EMPLOYMENT TRIBUNALS

Claimant: Mr K Cowley

Respondents: 1. Merseyside Community Rehabilitation Company (in Creditor's Voluntary Liquidation)
2. The Secretary of State for Justice

Heard at: Liverpool **On:** 17, 18, 19, 20, 21, 24, 27 and 28 October 2022 and 17 April 2023 (no parties) 18, 20, 21, 24 and 26 April 2023 (deliberations).

Before: Employment Judge Benson
Ms H D Price
Mr J Murdie

REPRESENTATION:

Claimant: In person (supported by his brother, Mr Cowley)
Respondents: Ms Crew of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint that the respondent failed in its duty to make a reasonable adjustment pursuant to sections 20 and 21 of the Equality Act 2010, by providing the claimant with information as to which aspects of his conduct were being investigated at the meeting on 31 October 2019 succeeds. That claim was presented outside the requisite time limit, but it is just and equitable to extend time.

2. The claimant was not disabled by reason of his hearing impairment as at the relevant date.

3. The remaining claims of failure to make reasonable adjustments pursuant to sections 20 and 21; and the claims of discrimination arising from the claimant's disability of anxiety and depression pursuant to section 15 Equality Act 2010 fail and are dismissed.

REASONS

Summary and claims

1. This claim was listed for 13 days to commence on 17 October 2022. Unfortunately, there was no judge available for the full period and the length of hearing was reduced to 10 days. Owing to sickness, the Tribunal was unable to sit on two of those days and the claim was relisted for a further five days on the first date that the Tribunal and parties were available, being 17 April 2023.

2. The claimant has brought claims of disability discrimination, being a claim that the respondents have failed in their duty to make reasonable adjustments in respect of his disabilities, and further that he has been subjected to discrimination arising from his disabilities. The disabilities relied upon are mental health issues, being anxiety and depression and hearing loss. The claimant alleges that having been subjected to bullying and harassment for a number of years by his manager, he suffered stress and depression. Following a referral for an Occupational Health assessment in March 2019 the claimant alleges that the respondents failed to carry out a proper wellness assessment upon him and as such his needs and adjustments that could have been made for him were not recognised or put in place. He suggests that this put in train a series of events which ultimately led to his long-term sickness absence, issues and allegations against him of bullying colleagues, and a sickness absence procedure. The claimant alleges that there was a conspiracy against him by senior management, which included allegations for which he was ultimately dismissed. Further, the claimant claims that his hearing impairment prevented him from fully participating in some meetings.

3. This claim was commenced prior to the claimant's dismissal. The claimant submitted a second claim relating to his dismissal but for reasons relating to the commercial arrangements between the respective respondents, and that the second claim was only at its early stages, it was agreed between the parties that those claims should not be consolidated. It was however further agreed that the same panel should, if possible, hear the second claim.

The position of the two respondents

4. The two respondents in this case were both represented by Ms Crew. The Merseyside Community Rehabilitation Company was the organisation which employed the claimant during the period April 2014 until the claimant's employment transferred back to the second respondent on 26 June 2021. This was part of the arrangements for the operations of the probation service to be managed by a private contractor which were reversed in 2021. The first respondent went into creditors voluntary liquidation during the course of these proceedings, however as the claimant’s employment transferred to the second respondent by reason of Transfer of Undertakings (Protection of Employment) Regulations 2006, all liabilities will pass to the second respondent. At all material times in the claims before us, the claimant was employed by the first respondent.

Claims and Issues

5. The respondents admit that the claimant is disabled by reason of his mental health impairments, but do not accept that his hearing loss amounts to a disability. In both cases the respondents dispute that they had knowledge of such disabilities or alleged disabilities.

6. The respondents resist all claims and further argue that a number of the claims were presented out of time, essentially those where the alleged discrimination was prior to 18 April 2020. They contend that there was no continuing act or course of conduct in that they were discrete incidents and carried out by different individuals, and further that it would not be just and equitable to extend time.

7. At previous case management hearings, a List of Issues was agreed between the parties and considered at the outset of this hearing. It was agreed that such list would be the issues which the Tribunal would decide. These are set out below:

Disability

1. The respondent accepts that the claimant was at all relevant times disabled with a mental health disability.

2. The claimant contends that he was also disabled with a hearing impairment. This is not admitted by the respondent. This is referred to as "the hearing impairment disability issue" in this list.

3. It was agreed that the hearing impairment disability issue will be determined at the final hearing.

Knowledge of disability

4. An employer has a defence to complaints under both section 15 and section 20 if it can show that it did not know, and could not reasonably be expected to know, that the employee had a disability.

5. The questions for the Tribunal are, therefore:

    5.1. Can the respondent prove that it did not know that the claimant had a mental health disability? Can the respondent prove that it could not reasonably have been expected to know that he had that disability?

    5.2. Can the respondent prove that it did not know that the claimant had a hearing impairment disability? Can the respondent prove that it could not reasonably have been expected to know that he had that disability?

6. Which set of questions the Tribunal will have to ask will depend, of course, on which disability is relevant to the particular complaint at hand.

Time limit

7. The respondent accepts that, for discriminatory acts or failures allegedly done on or after 18 April 2020, the claim was presented within the statutory time limit.

8. For anything allegedly done before 18 April 2020, the Tribunal will need to determine the following issues:

    8.1. Was the act or failure part of an act extending over a period which ended on or after 18 April 2020?

    8.2. If not, was the claim presented within such extended period as the Tribunal considers just and equitable?

9. It was agreed that the time limit issues should be determined at the final hearing.

Duty to make adjustments – auxiliary aid

10. The claimant says that, without the auxiliary aid of a workplace computer, he was placed at a substantial disadvantage in comparison with persons who did not have a mental health disability.

11. The disadvantage is said to have arisen in two ways:

    11.1. First, there were some tasks, such as preparing incident reports and contributing to the appraisal process, that could only be done on workplace computers. It was stressful for any employee to do the claimant's role without being able to do these tasks. Because of his mental health disability, the claimant was less able than a non-disabled person to cope with that stress.

    11.2. Second, the unavailability of a workplace computer meant that the claimant had to use his personal computer at home. The stress of taking his work home with him affected him worse than it would affect a person without a mental health disability.

12. The claimant's case is that this duty was breached between June and October 2019.

13. The issues for the Tribunal to determine here (besides time limits and knowledge of disability) are:

    13.1. Was the claimant placed at the alleged disadvantage without the auxiliary aid?

    13.2. Was the disadvantage more than minor or trivial?

    13.3. Can the respondent prove that it did not know that the claimant was likely to be placed at a substantial disadvantage?

    13.4. Can the respondent prove that it could not reasonably have been expected to know?

13.5. Was it reasonable for the respondent to have to provide that auxiliary aid?

Duty to make adjustments – provisions criteria and practices

PCP1 – bullying

14. The claimant says that the respondent, and particularly Mr Ashby and Mr Flanagan, had a provision, criterion or practice (PCP1) of bullying an employee by making baseless allegations and by accusing him of being loud.

    (There is likely to be an issue about whether or not this was sufficiently capable of replication as to amount to a PCP at all.)

15. It is his case that bullying put him at a substantial disadvantage in comparison with non-disabled persons, as his mental health disability made it more difficult for him to cope with being bullied than it would be for them.

16. The adjustment sought here is for the respondent to take the step of appointing an independent investigator to look into the bullying. The claimant contends that it was reasonable for the respondent to have to take that step from March 2019 onwards.

PCP2 – responding to e-mails about complaints and investigations

17. By PCP2, the respondent required an employee to respond to e-mails about complaints and investigations concerning them in addition to the usual responsibilities of their role.

18. The claimant says that PCP2 put him at a substantial disadvantage when compared to persons without a mental health disability, in that it gave him extra work to do, which caused particular stress because he had to do it at the end of his working day.

19. As an adjustment, the claimant says that the respondent should have taken the step of giving him ringfenced time during working hours to respond to these e-mails.

PCP3 – hospital appointment

20. PCP3 was applied to the claimant once. It was a practice of requiring an employee who had a medical appointment to remain at work until a short time before the appointment was due to start.

21. The claimant says that PCP3 put him at a substantial disadvantage in May 2019 when Mr Ashby kept him at work until 12.30 for an appointment in the afternoon. The stress of having to rush to his appointment was harder for him to bear than for a person without a mental health disability.

22. This disadvantage could have been avoided had the respondent taken the step of releasing the claimant earlier.

PCP4 – lengthy conduct investigations

23. It is the claimant's case that the respondent had a PCP of taking several months investigate the conduct of its employees (PCP4).

24. The claimant contends that, from June 2019, PCP4 put him at a substantial disadvantage in comparison with non-disabled persons. Again, the alleged disadvantage stems from his mental health disability. Living and working under the shadow of a conduct investigation was harder for him than for a person who did not have a mental health disability.

25. His case is that the respondent should have taken the following steps to avoid that disadvantage:

    25.1. Providing the claimant with the statements of witnesses to the investigation, so he was not "kept in the dark" for a long period;

    25.2. Concluding the investigation more quickly. (This is a step that should allegedly have been taken between June and November 2019. The claimant accepts that, once he went on sick leave, it was not reasonable for the respondent to have to conclude the investigation. Indeed, it is his positive case that the respondent should have ceased to communicate with him about the investigation until he was well enough. See PCP6.)

PCP5 – investigation meetings

26. The next PCP (PCP5) consisted of the respondent requiring employees to attend a meeting to investigate their alleged conduct without advance information as to what that conduct allegedly was. (The claimant described this as "going in blind".)

27. PCP5 caused him "a lot of panic" at two meetings in October 2019 and thereby put him at a disadvantage when compared to non-disabled employees whose mental health made them less inclined to panic.

28. The claimant says that, as an adjustment, the respondent should have taken the step of providing the claimant with information as to what aspects of his conduct were being investigated.

PCP6 – sick leave – communication about conduct investigation

29. As this summary has already foreshadowed, the claimant complains separately that he was placed at a substantial disadvantage by PCP6, which was communicating with an employee about an ongoing investigation into that employee's conduct whilst that employee was on sick leave.

30. The disadvantage is, again, in comparison with a person who did not have a mental health disability. It arises in two ways:

    30.1. Non-disabled people were less likely to be on sick leave than the claimant; and

    30.2. The stress of dealing with such communications whilst on sick leave was harder for the claimant than it was for a non-disabled person.

31. The respondent should, in the claimant's submission, have taken the step of pausing the conduct investigation until he was well enough to communicate about it.

