent, was, in essence, because his dead name continued to be processed by the employer - he did not want to leave the employer's employment while that injustice continued, as he saw it, and his great sensitivity to that injustice arose because of his ADHD; it prevented him from accepting advice from the respondent which contained pragmatism. Ordinarily, as both counsel advising and Mr Mahmood recognised, an offer which included termination of employment was a matter for the member to decide. Counsel's written recommendation that the offer be accepted was clearly on the basis that she had been told the claimant had said he would be comfortable with such an offer (in certain circumstances), which was untrue. The terms of the claimant's rejection were expressed to be something on which he would like help, when his position was that he did not wish settlement until the data breach was resolved. That was a new position, and not one he had expressed back in October (but in October he might have expected the processing of his dead name to have stopped). Again, this position was driven by his justice sensitivity.

246. We find ceasing support in the circumstances above (on a matter on which the member would usually be permitted to decide freely) was because of the claimant's ADHD traits – their manifestations as described above.

247. As to the withdrawal of local advice, immediately before its withdrawal the claimant had not failed to follow Mr Mahmood's advice. Mr Mahmood had previously given advice about a short communication concerning an employer reasonable adjustment, which the claimant had followed. On the 8 page data protection letter, for the reasons above, he said, "let's get it sent". Similarly, Mr Mahmood did not advise the claimant not to go the ICO – their communications appeared to be warm and friendly and without any dispute about advice given. Ms Sharp's evidence about the reason Mr Mahmood's local support was withdrawn was confused. In answer to the claimant's questions she said it would have been a conflict if Mr Mahmood had continued to advise on matters in the case. She was asked to explain what the conflict was. She was hesitant and unable to explain the conflict other than to say it was more hers than Mr Mahmood's, or that was our understanding of her evidence.

248. In re-examination Ms Sharp said the main reason for withdrawal of local – namely regional - workplace support by Mr Mahmood was the claimant's failure to follow advice.

249. We did not hear from the CSMC. We had to make our findings on the basis of the communications and evidence of others and the written communications. The other factors, which may have played their part in Ms Sharp seeking withdrawal of support were not identified as the CSMC's reason to withdraw legal support – which was singularly the refusal of the recommended offer and the terms of the refusal. To the extent those further considerations did play a part, Ms Sharp's fear of dismissal is addressed above and arose because of ADHD traits; the belief that the claimant would not accept any settlement because he was in fact on a campaigning crusade, is an

over-simplification of the instruction he gave in circumstances where he was put under very unhelpful time pressure to give a response.

250. He indicated he would have liked help with how he put his position to the employer. There was no discussion of how that instruction could be perceived by the employer, and to clarify it. In our judgment that was because, and this is the claimant's straightforward case, the respondent was fed up with the communications arising from his ADHD traits and wanted to cease support. We conclude the decision to cease legal support was unfavourable treatment, because of something arising in consequence of the claimant's disability. The withdrawal of regional support was for the same reason, and also because by the point of withdrawal, the respondent had aligned its position with that of the employer, considering the employer had acted reasonably and was not at fault by this stage.

251. Was it appropriate and reasonably necessary to cease both forms of support, with no appeal for legal support, balancing the discriminatory effect against the respondent's legitimate aims? Ms Sharp had given a previous promise of an appeal should legal support be withdrawn, which had not been fulfilled. It was outside the respondent's rules, but the claimant was not to know he had been given wrong information at the time.

252. The discriminatory effect of the withdrawal was considerable. The claimant was faced with dealing with complex proceedings with reasonable prospects of success as a litigant in person, or funding his own barrister. He may have been able to access informal support from a friend who was not legally trained, with some knowledge, but that did not equate to specialist legal representation. He instructed a direct access barrister in or around April 2021. He continued to have to navigate his position in the workplace without union support.