PCP7 – sickness absence meeting (Stage 1)

32. The respondent's sickness absence policy provided (PCP7) that, where an employee had been absent on sick leave for a given period of time, there should be Stage 1 meeting at which a manager should consider whether or not to give a warning to that employee.

33. The claimant says that his mental health disability meant that he could not attend the Stage 1 meeting in January 2020, and he was thus at a substantial disadvantage in comparison with non-disabled persons, who would have been better able to attend and explain why formal action should not be taken against them.

34. By way of adjustment, it is said that the respondent should have taken the following steps:

    34.1. Postponing the meeting; and/or

    34.2. Holding the meeting on a video platform such as Skype.

PCP8 – premature commencement of Stage 2

35. The next stage of the procedure was Stage 2. The claimant says that PCP8 involved commencing the Stage 2 process before the time period for appealing against the Stage 1 warning had expired.

36. His case on substantial disadvantage is once again based on the effect of his mental health disability on his ability to cope with stress. This time it was the stress of facing an escalated procedure in the knowledge that he had not been able to appeal the earlier stage.

37. As an adjustment, the respondent should have delayed commencing Stage 2 until the claimant had been given a proper opportunity to appeal.

PCP9 – Stage 2 meeting

38. PCP9 was holding a lengthy Stage 2 meeting by telephone. In the claimant's case, this took place in May 2020.

39. According to the claimant, PCP9 put the claimant at a substantial disadvantage when compared to non-disabled persons, in that:

    39.1. It was harder for him to follow what people were saying on the telephone because of his hearing impairment disability; and

    39.2. The claimant's mental health disability made him less able than others to manage the stress of a long telephone call.

40. The claimant contends that the following steps should have been taken to avoid these disadvantages:

    40.1. Holding the meeting face-to-face; and

    40.2. Taking breaks during the meeting.

PCP10 – Manual duties

41. The requirements (PCP10) of an employee in the claimant's role included driving a vehicle and lifting food parcels.

42. Here is how the claimant says PCP10 put him at a substantial disadvantage in comparison with persons who did not have a mental health disability:

    42.1. He was taking medication for his mental health which made it harder for him to drive safely; and

    42.2. It was harder for him than for others to bear the stress of having to carry out these duties when physically unfit to do them.

43. Both of these disadvantages allegedly occurred when the claimant returned to work in May 2020.

44. As an adjustment, the claimant says that the respondent should have taken the following steps:

    44.1. Giving him office work to do instead;

    44.2. Providing someone to do the driving and lifting;

    44.3. Allowing the claimant to shadow a colleague so as to reduce or avoid the driving and lifting.

<u>Duty to make adjustments – PCPs - issues</u>

45. The Tribunal will need to examine each of the steps that the respondent should allegedly have taken under the headings of PCPs 1 to 10. For each step, the respondent will need to ask itself these questions:

    45.1. Did the relevant PCP exist?

    45.2. Did it put the claimant to the alleged disadvantage?

45.3. Was the disadvantage more than minor or trivial?

45.4. Can the respondent show that it did not know that the claimant was likely to be put at a substantial disadvantage?

45.5. Can the respondent show that it could not reasonably have been expected to know?

45.6. Was it reasonable for the respondent to have to take the step?

45.7. Was that step taken?

Discrimination arising from disability

Original claim

46. The claimant alleges that the respondent treated him unfavourably by:

46.1. Giving him a Stage 2 absence warning in May 2020. The reason for the warning was that he had been absent from work since November 2019. That absence had arisen in consequence of his mental health disability.

46.2. Reducing the claimant's accrued annual leave on his return to work in May 2020. This, the claimant says, was also because he had been absent from work since November 2019, which had arisen in consequence of the same disability.

Amended claim

47. The claimant was given permission to amend his claim to add a further allegation of discrimination arising from disability.

48. The respondent is said to have treated the claimant unfavourably in February 2021 by commencing a disciplinary process against him. The reason for disciplining him was his conduct in refusing to cooperate with a third occupational health referral. He says that his refusal arose in consequence of his mental health disability in that he could not bear the stress of a third occupational health referral. To provide some context for how stressful the third referral would be, the claimant wishes to explain the disappointment he experienced following the first two referrals, which, he says, resulted in the occupational health doctors' recommendations not being followed.

Issues

49. In respect of each allegation of unfavourable treatment, the Tribunal must determine the following issues:

49.1. Did the respondent treat the claimant in the way that is alleged?

49.2. Was that treatment unfavourable?

49.3. Was it for the alleged reason?

49.4. Did that reason arise in consequence of the claimant's mental health disability in the way that is alleged?

49.5. Was the treatment a means of achieving a legitimate aim (to be clarified by the respondent)?

49.6. Was the treatment proportionate?

Evidence and Submissions

8. The claimant gave evidence on his own behalf. The first and second respondents provided evidence from 13 witnesses, being:

- Peter Hughes – Interchange Manager / Senior Probation Officer / Absence Review Meetings (Stage 1 and 2) Manager.
- Rebecca Flynn – Interchange Manager / Head of Performance and Quality / Investigating Officer for complaints raised by Nicola Pugh and Jane Leigh.
- Stephen Cope – Community Payback Operational Manager / Community Payback Operations Manager / Stage 1 Absence Review Appeal Manager.
- Victoria Travis – Interchange Manager / Senior Probation Officer / Sue Lam's Grievance Investigator.
- Carla Jones – Strategic Through the Gate Manager / Head of Production Delivery Unit / Sue Lam's Grievance Investigator.
- David Flanagan – Supervisor / Colleague.
- Gail Churchill – Community Director / Assistant Chief Officer, Head of Bolton Probation Delivery Unit / Claimant's Grievance Investigator.
- Jade Bolland – Employment Relations Specialist, HR / Provided HR advise to various individuals in respect of the claimant.
- Karen Taylor – Community Director / Senior Policy Manager / Stage 2 Absence Review Appeal Manager.
- Jane Leigh – Unpaid Work Manager / Unpaid Work Operational Manager / Claimant's Line Manager.
- Maurice Ashby – CP Manager / Operations Manager / Claimant's Line Manager.

- Nicola Pugh – Community Director / Head of Unpaid Work / Claimant's Director / Maurice Ashby's Line Manager.

- Samantha Stapleton – Interchange Manager / Senior Probation Officer / Sue Lam's Grievance Investigator.

9. We were also provided with written and oral submissions from both Ms Crew and Mr Cowley, for which we were grateful. Each of the witnesses gave evidence by way of written witness statements which we took as read and were cross examined upon. The claimant's witness statement ran to some 45 pages.

10. We were provided with an agreed bundle comprising some 2,497 pages.

11. It has not been possible within these proceedings, nor appropriate, to make findings in relation to all of the issues upon which we have heard evidence. We have confined our findings of fact to those issues which are relevant to the issues which we need to decide in order to determine the case or where we consider it is necessary for the chronology of relevant events. We have made our findings upon the balance of probabilities, that is what is more likely than not to have happened, having heard the oral evidence of witnesses and considering documentary evidence.

Other Preliminary Issues

Additional Witness Statements

12. The respondents had sought to bring additional witness evidence to the Tribunal hearing and the relevant witness statements were provided to the claimant a few days before the commencement of the hearing. These were four additional statements. Having heard representations from the claimant and Ms Crew, that witness evidence was admitted to the proceedings by consent. This was on the basis that the claimant was provided with a list as to the order of the witnesses and when they were likely to be giving evidence. As the Tribunal would be spending the first and half of the second day reading the papers in this matter, including relevant documents in the bundle the claimant was content to consider those witnesses statements during that time.

13. An application was also made for Ms J Bolland to give evidence by video hearing. Having heard from Ms Crew as to the difficulties relating to childcare and having considered both the overriding objective and any prejudice that would be caused, the Tribunal agreed to Ms Bolland appearing by way of video.

14. Adjustments were made both for the claimant and also Ms Pugh, who were provided with regular breaks and encouraged to ask if they required more. The Tribunal finished early on some days as the claimant appeared tired.

15. The claimant was also uncomfortable in being in the same room as Mr Ashby, Mr Flanagan, Ms Pugh and Ms Leigh other than when they were providing their evidence. We discussed the need for proceedings to be held publicly and the principle of open justice, however Ms Crew confirmed that each of those witnesses was happy to wait in the waiting room until such time as they were required to give evidence. This was put in place throughout the hearing.

Findings of Fact

16. On 8 February 2010 the Claimant commenced employment with the National Probation Service as a Supervisor. His role was to supervise those carrying out their sentences in the community.

17. On 26 June 2014 his employment transferred to the first respondent.

The Respondent's policies

18. For the purposes of this claim the relevant policies which applied to the claimant were those of the first respondent. These included a grievance policy, a sickness absence policy and a disciplinary policy. The relevant extracts from those policies are quoted at the relevant parts of this judgment.

The claimant's medical position

19. The claimant has a diagnosis of anxiety and depression. He has medication for those conditions. In March 2019, the first respondent's Occupational Health practitioner ("OHP") confirmed that the claimant was likely to be covered by the Equality Act 2010 in respect of these conditions.

20. In January 1998, the claimant was diagnosed with a hearing issue. A report obtained at that time described it as moderate inner ear deafness on both sides. The claimant has no other medical evidence concerning his hearing issues until a report dated 3 May 2022 was produced when he undertook a hearing test at Specsavers. That reported: "His audiogram shows normal hearing in his low and mid frequencies in his right ear which drops off to moderate high frequency hearing loss. His left ear shows normal hearing in his low frequencies and then a moderate hearing loss in his mid frequencies, and a severe loss in his high frequencies. High frequency loss tends to affect the clarity of speech rather than the volume of speech and Mr Crowley's right ear is stronger than his left ear."

21. From May 2022 the claimant had the benefit of a hearing aid.

22. The claimant sometimes spoke with a loud voice during his employment. His impact statement confirmed that at times (but he did not identify at what stage) he found it more difficult to follow conversations and dialogue at home and with friends. He says he began to use the phone less and watched facial expressions and found group conversations more difficult to follow.

Allegations of bullying

23. In 2016 Mr Ashby was appointed as the claimant's line manager. This caused the claimant concerns as he alleged that he had been previously bullied by Mr Ashby and a colleague Mr Flanaghan and that they had made an unsubstantiated allegation against him when they had worked together in 2010.

24. During the period 2016 to 2018, the claimant was subjected to homophobic graffiti on work vans and on walls. He believed that it was Mr Flanaghan who was responsible for this and made complaints. This was not correct. We were impressed with Mr Flanaghan's evidence and accept that he was telling the truth on this issue. It was more likely that it was the 'persons on probation' ("POPs") who were

responsible. Further, we do not accept that Mr Flanaghan bullied the claimant as he alleges.

25. The first respondent decided to move both individuals and Mr Flanaghan was moved to another geographical area and the claimant was moved to another project. Neither were happy with their moves.

Claimant's hearing issue

26. The complaints which the claimant brought included allegations that both Mr Ashby and Mr Flanaghan had accused him of speaking loudly and had mocked him about this when he was working with them.

27. The claimant provided a copy of the report dated January 1998 to Mr Ashby in respect of his hearing as an explanation as to why he was speaking loudly. This report was not passed on to HR. This was not a deliberate act but rather Mr Ashby's very lackadaisical attitude to management. This was evidenced later by his poor approach to his responsibilities to carry out appraisals upon the claimant and others and his use of a form for the claimant's referral to OH which he had used previously in respect of another member of staff and had left in personal details of that person. His evidence to the Tribunal was equally vague and he generally showed a lack of interest in his responsibilities.

Claimant's mental health

28. From 2016, the claimant's health deteriorated and from 2018 he considered that he was being monitored by Mr Ashby and that management were covertly monitoring him and recording all his activities. He also considered that Mr Ashby's manager Nicola Pugh was being copied in on correspondence. None of this was happening.

29. In December 2019, Mr Ashby put a number of envelopes on an office table and told the staff including the claimant to read the appraisals he had completed if they wanted to, to sign them and give him them back. The appraisal form was a mix of appraisals of previous years and the claimant was given an amber score. He considered that Mr Ashby had done this deliberately to confuse him, re-enforced by the fact that Mr Ashby would not provide him with the appraisal form in electronic form to complete when he requested it. He felt that he needed all documentation electronically in order to protect himself.

Wellbeing questionnaire

30. By this stage and following the correspondence from the claimant concerning his appraisals, the first respondent had concerns about the claimant's mental health and asked for his consent to refer him to see OH which he provided. Regrettably and in line with Mr Ashby's approach, the referral document which he completed had poor attention to detail and was lacking in care. The form was not discussed with the claimant before the appointment. That was not required by the first respondent's policy or normal practice.

31. The first respondent's Sickness Absence Policy states that a manager will tell an employee that they are being referred to OH and to expect confirmation of an

appointment. Further that the referral form will be completed by the manager. It states the sort of information which the OH Referral form should include.

32. Separate from the referral form, the first respondent had an internal system for assessing the wellbeing of employees. The Wellbeing Questionnaire was a collaborative process between an employee and a manager, whereby part A and part B were completed by the employee and part C would be completed as part of a discussion with the manager.

33. There was no requirement within the Sickness Absence Policy that the completion and discussion of a Wellbeing Questionnaire take place before an OH appointment or that the completed document be provided to the OHP. The claimant was sent Wellbeing Questionnaire on 28 January 2019 but failed to complete it.

34. The OH report 15 March 2019 stated that the claimant was likely to be disabled by reason of his stress/anxiety condition and protected under the Equality Act 2010. It recommended that a stress risk assessment should be completed by someone other than his direct line manager, Mr Ashby. It noted the claimant's medication.

35. The first respondent's stress risk assessment was part of the Wellbeing Questionnaire. On 12 April 2019 the claimant was emailed a further copy to complete parts A and B. Ms Monteith, another manager who had been asked to carry out the assessment, reminded the claimant about it a few days later and reported to HR that he was questioning what the assessment was for as he wasn't stressed because of his job, but because of Mr Ashby's and Mr Flanaghan's bullying. He said he intended to bring a grievance when he had a response to a Subject Access Request and that this was the only reason he was stressed and depressed in the workplace. He said that his wellbeing had improved since the colleague has been removed.

36. Ms Monteith wrote to the claimant on 19 July 2019 to acknowledge that he had said that his stress was related to his colleagues and that now this was no longer the case, the current ongoing issues would be considered when he raised his grievance. Further that the respondent understood that in respect of his health issues, nothing further was required. The claimant did not provide his completed Questionnaire until July 2019. It covered a wide range of issues including the allegations of bullying and Ms Monteith took advise from HR at that stage.

37. The claimant's response on 30 July was lengthy and reiterated his complaints about bullying. It said that the OHP had suggested that they meet to discuss the outcomes of events and formally record his concerns but that he did not have a mental health related issue as suggested by his manager. He again referred to his intention to lodge a grievance, but he was waiting for his SAR to be completed.

38. Ms Pugh, with HR advice, decided that the claimant's concerns raised to date should be treated as a grievance and on 8 August she wrote to the claimant to invite him to an informal stage one grievance meeting on 21 August to discuss all issues. On 14 August the claimant indicated he was happy to meet informally once someone had responded to his issues in writing. He requested a short agenda. Ms Pugh took it that he intended to attend the meeting and said that he wanted to meet to discuss the numerous lengthy emails sent over recent weeks and months. She commented

that it was difficult to decipher from the volume of emails what his concerns and formal complaints were. There was therefore an open agenda and she wished to discuss recent relevant issues as historical events would not be able to be investigated.

39. The claimant declined to attend that meeting saying that he would only meet when someone had responded to his issues in writing. The claimant did speak to Ms Pugh that afternoon and she made notes which she sent to the claimant, which he amended. A number of issues were touched upon including the SAR, the claimant's forthcoming grievance and the status of the investigation into the incident on 12 June.

Hospital Appointment

40. On 2 May the claimant spoke to Mr Ashby to ask if he could leave work at no later than 11.00am on 10 May to get ready to attend a hospital appointment at 2.30pm. It was for a short out-patient procedure. The claimant wanted to go home, have a shower, change his clothes and get a train to the hospital. He considered that he needed to leave by 11.00am so that he was not rushed or anxious.

41. Mr Ashby could not release him at that time and told him the earliest he would be able to go was 12.00 noon. The claimant reiterated his concerns by an email of 5 May 2019.

42. The claimant had the option of taking a day off as sick leave but did not take that option, rather attending work on 10 May.

43. On that day the claimant was unable to leave work until 12.30pm. As such he had to rush for his appointment. He did attend in time but was anxious and stressed when he arrived.

Incident in reception 12 June 2019

44. On 12 June an incident took place in the reception area of the Prescott centre where probation supervisors met with POPs to take them out. The claimant and one of his colleagues Mr Alan Crist both smelt cannabis from a POP. They asked Ms Lam, another supervisor, who agreed she could smell it but was unclear who it was coming from. Mr Crist asked a manager to attend and she and Ms Lam met with the POP in a private room. Neither could smell cannabis and allowed the POP to return to the waiting area. Following a disagreement about this in the reception with Mr Crist and the claimant, Ms Cunningham and Ms Lam became upset. Mr Hughes the manager was called and Ms Lam went home.

45. The incident was in view of a number of POPs, the reception staff and others.

46. Mr Ashby initially spoke to the claimant and Mr Crist to find out what had happened, but the first respondent decided that the matter needed to be formally investigated and on 13 June Ms Carla Jones was asked to carry this out. On 4 July, Ms Lam submitted a formal grievance against the claimant and Mr Crist which was wider than just the events of 12 June and after some discussions with the union, it was agreed in August 2019 that Ms Jones' investigation would be for the purposes of the grievance and any potential disciplinary issues.

47. Ms Jones requested that central HR send out invitations to attend investigatory meetings to the claimant and Mr Crist. Regrettably those invitations which invited both to meetings on 3 October were not sent. This was another in a long line of errors within the HR team. The invitation was sent on 3 October so neither the claimant nor Mr Crist had any notice of the meeting.

Sue Lam grievance investigation

48. The claimant would not attend the investigation meeting with Ms Jones that day as he felt it would be unfair as he had no notice of the meeting. He did however have a conversation with her in which he was agitated and stressed. He had understood that the issue was not being pursued having not heard anything about it since a conversation with Ms Pugh in August. This is supported by his email of 20 July, where he says the 'entire incident seems to have disappeared' after he asked for the CCTV and on 30 September the claimant's evidence in his witness statement was that 'unbeknown to him at the time' Ms Jones was appointed to 'reinvestigate'.

49. Throughout the investigation, Ms Jones referred to Ms Pugh to seek advice. Ms Pugh was appointed to consider Ms Lam's grievance. It was in our view more than just keeping her informed, as suggested by Ms Jones, and her contact was inappropriate for someone who was carrying out an independent investigation. During those interactions Ms Jones inaccurately advised Ms Pugh that the claimant was refusing to engage. That was not correct. We do not however consider there was any form of conspiracy between Ms Pugh and Ms Jones or indeed amongst any employees of the respondent as alleged by the claimant. Ms Jones was inexperienced, and we consider seeking to create a good impression with Ms Pugh, but it was not with the intention of disadvantaging the claimant.

50. The claimant became increasingly concerned as to what was being investigated. His correspondence to Ms Jones and Ms Pugh between 3 and 31 October demonstrates that he was excessively agitated and worried about what the investigation concerned. On 8 October he sent a list of eleven questions seeking more information about the incidents which were being investigated. He asked for the information before they met. Some of these were basic and straight forward questions such as who made the complaint and what the claimant was alleged to have done wrong, asking for an explanation for the delay and seeking a copy of the CCTV of the incident. All of these issues could have been easily answered and would not have prejudiced the investigation. Ms Jones discussed the issue with Ms Pugh on 24 October and was advised that the HR policies did not require any further information to be given in advance and the claimant was therefore not provided with details of the grievance or the nature of his conduct which was being investigated.

51. On 16 October Ms Pugh bumped into the claimant and as she had written to him that day in response to further correspondence about his bullying complaints against Mr Ashby and Mr Flanaghan to tell him that if he wished to raise his own grievances then he must do so formally, she mentioned that to him. She found his reaction defensive, and she felt intimidated by him. In that letter she reiterated the mistaken information that the claimant has refused to engage in the investigation.

52. The claimant continued to press for information and advised Ms Pugh on 24 and 28 October that he was having to attend an investigation meeting which he would be ill prepared for, as he has not been told what the meeting was about and

what Ms Jones wanted to discuss with him. By that stage the only information he has been told about is as set out in letter of 23 October 2019 which repeated the same information as the letter send on 3 October. That stated: "I am writing to inform you that I have been appointed as the investigation officer in relation to an incident that occurred on 12 June 2019 at Prescott CRC office. As a result of this incident a formal grievance has been received and within this grievance you are named as the employee involved". Further that if he wished to rely upon any written material or documents he may bring them to the meeting.