253. As to legitimate aims, the respondent led no evidence from the CMSC or otherwise, on the detail of the effective running of its services, for example the amount spent on legal support, the cost to it, nor of the legal assistance to the claimant, the budget for this case relative to other cases or the total amount of members' subscriptions or other income, nor any evidence about how that cost related to other claims being supported and their costs.

254. We can find, applying industrial experience, that the claimant's case against the employer would be a costly case because of its complexity – the need for expert evidence was discussed in the case management hearing - but the respondent had decided to support it because of its strategic importance and reasonable prospects of success. Beyond that, there was no forecast or evidence from which the additional cost caused by the claimant's ADHD traits, could be understood.

255. Ms Sharp's communications demonstrated that she was robust in dealing with the claimant's communications, and it was she who managed the legal proceedings for him. Her means to prevent being placed under unreasonable pressure or stress including limiting communications with him, and the clear minuting of meetings and communications and actions; that had been effective. The point at which their relationship came under great strain, was as a result of her actions in handling the offer, which we would conclude amounted to contraventions in themselves; and as a

result, the claimant made a subject access request of the respondent.

256. Less discriminatory means included: continuing to support the claimant's legal case on its merits, while allowing an appeal against the CSMC decision – which Ms Sharp had said on 15 December - would be allowed; explaining costs budgetary concerns and how they could be managed; discussing how best to put his rejection back to the employer; agreeing that the data breach was properly one for ICO advice and resolution; considering how the claimant's ADHD impacted the management of legal proceedings and looking for specialist input with that if necessary; sticking to the boundaries set – Mr Mahmood not replying other than on Mondays and for an hour, as agreed.

257. The Tribunal's weighing of the respondent's justification includes taking account of its own literature which explains the disadvantages for disabled people in the workplace, and the fact that for those with learning difficulties, the likelihood of employment was less even than for those with "visible" disabilities.. Recommending a disabled member lose employment (when he did not wish to), and then terminating its support both in the workplace and for his legal case, when he did not accept the employer offer in terms on which he sought help, were not proportionate means of achieving a legitimate aim in all the circumstances of this case, and these Section 15 allegations would succeed.

258. As disability related harassment allegations, these would also succeed, applying the analysis above. The conduct was unwanted, it related to his disability, and its effect was reasonably to be perceived in all the circumstances as having the section 26 effect.

Allegation 31: Mr Cafferty communication on 21 April 2021 – refusing appeals/complaints - section 15
Allegation 32: Ms Thomas using the incorrect pronoun for the claimant in an email of 30 June 2021 – GR direction discrimination and harassment
Allegation 34: Mr Stolliday's communication to the claimant on 1 October 2021 refusing appeal/complaint - section 15 and disability harassment and direct GR discrimination

259. On 8 March 2021, the claimant wrote to Mr Cafferty, Regional Secretary - Yorkshire and Humberside of UNISON in order to appeal against the decision to withdraw Regional support and representation in the workplace, and complain formally that the advice had been inappropriate, inadequate, and/or unreasonable, and; that the Union had unreasonably and without just cause withdrawn legal representation for this case, and that local representation had been withdrawn without due process.

260. Mr Cafferty had experience reviewing race discrimination cases which were not taken forward by the respondent for members – he had probably done 60 to 80 such reviews over the years and he was very familiar with legal tests for discrimination. He did not know the claimant prior to discussing the matter with Ms Sharp on 24 February but he heard the circumstances and gave the instruction that the matter be referred by her to the CMSC in accordance with due process – the in principle decision to refer. He could not be said to be without involvement in the matter.

261. On 21 April 2021 Mr Cafferty wrote to the claimant in respect of his appeal stating that the claimant's appeal and complaints had been dismissed/ not upheld.