53. The claimant advised Ms Pugh that he wanted the meeting to be productive, but that he was walking blindly into a meeting with no knowledge of what to expect. He also pointed out in the correspondence that the incident which he had been told the meeting was about happened some 5 months ago. On 29 October Ms Jones advised the claimant by email that under the grievance policy no information prior to the interview would be disclosed and the purpose of the interview was to fact find and he would be provided with an opportunity to respond to the points in question during the interview. She stated that the interview related to a grievance rather than a single incident.

Investigation meeting 31 October 2019

54. The claimant met with Ms Jones on 31 October to discuss Sue Lam's grievance. That grievance dealt with a number of issues involving the claimant and Mr Crist from 5 February 2019 through to 12 June 2019. There are no minutes of that meeting or statements from the claimant or the other individuals she met with.

55. Ms Jones prepared her report and Mr Crist's and the claimant's responses were noted on Ms Lam's grievance document. She sent a copy of that report to Ms Pugh and HR on 4 November 2019.

56. It is clear from that report that Ms Jones was carrying out a disciplinary investigation in addition to investigating the grievance. That report went further than the first respondent's Disciplinary Policy in that in addition to fact finding, she concluded that the threshold for disciplinary action for gross misconduct was met in respect of the claimant and Mr Crist. The claimant was notified of the outcome by letter of 21 November. A copy of the report was not provided, but the claimant was told that he would be contacted about the next steps under the first respondent's conduct policy.

Sickness Absence Reviews

57. On 11 November the claimant's long-term absence commenced. His initial fit note referred to stress and he was signed off for 4 weeks. On 6 December he was invited to a Long Term Absence Review meeting by Mr Peter Hughes to take place on 16 December to discuss his absence. That meeting did not proceed as the claimant advised that his GP had told him he needed to get plenty of rest and to avoid unnecessary stressful situations. He attached information about his medical situation.

58. Mr Hughes having tried unsuccessfully to contact the claimant by phone, wrote to him again personally on 12 December suggesting a meeting in a couple of weeks' time. He said the meeting could proceed without him and if so, he could send

more representations. It referred to arranging for the claimant to be sent a Wellbeing Questionnaire to complete and that he would wish to discuss how to assist him in returning to work. The claimant was not sent the questionnaire at that stage.

Stage 1 Absence Review Meeting

59. The claimant did not respond and on 23 December a further letter was sent by the first respondent's HR department inviting the claimant to another meeting but mistakenly inserting the original meeting date of 16 December, a date which was earlier than the letter.

60. On 31 December another letter was sent to the claimant apologising for the error and correcting the date of the meeting to 14 January.

61. On 3 January a further letter was sent enclosing a paper copy of the Wellbeing Questionnaire.

62. On 6 January 2020, the claimant wrote saying he could not attend a meeting and asked to be left alone. He explained the various medical issues he was having and enclosed photographs of himself showing he was undergoing tests and monitoring. He said that he considered he was being bombarded with letters by the first respondent (including telling him about vacancies), that he was on medication which caused him to be drowsy and fuzzy headed and that he couldn't travel. Further that he was unlikely to return before 31 January and that he would complete the Wellbeing Questionnaire when once he was well enough to return to work. He also asked for an electronic copy of the questionnaire as he needed more room to express his comments.

63. On 31 January Mr Hughes wrote to the claimant again to advise him that he would conduct the meeting in his absence in accordance with the first respondent's policies. He confirmed he would take the information provided by the claimant into consideration. At this stage (pre Covid) it was not the practice, nor did it occur to either the claimant or Mr Hughes to hold the meeting via video link (Sykpe or Teams).

64. On 14 January the claimant advised that he would not be attending and raised his general concerns about attending a meeting. He referred to having received the electronic Wellbeing form but said that he did not feel he should have to complete it while he was off sick and that it should be completed in work time. He referred to an earlier one which he had provided. He accepted the meeting was proceeding without him and asked for his comments to be taken in to account.

65. A meeting did not take place as such, but Mr Hughes considered the information which the claimant had provided. He did not make any further enquiries of HR or ask for any further information or documents from them and nor did HR send him anything. It does appear from Mr Hughes' notes that he had some knowledge of the OH report dated 15 March 2019 and we can therefore only conclude that this came from the claimant.

66. The first respondent's Long Term Absence Procedure had a staged procedure with trigger points which could ultimately result in an employee's dismissal. The meetings took place at one month (Stage 1; Continued Absence at

Two Months (Stage 2); Continued Absence at Five Months (Stage 3) and a Stage 4 meeting where there had been continued absence at nine months. The outcome of each of the initial three stages was the issuing of an Advisory notice. The notice could be appealed. The only situation in which the Advisory notice may not be applied was if there were mutually agreed adjustments following OH advice, which had not been implemented and which were expected to have a positive impact upon the employee's attendance at work.

67. Mr Hughes' evidence was that the meetings had to take place and it was only the outcome which was in his discretion which was extremely limited and it was only in the most exceptional circumstances that the notice would not be given. In the evidence of Ms Leigh she clearly saw the policy as a 'disciplinary policy' which led to dismissal if an employee was absent for the periods of time in the policy.

68. As such on 28 January 2020 a Stage 1 Absence Advisory notice was issued to the claimant. Mr Hughes sent his notes and the outcome within a day or so of the meeting to Ms Bolland to review. He uploaded the notes to the central HR hub and expected these to be sent to the claimant with the letter. The letter containing the notice was not seen by Mr Hughes before it was sent by the central HR hub. The letter was full of inaccuracies. It was a standard letter and had not been adapted for the claimant not being present, referring for instance to Mr Hughes having "listened very carefully to what was said at the meeting". It did not have the meeting notes attached when it said that it did. It was indicative of the sloppy HR processes.

69. Based upon the general poor administration of the central HR hub, we accept that the claimant did not receive the notes until 4 February 2020 which was when Mr Hughes personally resent them by email. The claimant said he did not receive notes until 9 March 2020 but we find that he had them on 4 February.

70. On 3 February 2020 the claimant submitted an appeal against the Stage 1 Absence Advisory notice.. He did not at that stage have the notes of the meeting. This email also attached the original wellbeing questionnaire which he had competed in July 2019 and he said he would not complete another stress health questionnaire because the last one was not acted upon.

71. On 4 February 2020, as the claimant had reached the Stage 2 absence trigger, Mr Hughes instructed the central HR hub to send a Stage 2 Absence Review meeting invitation to the claimant. At that time Mr Hughes did not know that the claimant had appealed against his Stage 1 notice. The invitation was sent on 4 February.

72. The mistake was quickly noticed and rectified and on the same day at 14:12, the claimant was notified to ignore the invitation.

73. A Stage 1 Absence Review Appeal meeting took place with Stephen Cope on 20 February in the claimant's absence, and the notice was upheld. The claimant was notified by letter dated 25 February 2020.

74. In April 2020 the Claimant's manager changed from Maurice Ashby to Jane Leigh.

Stage 2 Absence Review Meeting

75. On 11 May 2020 the Stage 2 Absence Review Meeting took place having been rescheduled on a number of occasions. The meeting took place by Skype audio call. There was an attempt to set up a video call but this was not successful and it was agreed that it be conducted by conference call.

76. The call was between 2 and 3 hours long. For the first hour and a half the claimant and his union representative revisited the Stage 1 notice. Mr Hughes lost track of the time as the discussions were intense and all participants were concentrating on the issues. As such towards the end of the meeting, the claimant's TU representative suggested they should break. It was agreed that the meeting would be resumed on 13 May. Neither the claimant nor his representative at any stage mentioned that the length of the meeting was causing the claimant any particular difficulties, or that he had any issues hearing what was being said.

77. The meeting was reconvened on 13 May 2020 and a Stage 2 Absence Advisory notice issued. The claimant's union representative alerted Mr Hughes to the claimant's disability and asked if the process could be paused until the claimant had been referred to OH. She considered that would allow Mr Hughes to make a more informed decision on the Stage 2 notice. Mr Hughes declined. He considered that he had an OH report at that time. The purpose of this meeting was to issue a further warning. He made the decision having discussed it with Ms Bolland of HR. Mr Hughes was asked in evidence if the claimant's disability was taken into account, and he confirmed that he had, in that the claimant had already gone well past the normal trigger points, and a Stage 2 warning had to be issued under the policy.

78. The notes of the meeting were not received by the claimant until 25 June 2020.

79. On 16 May 2020 the claimant appealed against the Stage 2 notice. That appeal was not heard until 19 November 2020 because of various matters relating to the claimant's health, his union representative's availability and Ms Taylor, the appeal officer's availability. On 3 December 2020 the claimant was advised that the Stage 2 Absence Advisory notice had been revoked by Karen Taylor. Her reasons were that she considered his mental health hadn't been taken into consideration in that the claimant wasn't familiar with Skype, and the meeting was long without any breaks. She felt that these had combined to not allow the claimant to fully get his points across.

80. On 13 May 2020 the claimant met with his new manager Jane Leigh to discuss his return to work as his sick note was expiring. This was at the height of the Covid pandemic and the first respondent's employees were carrying out voluntary work distributing food in the local community. A three week phased return was agreed where the claimant would be working a couple of days each week. He agreed he would also take his annual leave which had accrued during his absence during this period.

81. On 15 May the claimant returned to work and worked the morning only. Thereafter he worked on 20 May for 1 hour and the morning of 22 May. Thereafter he was on annual leave. The claimant's role involved carrying food boxes. He did not advise the first respondent that he was having any difficulty with this, or that he should not be driving as he was on medication. Whilst he was on two weeks annual leave, he advised Ms Leigh that he was coughing up blood and was unwell and on

19 May she placed him on directed sick leave under the first respondent's policy. Ms Leigh referred him to the OH department and the claimant remained on directed sick leave on full pay until December 2020.

82. On 13 July 2020 the claimant raised the grievance he had been referring to over the previous year.

83. On 28 July ACAS Early Conciliation Certificate was issued and an ET1 submitted on 30 July 2020.

84. On 3 September the claimant's grievance meeting took place with Gail Churchill and an outcome letter was issued on 25 September 2020. Other than one small issue, the grievance was not upheld. The claimant sought various outcomes, including clarification about the outstanding 2019 disciplinary issue, maintenance of his current line manager Jane Leigh and consideration of a return to the unpaid work project in St Helens.

85. The claimant was also referred to Occupational Health and assessments took place on 19 August and 30 September 2020. At the initial appointment, the claimant had provided the OHP with a completed risk assessment of 18 pages. The OHP considered that he did not have sufficient time at that appointment to assimilate all of the information and arranged a further appointment for 30 September 2020. He reported that the claimant had a history of a hiatus hernia and oesophagitis related to this, that there were concerns about a shadow on his lung but that the shadow had shrunk which was reassuring but that the claimant was still short of breath and experiencing palpitations, which the claimant put down to stress. He noted that the claimant had ongoing stresses concerning his appeal at work and a disciplinary issue which was outstanding and that he was still awaiting a meeting to discuss his wellbeing questionnaire. He noted that the claimant had stopped taking his antidepressant medication as it impaired his concentration when dealing with his appeal and ongoing grievance process. He considered that the claimant remained unfit for work and that resolution of the outstanding work issues with clear communication would probably reduce his stress levels and thereby his associated symptoms of anxiety.

86. In November 2020, the claimant was removed from directed sick leave.

87. In response to the grievance outcome and OH report, the first respondent decided to progress the disciplinary issues concerning the allegations by Sue Lam. These had already been investigated but following HR advice, inexplicably, Sue Stapleton was asked to reinvestigate them. The first respondent considered that the original investigation by Ms Jones wasn't an investigation under the disciplinary policy and therefore another investigation had to be carried out. Unsurprisingly, when the claimant was advised of this, he could not understand why he had to go through the process again when he had already met with Mr Ashby straight after the incident and then Ms Jones five months afterwards and now Ms Stapleton some 18 months afterwards. He made that position clear to Ms Stapleton when she asked to meet with him on 20 January 2021 and she finalised her report without any further input from him.

Conversations with Jane Leigh December 2020

88. On 2 December the claimant met with Ms Leigh in a return to work meeting. The meeting was conducted face to face and the claimant's union representative dialled in. The claimant continued to raise issues about his wellbeing assessments and matters contained within his grievance. He considered he was still being bullied. It was agreed that he would return to work on Wednesday 9 December and a discussion would take place to agree a phased return over four weeks. The wellbeing checklist would also be discussed and completed. During that meeting the claimant at times became agitated and raised his voice. He was aggressive towards Ms Leigh. He later apologised and advised that his hearing difficulties made him raise his voice. Mr Ashby who was in the next room texted Ms Leigh to check she was ok. Ms Leigh found the meeting difficult. The claimant's union represented confirmed directly to the claimant that his tone towards Ms Leigh was inappropriate and aggressive.

89. Following receipt of the minutes of the meeting, the claimant amended them and challenged much of what had been discussed. On 9 December the claimant spoke with Jane Leigh in a telephone call as arranged but did not return to work. He discussed his concerns about the minutes and again expressed his view that he was being bullied and treated unfairly. Again, his voice was raised and he became irate such that Ms Leigh had to tell him to stop shouting. He refused to complete the wellbeing form saying that Ms Leigh was trying to cover over the past. He said he wasn't taking his antidepressants as he wanted to be able to drive when he returned to work. He felt that he needed to return, or he would be sacked. Ms Leigh sought to allay his concerns but was unable to do so. Ms Leigh raised concerns about the claimant's conduct towards her to her manager.

90. Ms Leigh was concerned that the claimant was not fit to return to work and on 13 December 2020 the claimant was placed back on directed sick leave until further notice. He was asked to consent to seeing the OHP again.

91. Conversations took place between the claimant's union representative and Ms Pugh in which she was keen to persuade the claimant to return to see the OHP. She considered that another OH report needed to be obtained to try to move matters forward. Ms Pugh raised the claimant's conduct towards Ms Leigh and intimated that these were issues which could result in action against him. When the union represented reported this to the claimant, the claimant saw it as a threat and blackmail to make him attend the OHP. His union representative recommended seeing the OHP as a good way forward even if the claimant saw it as coercion. He expressed his concern at the claimant's fixation upon historic issues and was concerned about his mental state. The claimant refused to see the OHP again.

92. On 14 January, Nicola Pugh and Jane Leigh submitted grievances in relation to the claimant's behaviour. Ms Leigh's related to the claimant's conduct in the meetings of 2 December and call of 9 December 2020. Ms Pugh's was in respect of the claimant's conduct, which she considered was bullying, and inappropriate defamatory and offensive comments towards her. We do not find this was evidence of a conspiracy as alleged by the claimant. We have noted that both grievances were raised on the same day, but Ms Leigh had raised her complaints about the claimant's behaviour shortly after 2 December but had not pursued it at that stage as she tried to assist the claimant and to make progress in engaging with him. We consider that Ms Pugh added her grievance to that of Ms Leigh, having also tried to assist but in the process felt she had been subjected to unacceptable behaviour by the claimant.

93. Between February and April 2021, Rebecca Flynn undertook an investigation in light of receipt of Ms Pugh and Ms Leigh's grievances. She met with a number of individuals and obtained statements from them. She attempted to meet with the claimant, but he did not attend the arranged meeting and did not provide written representations. Ms Flynn provided her report to Ms Bolland and she concluded that the claimant's behaviour had breached the code of conduct. Although Ms Flynn was at pains in her evidence to stress that this was not a disciplinary investigation, it is described as such in the documents, and we cannot see what else it might be. Ms Flynn was later asked to attend a disciplinary hearing to present her report, the following year in February 2022.

94. On 11 January 2021, Ms Travis was asked to conduct a disciplinary hearing in respect of the original allegations from June 2012 investigated by Ms Jones and then Ms Stapleton. The claimant asked that the meeting take place in person, but a suitable place was not able to be identified because of travel issues and Covid. Other suggestions were made but having not heard back from the claimant, Ms Travis conducted the disciplinary hearing on 16 March without him. She was part way through preparing the outcome letter when Ms Bolland advised her that the claimant was engaged in a preliminary hearing that day in respect of his Tribunal claim. She was advised to not proceed with the outcome letter. That letter was never issued and the disciplinary proceedings into this issue stalled.

The Law

Disability

95. The definition of disability is contained in the Equality Act 2010 at section 6. It states that: A person (P) has a disability if-(a) P has a physical or mental impairment; and(b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

96. Section 212(1) defines "substantial" as more than minor or trivial.

97. Schedule 1 of the Act provides supplementary provisions, including at paragraph 2(1)

The effect of an impairment is long term if-

a. It has lasted for 12 months

b. It is likely to last for at least 12 months, or

c. It is likely to last for the rest of the life of the person affected

And at 2(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is treated as continuing to have that effect if that effect is likely to recur.

98. Paragraph 5(1) of Schedule 1 states that an impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

a. Measures are being taken to treat it or correct it; and

b. but for the measures, the impairment would be likely to have that effect.

c. Further, Schedule 1 provides the power for guidance to be issued and that a Tribunal must take account of such guidance as it thinks relevant. The guidance which has been issued is the Guidance on Matters to be taken into account in determining questions relating to the Definition of Disability (2011). We have also had regard to the EHRC Code of Practice on Employment (2011) Appendix 1 in so far as it relates to the matters which we must decide.

99. The activities affected must be "normal". The Equality Act 2010 Guidance states at paragraph D3 that in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.

100. At paragraph C5 of the Guidance it states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'.

101. The Guidance further states at paragraph C2 that the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect.

102. We have also had regard to the decision of the EAT in Goodwin v Patent Office 1999 ICR 302 in which guidance was given as to the proper approach to adopt when applying the provisions relating to disability. Although this case related to the Disability Discrimination Act 1995, the approach is one which can be adopted in determining section 6 of the Equality Act 2010. The four questions which we must address sequentially are:

a. Did the claimant have a mental and/or physical impairment?

b. Did the impairment affect the claimant's ability to carry out normal day to day activities?

c. Was the adverse effect substantial?

d. Was the adverse effect long term?

Discrimination Arising from Disability

103. Section 15 of the EQA provides that

(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.

104. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

a. there must be unfavourable treatment

b. there must be something that arises in consequence of the claimant's disability

c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

105. If the employer can establish that it was unaware and could not reasonably have been expected to know that the claimant was disabled, the claim cannot succeed.

Duty to make reasonable adjustments

106. By section 20 of Equality Act 2010 the duty to make adjustments comprises three requirements.

107. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer'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.

108. The third requirement, by section 20(5) is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

109. A disadvantage is substantial if it is more than minor or trivial: section 212(1) Equality Act 2010.

110. Paragraph 6.28 of the EHRC Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;
(2) The practicability of the step;
(3) The financial and other costs of making the adjustment and the extent of any disruption caused;
(4) The extent of the employer's financial and other resources;
(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
(6) the type and size of employer.

111. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made.

Burden of proof

112. Section 136 of Equality Act 2010 applies to any proceedings relating to a contravention of Equality Act. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

113. We are reminded by the Supreme Court in Hewage v. Grampian Health Board [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Time Limits

114. The time limit for Equality Act claims appears in section 123 as follows:

> *"(1) 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…*
>
> *(2) …*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*

(b) failure to do something is to be treated as occurring when the person in question decided on it".

115. As confirmed by the Court of Appeal in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay. If it checks those factors against the list in Keeble, well and good; but he would not recommend taking it as the framework for its thinking. The British Coal Corporation v Keeble [1997] IRLR 36 sets out below, as well as other potentially relevant factors:

a. The extent to which the cogency of the evidence is likely to be affected by the delay.

b. The extent to which the party sued had co-operated with any requests for information.

c. The promptness with which the claimant acted once they knew of the possibility of taking action.

d. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

116. Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 states "no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised" and that whether to grant an extension "is not a question of either policy or law" but "of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it". For this reason, the exercise of the discretion is rarely subject to successful appeal.

Decision and Conclusions

104 We turn now to our conclusions. We have made additional findings of fact where not previously dealt with in this reserved judgment.

Disability

Hearing loss

105 The respondents deny that the claimant was at the material time disabled by reason of his hearing impediment. The allegation which the claimant relies upon in respect of this impairment is the conduct of his Stage 2 Absence review meeting in May 2020. There is no doubt that the claimant had some hearing loss at the time having previously worked in the printing industry. The burden is however upon the claimant to show that as at May 2020, his hearing impediment had a substantial long term adverse effect on his normal day to day activities.

106 The only medical evidence to which we have been referred is the report dated January 1998 which confirms that the claimant had some hearing issues but describes them as moderate inner ear deafness on both sides. The later report dated

3 May 2022 confirms more significant hearing loss, but that is after the events upon which the claimant relies. The claimant's evidence in his impact statement and witness statement describes some difficulties when in group or loud discussions. He provided no detail as to when these difficulties first arose but it was not until April 2021 that he started wearing a hearing aid.

107 It is apparent from the notes of meetings and accepted by the claimant that he did not raise any concerns about not being able to hear the conversations in any of the Skype or other meetings which he attended. The first respondent's managers did not gain any impression from the claimant's participation in these meetings that his hearing was an issue which was causing him difficulties at that time. In the OH reports of March 2019 and 2020 the OHP does not mention the claimant's hearing issue, we find because at that time it was a matter which was only causing him minor or trivial concern.