262. As to an alleged failure to follow Mr Mahmood's advice, Mr Cafferty's letter was simply wrong: the claimant had accepted the advice of the branch secretary (before Mr Mahmood became involved) not to supplement his grievance appeal by subsequent victimisation issues relating to systems access and other issues – they would require a new grievance. It is right he had called upon Mr Mahmood beyond Mondays. It was not fair to say that "there was a persistent failure to follow advice (such as the submission of a SAR ("subject access request"). There had been no advice from Mr Mahmood not to submit a SAR to the employer - there was discussion of the 8 page response to the employer, which ended with – "let's get it sent". The claimant had asked the Equality Officer back in spring 2020 about an employer SAR and been told that was fine. The only reference to a SAR as a reason to cease support to the claimant was Ms Sharp reporting that the claimant had presented such a request to the respondent. The way that the claimant chose to communicate with his representative, was also within Mr Cafferty's criticism of him.

263. Mr Cafferty's assessment was that he considered there was no basis to convene a panel to address the claimant's position, that he was not aware of how he had failed to follow advice.

264. As to legal representation, Mr Cafferty explained the rules, to the effect that there was no appeal against a decision of CMSC. Nevertheless he went on to comment on the claimant's complaint submission - that the advice to accept the offer was procured on the basis of wrong instructions and he had not said he was comfortable with termination.

265. Mr Cafferty said, in effect it was not the rejection of the offer itself, but the terms of that rejection - I *do not feel that any form of settlement can be reached or agreed upon whilst [the employer]has not adequately resolved the issues which I have raised with them* – amounted to a statement that no offer would be agreeable, short of "the employer resolving all matters to your satisfaction". That was the reason legal support was withdrawn. He did not uphold the claimant's complaint and told the claimant there was no further right of appeal on either issue.

266. On 22 April 2021 the claimant wrote to John Stolliday, Head of Member Liaison, to request a review under Section 3 of the respondent's complaints procedure. He said Mr Cafferty should not have determined the complaint because he was involved, his conclusions were incorrect, concerns were not addressed, and he wrongly advised there was no further appeal. He set out his belief that the complaint process had been mismanaged to date. He highlighted the difficulties for members with ADHD, quoted the respondent's published position on ADHD, and said, "sadly despite Unison's long published stance, its therein demonstrated understanding of my disability, also its stated desire to suppor the difficulties people like me face, the representatives in this case have failed to make any supportive adjustments. They have also failed to recognise and accommodate the fact that my difficulties are directly related to this disability, and further failed to take into account the {known) severely detrimental impact this ongoing case has had (and continues to have) on my health, particularly related to the symptoms of this disability. These representatives have

rather chosen to characterise me as “difficult” and have in some respects worsened these symptoms.....”

267. The complaint made no reference to his GR status, and the signature contained no indication of his preferred pronouns.

268. This review was rejected by the member liason unit in a letter dated 22 June 2021. This short decision did not engage at all with the claimant’s complaint, in effect, of disability discrimination by his own union.

269. During May and June the claimant had been communicating with his contact – Chair of the National Women’s Committee (“CNWC”), from his personal and work email address (in those emails there was not a signature indicating preferred pronouns). He was, in effect, asking for her help and she indicated she had had a brief chat with Ms Thomas, whose team could do a Section 3 review. There were then an email chasing that.The CNWC forwarded the complaint to Ms Thomas, who at the time was nursing her own mother through end of life care.

270. Ms Thomas had returned to work for a few days in early June preparing for her mother’s funeral on 15 June. She then returned to work again and on 22 June sent an email saying “Hello [CNWC] just to advise that the union has undertaken a stage 3 review of [the claimant]’s complaint and the outcome should be with her shortly.”. The CNWC forwarded Ms Thomas’ email to the claimant, and the claimant replied, including to ask that Ms Thomas be reminded his pronouns were they/them or he/him and that it was really upsetting, “particularly as it’s all over my documents that it is not appropriate to use those pronouns”. Pronoun preference was not all over the emails that CNWC had forwarded to Ms Thomas, and the claimant’s Stage 3 letter did not mention them.