108 We do not find that the claimant has shown us that his hearing loss had a substantial adverse effect on his normal day to day activities for at least a 12 month period by May 2020, or that any effect comes within the definition of "long term" within schedule 1 of the Equality Act 2010.

109 Although we accept that the claimant provided Mr Ashby with his hearing report, as at May 2020 the claimant was not disabled by reason of his hearing loss and there is therefore no requirement to make any findings relating the respondent's knowledge.

Mental Health

110 The respondents accept that the claimant was at the relevant times disabled within the meaning of section 6 of the Equality Act 2010 by reason of his mental health. He has the impairment of depression and anxiety.

111 The first respondent's OH report of 15 March 2019 makes it clear that he considers that the claimant would likely to be covered by the Equality Act 2010 and the respondents would have a duty to make reasonable adjustments.

112 That report was provided to the first respondent's HR department and following the advice within that report, they sought to carry out a Workplace assessment with the claimant. An employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser, HR officer or line manager) knows in that capacity of the disability. The EHRC Employment Code makes it clear that such knowledge is imputed to the employer. We consider that even if, as pointed out by Ms Crew, an employer must make its own decision and assessment as to whether the claimant was disabled, there is sufficient in that OH report, coupled with the claimant's erratic behaviour which caused them to suggest he attend OHP in the first place, to amount to knowledge of the disability or at the very least provide them with constructive knowledge such that it ought reasonably to have known that the claimant was disabled and should have made further enquiries. The first respondent had knowledge of the disability from 15 March 2019.

113 We go on to consider below in respect of each alleged PCP whether the respondent had knowledge that the disability was likely to put the claimant at a substantial disadvantage in comparison with non-disabled persons.

Duty to make adjustments – auxiliary aid

114 The claimant says that he should have been provided with an auxiliary aid, being a workplace computer. This allegation relates to the period June to October 2019. We find that the claimant normally had a laptop computer, but this was unusual for supervisors. For a short period in June 2019 the laptop did not work for all purposes but by an email of 2 July, the claimant confirmed that it worked for what he needed. The IT team however advised him that he required a new one which would be provided and the claimant was to call and book an appointment. Thereafter he raised no concerns about that replacement laptop. There was therefore only a short period when he did not have access to a laptop. In that period, he did have access to the workplace computer in the Prescott centre which was available for all staff to use.

115 In any event the claimant had little work that was required to be done on acomputer. The only paperwork which was required were incident reports which took about 10-20 minutes to produce and appraisals and these were infrequent. The claimant said that the incident reports were not filled in on a daily basis and there may be none for a couple of weeks and then a couple. Most staff completed incident reports in handwritten form. It was the claimant's preference that he prepared them electronically but there was no substantial disadvantage to him if he did not have his own laptop on which to complete them, as he could have handwritten them.

116 A such the claimant has not shown that he was without a workplace computer that was sufficient for his needs. He didn't need a computer to complete the incident reports or appraisal documents. He had a laptop most of the time in any event and there was always the computer in the centre which he could use. Further he has not shown that he was placed at a disadvantage. There was therefore no substantial disadvantage compared with others without a disability.

117 This claim fails.

Duty to make adjustments

PCP1 – bullying

118 The first issue we must consider is whether the PCP relied upon can amount to a policy, criteria or practice. Where a disabled person claims that a 'practice' (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the EAT has held that the alleged practice must have an element of repetition about it and be applicable to both the disabled person and the non-disabled comparators.

119 The claimant say that the first respondent had a practice of bullying an employee by making baseless allegations and by accusing the claimant of being loud. Even if the Tribunal considered that the claimant was subjected to bullying behaviour by Mr Ashby (having found that he was not bullied by Mr Flanaghan) there was no evidence presented to us from which we could conclude that behaviour of this kind was a practice which was repeated in the organisation. The claimant

confirmed that he considered it was him was targeted and the behaviour was personalised to him. Complaints were made about the claimant which required investigation. They may have turned out to be without any merit, but it was appropriate for them to be raised with the claimant.

120 As such this policy, criteria or practice was not capable of amounting to a policy, criteria or practice and the duty to make adjustments does not arise.

121 This claim fails

PCP2 – Responding to emails about complaints and investigations

122 The first respondent accepts it required employees to respond to e-mails about complaints and investigations involving them, in addition to the usual responsibilities of their role and that this was a policy which they applied.

123 We must then consider whether the claimant was put at a substantial disadvantage by this policy compared with someone who was not disabled. The claimant says that it gave him extra work to do, which caused particular stress because he had to do it at the end of his working day.

124 Any disadvantage which the claimant suffered because of this policy was during the period March to November 2019 as he was on sick leave from 11 November 2019 and thereafter he was not undertaking his normal role. There were occasional days in May and December 2020 when he was due to return, or was briefly at work, but this was for a few days. During these periods, he was not carrying out his usual role.

125 We accept the claimant's evidence that he was becoming more stressed because of his perceptions and his belief that he was being bullied. As such from late 2018 he considered he was being monitored and needed all communication to be in electronic form. These caused him to believe he needed to record all issues in email and on a computer and at considerable length and detail. This related not just to matters where the first respondent had asked him to respond, but in large part in respect of appeals, complaints and grievances which he had raised. This added to the amount of information he provided to the first respondent and took him more time to produce. He was therefore working at home for long periods after his normal working hours.

126 The policy that he was required to respond to the complaints and investigations during his working hours, when he was carrying out his normal duties during the period March to November 2019 did put the claimant at a substantial disadvantage compared with someone who didn't have his mental health conditions, but not because, as alleged by the claimant that it gave him extra work to do, which caused him particular stress because he had to do it at the end of the day. The respondent's policy put the claimant a substantial disadvantage because his perceptions, which were likely to be as a result of his anxiety issues caused him to believe that he was being monitored and he needed to put everything in emails and correspondence. As such he spent many hours in the evening after work carrying out these tasks because of those perceptions. That in turn made him feel more stressed. A non disabled person would not have had those anxieties.

127 The claimant did raise with the first respondent that he was responding to emails in the evenings and that he was having difficulty keeping up with it. In correspondence it is a theme but the first respondent, rightly suggests that he did not need to correspond to the extent that he did. It was therefore put on notice that he was spending considerable time doing this and the additional stress this was causing him. Some of this was however when he wasn't in work, but on sick leave. We find however that the respondent did therefore have knowledge of the substantial disadvantage when at the time he was in work. The duty therefore arose.

128 We do not however consider that the adjustment that the first respondent provide ringfenced time during working hours to respond to these e-mails would have been effective at avoiding the disadvantage or that it was a reasonable step for that respondent to take. The claimant's approach to interactions with the first respondent was to write numerous, lengthy, repetitive and complex emails covering a multitude of topics. The first respondent sought to respond to these which, as the claimant alleges, resulted in his receiving many emails in response. The claimant did not know when to stop and we consider that if he had been given more time, he would have produced more correspondence and still have carried on into the evenings.

129 Further it would not have been reasonable to ringfence time during the working day as much of the correspondence was not to respond to things the first respondent had asked the claimant to comment upon, but were issues and complaints that he had raised, and it would not have been reasonable to give the claimant ringfenced time in his working day to raise and pursue complaints and grievances about the first respondent and its staff.

130 This claim fails.

PCP 3 – hospital appointment

131 The claimant relies upon a practice of requiring an employee who had a medical appointment to remain at work until a short time before the appointment was due to start. The claimant confirmed that this occurred once in respect of him.

132 The first respondent's Sickness Absence policy required employees to try to arrange routine medical appointments outside normal working hours but where that was not possible, they should be arranged at the beginning or end of the working day. They were expected to agree any time out of the workplace with their manager in advance of the appointment and agree how they would make up any time. It stated that it was always necessary to apply some discretion when dealing with non-routine health related appointments. Attendance for tests, treatment and rehabilitation were usually to be recorded as disability related sickness absence.

133 The claimant's appointment was a medical procedure, and the appointment was at 2.30pm. We accept that when a medical appointment couldn't be arranged out of working hours, Mr Ashby would seek to allow the employee to attend work for part of the day and leave in time to attend the appointment. That ensured that the employee did not have to incur a sickness absence for a morning or afternoon or by requiring them to take a whole day off. We therefore find that there was practice which had an element of repetition and was or would be applied to other employees, including those who did not have disabilities.

134 It is then necessary to consider whether the practice put the claimant at a substantial disadvantage compared with an employee who was not disabled. That is something that was more than minor or trivial.

135 We accept that a person with a mental health disability would become more stressed if under time pressures, and that stress would be more than minor or trivial. The first respondent had knowledge of that substantial disadvantage because claimant had expressed it in an email to Mr Ashby and when he asked if he could be allowed to leave at 11.00am.

136 The duty therefore arose, and we must consider whether the adjustment which the claimant sought of being allowed to leave at 11.00 on that day was reasonable.

137 We find it was not. That is because he had been told in advance that he could not leave at that time and there were clear alterative arrangements that the claimant could have made. On the 11 May, the claimant was permitted to leave at 12.30 for an appointment at 2.30pm. He had asked if he could be released at 11.00am and Mr Ashby had said no at least a week before. As such he was put on notice that if he needed more time to get to his appointment, he should take off the morning from work. Having been told that was the case it would not have been reasonable to allow him to leave at 11.00am. The claimant had a clear alternative, which was to take the day off work such that he would not have to rush.

138 This claim fails.

PCP4 – lengthy conduct investigations

139 The practice which the claimant relies upon is that the first respondent took several months to investigate the conduct of its employees. The claimant is referring to the investigation into the incident on 12 June 2019 involving Ms Lam. The delay in the period from June 2019 to November 2019.

140 The first respondent itself was confused as to which policy this issue was being investigated under and therefore what were the relevant timescales for an investigation. It sought to suggest that the reason Ms Stapleton was asked to reinvestigate was that Ms Jones' investigation wasn't a disciplinary investigation when it clearly was. She may have also been carrying out an investigation into a grievance, but she recommended disciplinary action. The first respondent's Disciplinary Policy has no deadline for completion of the investigations. We have been referred to the authority of Nottingham City Transport Limited v Harvey [2013] All ER D73 which held that a procedurally flawed investigation was not a practice as there was no evidence that investigations conducted were generally inadequate. There would need to be an element of repetition of delayed disciplinary investigations for the practice relied upon by the claimant to amount to a practice, or that it would happen in the future. The claimant hasn't been able to show that is the case. Although there are plenty of quite justified criticisms of the application of the first respondent's policies, there is no evidence that delaying investigations repeatedly is one of them. This situation was unusual. Although any delay was primarily the first respondent's fault, it was not a practice.