271. Ms Thomas retired from her position as Assistant General Secretary. She did not attend this hearing, and again we make findings without the benefit of oral evidence. In her written statement Ms Thomas said: she was aware the claimant had ADHD but was not aware that he identified as non-binary. She understood the claimant to be female; she would use the pronoun corresponding to sex unless she was aware a person prefers another pronoun; she would never intentionally use a sex based pronoun if she knew a person had preferred pronouns and she was sorry if she upset the claimant unwittingly but it was certainly not intentional.

272. Unlike in Mr Walton’s case, the claimant did not accept the reference was accidental; he said that her use of sex based pronouns was a dog whistle and that Ms Thomas must have gender critical views.

273. In assessing evidence, we deploy a range of tools – one of those is, often, to consider if an account is likely, or unlikely. There was no evidence put before us to suggest that Ms Thomas’ written evidence should not be accepted at face value. Indeed, such were her personal circumstances at the time that it was overwhelmingly likely. She was being chased by the Chair of the National Women’s committee, the claimant’s name was not indicative necessarily of one gender or another, her knowledge of ADHD had no doubt come from the detail in the letter forwarded to her. It is unsurprising that she held the belief she held. She was corresponding at a time

when she had been "out of the office" in sad circumstances. Her email was plainly not a "call to arms' for those who are hostile to GR members.

274. In our judgment, a mistaken pronoun, where a member has a preference, could amount to unwanted conduct relating to GR, or less favourable treatment (subject to a comparator) if deliberate, or as the claimant says, with the purpose of marshalling ill will or ill treatment. This was not such an occasion, and we would not uphold this complaint. We consider Ms Thomas is in no different a position to Mr Walton – she has made a mistake for which she has made an apology.

275. The Tribunal recognises that the effect of "a dripping tap" can be profoundly upsetting, albeit one drop is not. Nevertheless, even if this unwanted conduct related to GR (and we do not consider it so related in these circumstances) as upsetting as one instance in a series of instances can be, and taking into account the cumulative effect of the mistakes in this case, we do not consider Ms Thomas' action could reasonably be perceived to have the Section 26 effect.

276. Following an unsuccessful mediation of the employer case, on 7 May the claimant obtained an opinion from his privately instructed counsel to the effect that the respondent was encouraged to resume legal support. The opinion set out the effect counsel understood of ADHD in connection with behaviour and litigation. The opinion was that it was not unreasonable of the claimant to reject the employer's offer previous offer, having reviewed some of the relevant documents. The claimant provided that opinion in support of his Stage 3 complaint and review to the respondent. The claimant was encouraged by his counsel to return to work.

277. A Mental Wellbeing Service wrote on 26 July 2021 that the claimant was attending sessions with an Employment Adviser after a decline in mental health triggered by issues with his employer and ADHD. The letter set out why the claimant had rejected the employer's offer. Five grounds were given: 1) it would mean losing his job which he had always wanted to keep; 2) the claim was undervalued; 3) the offer included an NDA; 4) the employer would not be rectifying matters; 5) he was required to endorse regressive policy changes. The letter sought restitution of support for the claimant, both legal and/or local, on the basis that without that support he was feeling more isolated and stressed. It also sought measures to explain and give a time frame in which the respondent would provide its answer.

278. On 8 August 2021 the claimant notified ACAS of the dispute with the respondent. On 19 September 2021 a certificate was issued.

279. The General Secretary asked Mr Stolliday to seek legal advice on whether the respondent had "done anything wrong". The instructions for an opinion were focussed on the value of the claimant's employer claim, the 20 January offer, and the reasonableness of both the claimant's rejection and the legal adviser's recommendation of the 20 January offer.

280. The short opinion, on 21 September 2021 was to the effect that both were reasonable. It noted, that under K6 a discretion to withdraw support was given "if the member does not follow the advice of the Union or its appointed solicitors". Significantly, the member not following advice did not have to be unreasonable for the

discretion to be exercised to withdraw support. The opinion's focus then, was back to the claimant's failure to accept the termination offer (rather than his indication that he would not settle while the data breach remained unresolved).