141 This claim fails

PCP 5 – investigation meetings

142 The claimant says that it was a policy or practice of the first respondent to require an employee attend a meeting to investigate alleged conduct without advance information as to what the conduct was.

143 Although the first respondent accepts that it was not usual practice to provide an employee with significant information in advance of a grievance meeting, because its' purpose was for initial fact finding, Ms Crew in her submissions says that the first respondent denies that it had a PCP of providing no information. That is not in fact what the claimant is suggesting. The claimant is firstly alleging that the investigation is into his conduct, ie such that it could result in potential disciplinary action, rather than solely a grievance as suggested by the first respondent, and secondly he relies on a policy, criteria or practice that there was no advance information as to what the conduct was.

144 We find that there was such a policy, criteria or practice in operation. Ms Jones was carrying out an investigation which was both for the purposes of the grievance and potential disciplinary action. Indeed, that is what she recommends. Further in the email exchanges between Ms Jones and Ms Pugh, Ms Pugh confirms that it is the first respondent's policy not to provide further information.

145 The next issue is to consider whether the claimant has shown that the policy put him at a substantial disadvantage compared with someone who is not disabled. He says that in not having advance warning of what conduct of his was being investigated, it caused him "a lot of panic". He refers to this occurring at the meetings on 3 October and 31 October 2019.

146 We find that on 3 October when the claimant was called into the investigation meeting by Ms Jones, he was not put at a substantial disadvantage by not having information about the conduct being investigated in advance. The meeting did not go ahead. He had not received the letter inviting him to that meeting, so it came as a surprise to him when Ms Jones asked him to meet. Although he spoke briefly to Ms Jones, he was not willing to proceed with the 3 October meeting on that date without having advance notice. The claimant was put under no pressure to attend the meeting by Ms Jones and when he expressed his concerns, she confirmed that it would be rearranged. Although he might have been caught off guard, any panic was not because he didn't know what the allegations were, but rather because the issue was being brought up when he had thought it had gone away.

147 There was no substantial disadvantage, and no duty arose in respect of that meeting.

148 The claimant was required to attend a reconvened meeting on 31 October. The letter of 23 October (which was in the same terms as the letter sent on 3 October) inviting him to that meeting gave him very little information.

149 The claimant was unclear what it was about his conduct on 12 June 2019 that had resulted in a grievance against him. From the notes of the initial meeting with Mr Ashby, he was unclear what he had done wrong and Ms Jones letter did not assist in her letter.

150 The claimant submitted the list of 11 questions relating to the substance of the allegations.

151 Ms Jones took advice from Ms Pugh on whether those questions needed to be answered and she advised they did not. Ms Pugh confirmed this to the claimant on the basis that it was not the first respondent's policy to provide details in advance. We have considered the claimant's correspondence between 3 October and 31 October and it is clear that the claimant is becoming increasingly agitated at the lack of information about his alleged conduct some 4/5 months earlier and the refusal to provide him with any information other than provided by Ms Jones in her letter.

152 The refusal to provide anything other than the most basic information in advance as to the allegations about his conduct put the claimant, with his mental health issues (anxiety), at a more than minor or trivial disadvantage compared to a person without a disability, in that it was clear he was extremely anxious about what the meeting was to cover. Although any employee facing such an investigation would be anxious, the level of anxiety of the claimant is clear from his correspondence, both its content, frequency and urgency as the 31 October approached.

153 Although the claimant understood that the allegation would have related to the incident on 12 June 2019 and Ms Lam's complaint about that, he did not know what else she was alleging. In fact, it is clear from Ms Jones' report that the complaints and conduct she was investigating were wider than just that incident. The report summarises him being asked about a number of issues wider than just the 12 June incident.

154 Both Ms Jones and Ms Pugh would have had knowledge of the claimant's increasing level of anxiety and the substantial disadvantage suffered from his correspondence. The duty therefore arose.

155 Although we do not consider that it would have been a reasonable step for the first respondent to have answered all of the 11 questions asked by the claimant, some of the questions were straight forward and would have caused no issue for the first respondent if they had been answered in advance. We consider that there was a possibility, which is all that the authorities require, that in providing some further information about the allegations in advance, it would have reduced the panic and anxiety which the claimant was suffering. Ms Pugh, who made the decision, appears to have given no consideration to whether it might assist the claimant to depart from or make an adjustment to the first respondent's usual practice. The adjustment of providing some further detail about the claimant's conduct which was being complained about, in advance of the meeting on 31 October, was a reasonable adjustment to make.

156 That claim succeeds.

PCP 6 – sick leave – communication about conduct investigation

157 This relates to the investigation into the claimant's conduct concerning the incident on 12 June 2019.

158 The policy, criteria or practice relied upon is that of communicating with an employee about an ongoing investigation into that employee's conduct whilst that

employee was on sick leave. The claimant's case is that this relates to any communication about the issue. The claimant was absence from 4 November 2019 until 15 May 2020; from 19 June 2020 until 9 November 2020 and from 13 December 2020.

159 During times when the claimant was on sickness absence from 4 November 2019 until 9 November 2020, the first respondent took no further action in respect of disciplinary action against the claimant, and it paused the process. It did however notify the claimant of the outcome of the investigation into the Sue Lam issue on 21 November 2019. In November 2020, it progressed the issue by arranging for Ms Stapleton to reinvestigate. That was in response to the OH report which advised that the claimant was anxious about the outstanding disciplinary issues hanging over him and the lack of communication. Ms Stapleton first contacted the claimant after he was no longer on directed sick leave and arrangements were being made for him to return to work. He was asked to attend a meeting with her after he had been placed back on directed sick leave on 15 December, but he declined to attend having already attended an investigation meeting with Ms Jones and advising that he had nothing further to add. Thereafter this disciplinary process was progressed and although the claimant did not attend the disciplinary meeting with Ms Travis, he was invited to it and communicated about his attendance.

160 There was therefore a practice of communicating with an employee about an ongoing investigation whilst the employee was on sick leave. It happened on a number of occasions during the claimant absence, particularly from 15 December 2020.

161 We do not find that the claimant has shown that he was put to a substantial disadvantage compared to someone without a disability to the extent that such a person was less likely to be on sick leave which is the claimant's first argument. It might be the case that a non disabled person would not have as much sick leave but it was not the being on sick leave which caused any disadvantage.

162 In respect of his second argument that a person with his disability would be at a substantial disadvantage because of the stress of dealing with such communications whilst on sick leave, we find that the disadvantage to the claimant was more than minor or trivial. It was clear from 2 December 2020 that the claimant's behaviour was more irrational and agitated in communications with the first respondent. Ms Pugh and Ms Jones' grievance's support this.

163 They were aware that the claimant responded to any correspondence with lengthy written communications and emails. He considered that he needed everything to be in writing as he believed the first respondent was monitoring him. Any communications with him would therefore have resulted in him becoming more anxious than someone who did not already suffer from anxiety.

164 The first respondent through Ms Pugh and Ms Leigh were aware of that substantial disadvantage from their communications with him or at the least had constructive knowledge from the meeting on 2 December 2020. The duty therefore arose.

165 We must therefore consider whether the adjustment sought by the claimant, that is pausing the conduct investigation until he was well enough to communicate about it, would have alleviated the disadvantage. We find that it would not.

166 The OHP report of September 2020 reported that resolution of the claimant's issues at work, together with effective treatment for his anxiety would assist in reducing his stress levels and assist in a return to work. One of those issues was the disciplinary issue involving Ms Lam's complaint. Once that investigation was reignited in November 2020 when the claimant was no longer on directed sick leave, it would not in our view have alleviated the disadvantage to have paused it again. It is clear that these issues needed to be resolved. They were a barrier to the claimant retuning to work. The claimant's failure to engage with Ms Leigh and Ms Pugh and attend a further OH appointment, left the first respondent without the option of seeking the OHP's updated views. The claimant's union representative agreed that he should attend another appointment, but he would not. It was not therefore an adjustment which it was reasonable for the first respondent to make.

167 This claim therefore fails.

PCP 7 – sickness absence meeting (Stage 1)

168 The claimant says that first respondent's sickness absence policy provides that where an employee had been absent on sick leave for a given period of time, there should be Stage 1 meeting at which a manager should consider whether or not to give a warning to that employee. The first respondent accepts that it has a policy at which an employee is invited to a Stage 1 meeting if their absence hits certain trigger points.

169 The claimant was invited to such a meeting on 16 December 2019 in line with the policy but requested a postponement which was granted. Another meeting was arranged for 14 January 2020. He wrote to advise he could not attend, provided an update about his health and asked for his comments to be considered. The reason he gave was that because of his medication he couldn't drive and in any event his doctor had recommended rest and recouperation. He didn't ask that this meeting be delayed or postponed.

170 The claimant says that he was put at a substantial disadvantage compared with a person without a disability in that such a person would have been better able to attend and explain why formal action should not be taken against them.

171 We find that the claimant has not shown he was at a substantial disadvantage by not attending the meeting. He had ample opportunity to put forward evidence and he did so. Further the first respondent's policy was such that there was virtually no discretion whether to issue an Advisory notice. The evidence of Mr Hughes confirmed this and the claimant did not fit into one of the categories described by Mr Hughes which permitted any discretion. The issuing of the notice applied to all employees whether they had a disability such as the claimant's or not. Adjustments had by reason of the adjournment of the meeting arranged for 16 December, been made in that the claimant has been absent for 64 days when he was issued with the notice, rather than the one month provided for by the policy.

172 As there was no substantial disadvantage, the respondents could not have had knowledge.

173 Whether the claimant had attended the meeting or not, whether in person or by Skype, he would have been issued with an Advisory notice. It would not in any event therefore have been a reasonable adjustment to hold the meeting by Skype.

174 Even if there was a substantial disadvantage to the claimant, it cannot be a reasonable adjustment to postpone a meeting under the long term absence policy until an employee felt he was well enough to attend. That could result in employees not engaging with a process the purpose of which was to seek ways to assist them in returning to work.

175 This claim fails.

PCP 8 – premature commencement of Stage 2

176 The next stage of the procedure was Stage 2. The claimant says that the practice involved commencing the Stage 2 process before the time period for appealing against the Stage 1 warning had expired. The claimant has not shown that this was a practice adopted by the first respondent. It was a one-off error which was immediately rectified. A practice has to have some element of repetition and there is no evidence that this had happened before or would happen in the future.

177 In any event the claimant was not put to any substantial disadvantage, the Stage 2 process was delayed and an adjustment made.