281. Mr Stolliday then wrote to the claimant on 1 October, referring to both opinions on settlement (the claimant's from May and this most recent one). He also referred to the 26 July letter. He confirmed, "we therefore have no alternative but to reiterate our previous decision that we cannot agree to your appeal or complaint on either matter and the decisions stand".

282. The decisions of the respondent, communicated on 21 April and five months' later on 1 October maintained the original decisions, made, in principle, in the region after which approval was sought from others.

283. Throughout the complaint and review process there was no engagement with the suggestion that aspects of the claimant's conduct, latterly in the May opinion (whether volume or intensity of communication – his communication style, or decision making or "pre-empting" as Ms Sharp put it) were "somethings" arising from his ADHD, and that, the withdrawal was discriminatory, unless a proportionate means of achieving a legitimate aim.

284. In relation to the maintenance of the original decisions, there were no additional means, put in place, which engaged or recognised the difficulties and discriminatory effects on the claimant, albeit Mr Stolliday's letter apologised that he was not delivering the hoped for news. Nor was there any further explanation to the claimant about the reasonable necessity of the decisions, or any further rationale of the respondent's aims, and how the decisions achieved those aims given the respondent's published position on supporting disabled members. These were two opportunities to address the discriminatory effect of the previous decisions, and to put in place less discriminatory measures, which were not taken.

285. For these reasons, which include all our conclusions concerning the handling of the 20 January employer offer onwards, we uphold allegation 34, the decision communicated by Mr Stolliday as a further contravention by Section 15 discrimination. It was presented in time and limitation does not arise.

Limitation

286. We consider from the findings and conclusions above, that the claimant has established discriminatory conduct extending over a period within Section 123(3)(a). From the receipt of the offer, the claimant's ADHD related needs and challenges were largely ignored in the management of the litigation, and we consider that to be a discriminatory state of affairs which persisted until the final decision communicated by Mr Stolliday. His ADHD condition was also questioned, and its effects, and need for reasonable adjustments doubted, despite the respondent having access to the medical and other evidence. The allegations which we would uphold, we do then declare to be contraventions of the Act.

287. We would also, in any event, extend time from the Section 123(1) time limit to enable us to determine on merit all allegations, including those very much earlier than

the January offer. These proceedings have no doubt caused strain and distress for everyone involved and it is important that they are declared as successful or unsuccessful on merit and on the basis of our findings and conclusions. Many of the earlier allegations arose from subject access material, of which the claimant was unaware at the time.

288. The claimant was also absent from work and unwell from February 2021 onwards for a substantial period, and he made all efforts to enable the respondent to change its decisions concerning its representation of him, and to point out the injustice involved.

Reasonable steps defence

289. On our conclusions, employees of the respondent have not been found to have contravened the Act and Section 109(4) is not engaged. There is no similar provision in respect of officers, elected officials or agents.

290. To the extent we are wrong in that, and there are those who have taken decisions or engaged in conduct we have found to be contraventions, who are employed by, rather than being officers or agents of, the respondent, we do not consider the respondent can be said to have taken all reasonable steps to have prevented the contraventions found.

291. The respondent knew that its member had ADHD. It was provided with the relevant information, albeit it did not have explicit documented confirmation of all “somethings arising”, as we have found them to be. Nevertheless, the claimant’s ADHD traits were recognised as causing difficulties for the respondent. If, as appeared in the communications seeking withdrawal of support, ADHD itself was doubted, and/or the need for adjustments, all reasonable steps in such circumstances would, at the very least, involve seeking the remainder of the claimant’s diagnosis letter (which he offered), reviewing all the relevant information from his counsellor and others, reviewing the respondent’s own wealth of policy information, and discussing it with him in relation to the delivery of the respondent’s service to its disabled member.

292. For the reasons expressed above, we give the unanimous declarations expressed in our Judgment.

Employment Judge JM Wade

Date 28 September 2023