178 This claim fails.

PCP 9 – Stage 2 Meeting by telephone

179 PCP9 was holding a lengthy Stage 2 meeting by telephone. In the claimant's case, this took place in May 2020. The claimant says that this put him at substantial disadvantage when compared to a person who is not disabled in that: it was harder for him to follow what people were saying on the telephone because of his hearing impairment disability; and the claimant's mental health disability made him less able than others to manage the stress of a long telephone call.

180 We have found that the claimant did not a disability of a hearing impediment as at May 2020. He therefore relies upon his mental health impairment which he says made him less able to manage the stress of a long phone call.

181 It was the first respondent's practice of conducting some meetings by Skype or telephone during the Covid pandemic.

182 The claimant has not shown any facts from which we could conclude that holding the meeting by phone caused him more stress than a non disabled person. The evidence showed that he fully participated in the meeting with the assistance of his union representative. He didn't at any stage raise that he was stressed and needed to break or that he was having any difficulties in conducting the meeting by phone or the length of the meeting. It was his union representative who raised the need to break, Mr Hughes having lost track of the time.

183 As there was no substantial disadvantage to the claimant, the respondents could not have had knowledge.

184 The duty does not therefore arise.

185 This claim fails.

PCP 10 – Manual Duties

186 We find that the first respondent had a practice in May 2020 of requiring employees who normally worked supervising POPs to assist in delivering food to vulnerable people in the community. This involved those employees in the claimant's role driving a vehicle and lifting food parcels. It was regular and carried out over a number of months.

187 The claimant says that this put him at a substantial disadvantage in comparison with persons were was not disabled in that he was taking medication for his mental health which made it harder for him to drive safely; and it was harder for him than for others to bear the stress of having to carry out these duties when physically unfit to do them. He says that both of these disadvantages allegedly occurred when the claimant returned to work in May 2020.

188 The difficulty that the claimant has in showing facts from which we could conclude that he was at a substantial disadvantage by this practice is that he agreed to do the work at his return to work meeting on 13 May 2020, and did not advise the first respondent that that he was on any medication which would prevent him driving or that he had any issues in lifting boxes. Neither has he produced evidence to support this to the Tribunal. We are not persuaded that this was strenuous work in any event. He mentioned in that meeting that he had some pains in his ribs but that the doctor had told him he needed to get away from his computer and get some exercise. He was asked whether this would stop him returning to work and he said it would not. At this stage the first respondent had no medical evidence which indicated the claimant should not be driving or lifting.

189 Although the later OH report in September 2020 says the claimant should not be doing heavy lifting, he was not then in work.

190 The claimant has not shown the substantial disadvantage he alleges. He suggests that his mental health issues made it harder to carry out the duties when unfit to do so. We are not persuaded that is the case. Although the claimant may have been on medication which prevented him driving, the first respondent was not informed of this and indeed the claimant was under an obligation to tell them if he was.

191 The respondents cannot in any event have had knowledge of any disadvantage at that time, substantial or otherwise.

192 The duty does not arise.

193 This claim fails.

<u>Discrimination arising from disability</u>

194 When considering a claim of discrimination arising from disability, we must consider two questions: did the respondents treat the claimant unfavourably because of 'something', and whether the "something" arose as a consequence of the disability. The first question requires us to look into the mind of the person who the claimant alleges caried out the unfavourable treatment and consider what was the conscious or subconscious reason for the treatment? if the something is more than a merely trivial part of the reason the first stage is met. It is then for the Tribunal to consider objectively whether the "something" arose as a consequence of the claimant's mental health. If we accept that this test is met, the respondents can argue that they had a legitimate aim for acting as they did and that this aim was achieved by proportionate means. Essentially this is a balancing exercise for the Tribunal to consider.

195 The claimant relies upon three allegations of unfavourable treatment, and we deal with each in turn:

Giving of a Stage 2 absence warning in May 2020

196 The respondents accept that issuing a Stage 2 Advisory notice (or warning) amounted to unfavourable treatment and as this was in respect of the claimant's absence because of his mental health issues, it arose as a consequence of his disability. It was in place between 13 May to 3 December 2020 when it was overturned on appeal.

197 We move therefore to consider the respondents' defence. They say that the Sickness Absence policy of which the issuing of a Stage 2 notice was part, had the legitimate aim of ensuring adequate attendance levels amongst its employees. We accept that this is a legitimate aim for an employer as it requires the attendance of employees to be able to run its service.

198 Turning to whether this aim was achieved by proportionate means. The policy itself had four stages before an employee was at risk of their employment being ended. There were safeguards in place for the final stages including the obtaining of OHP advice and consideration of adjustments. Although the first and second notices were issued after one month and two months of absence, the later notices according to the policy were issued after five months absence and then dismissal considered only after nine months. The policy was applied strictly in that there was little or no discretion when issuing the Advisory notices, however there was flexibility in when the meetings actually took place and in the claimant's case, he was absent for much longer periods than provided for as trigger points under the policy. Adjustments were therefore in practice made for him. It was proportionate to do that. The policy provided for appeals against the notices and the claimant successfully appealed the stage 2 notice. The reason for the notice being overturned was the conduct of the meeting rather than the need to issue the notice itself. Although the claimant raised other issues about the process, there was confusion about whether that was an issue for the grievance or an issue for the absence management appeal. Although that matter appears to have become lost somewhere between the two processes, the Stage 2 warning was overturned, and the Stage 3 was never progressed.

199 Although therefore the process gave little or no discretion such that Mr Hughes felt he had to issue the Stage 2 notice, there was an appeal process, Stage 2 was not issued until the claimant had substantially exceeded the trigger points and

the process itself had significant periods before the claimant's absences could have resulted in his dismissal. We find in carrying out the balancing exercise the decision to issue the Stage 2 notice to the claimant was a proportionate means of ensuring adequate attendance levels amongst the first respondent's employees.

200 This claim fails

Reducing the claimant's accrued annual leave on his return to work in May 2020

201 The claimant's claim, when clarified with him during the hearing, was that he considered that the first respondent had made him use up his accrued annual leave in May and June 2020, when he was on a phased return to work, whereas he didn't need to because he realised when he returned that other staff were on furlough and not working anyway.

202 We accept the first respondent's evidence that no employees were furloughed but that if there was not enough voluntary work on a day to day basis to keep all employees busy, some were not required to work. It was ad hoc and dependent upon what the service required on the day.

203 The claimant has not shown that the first respondent reduced his accrued annual leave as he alleges. He agreed to use it up. That was his decision. He may have done so without realising that he may not be required to work every day he was due to be in work, but it was used with his agreement. Even if that amounted to unfavourable treatment, which is not what we have found, it is not arise as because of his disability. Although his leave accrued because he was absent as a consequence of his disability, his decision to take his leave when he did was not something which arose as a result, it arose because he agreed to it.

Commencing a disciplinary process against the claimant in February 2021

204 The commencement of disciplinary action in the form of an investigation by Ms Flynn into the allegations of bullying and aggressive behaviour made by Ms Leigh and Ms Pugh amounts to unfavourable treatment. The claimant says that the first respondent took this action because he refused to attend a third occupational health appointment and that his decision not to attend arose as a consequence of his mental health in that he couldn't bear the stress of another assessment.

205 The first question for us to decide is whether the first respondent took the decision to commence disciplinary action because the claimant would not attend a further OH appointment. It is self-evident that the first respondent asked Ms Flynn to investigate because it received Ms Pugh and Ms Leigh's complaints, not because the claimant wouldn't attend a further OH appointment. The claimant's case however is wider than that. He says that Ms Leigh and Ms Pugh decided to take forward the complaints about the claimant's behaviour because he wouldn't attend a further OH appointment. We must therefore consider Ms Leigh's and Ms Pugh's conscious and unconscious motives.

206 The claimant's view came about as a result of an email from his union representative of 21 December 2020, reporting on the discussions with the respondent. His representative in that email is seeking to persuade the claimant to see the OHP again. He stresses it is in the claimant's interests to take that step as

he has had a strong hint that the respondent is likely to be taking the complaints by Ms Leigh forward and would also be progressing the sickness absence procedure. He suggests to the claimant that this is a way forward which provides the respondent with a solution to their dilemma. This was the union representative's view. It was not necessarily that of the respondent. What is clear however from that correspondence and from Ms Leigh already having raised these concerns, is that the respondent was already looking at taking action in respect of the claimant's behaviour.

207 At the return to work meeting on 2 December 2020 and the telephone call on 9 December, Ms Leigh was unhappy about the claimant's behaviour and reported it to her manager but no action was taken at that time as Ms Leigh and Ms Pugh sought to find ways to take matters forward with the claimant and his union representative. Ms Leigh was concerned about his fitness to return to work and put him on another period of directed sick leave under the first respondent's policy from 13 December 2020. She wanted further advice from the OHP and requested that the claimant consent to attend another OH appointment. The claimant refused.

208 Although Ms Leigh and Ms Pugh raised the grievances after the claimant had said he would not attend a further OH appointment, we accept that their decision was not because the claimant would not attend. Ms Leigh had already raised her concerns about the claimant's behaviour immediately after the phone call on 9 December. Although the timing might make the claimant come to that view, we do not accept that was the motivation of Ms Pugh and Ms Leigh. They were both trying to assist the claimant by seeking a further OH view. Ms Leigh did not progress her complaint whilst discussions took place with the claimant's union representative concerning his health and potential return to work. Had the claimant attended the OH appointment, the first respondent might also have had a better understanding of why the claimant had acted in the manner he did with Ms Leigh and Ms Pugh, but it did not mean that they would have not proceeded with the disciplinary action.

209 We find that their reasons were the claimant's inappropriate and aggressive behaviour towards them and not because he had refused to attend a further OH appointment which we find was no more than a trivial part of their reasoning.

210 Further, and although not necessary in view of our finding above, we find that the claimant's refusal to attend was not because he could not deal with the stress of another OH appointment, but rather that he was unwilling to cooperate with the first respondent as he was aggrieved that in his view they had not properly dealt with his issues to date, including the historic allegations of bullying by Mr Ashby and Mr Flanaghan, and had not properly completed his wellbeing questionnaire process. This is clear from his correspondence at the time including with his union representative.

211 This claim fails.

212 <u>Time Limit</u>

213 The only complaint brought by the claimant which we have found succeeds is that of the failure to make a reasonable adjustment by providing him with advance warning of the allegations which Ms Jones wanted to discuss with him on 31 October 2019 as part of her investigation. That was a one off act and is not therefore part of any of course of conduct.

214 The claimant first approached ACAS on 17 July 2020 as part of early conciliation and his claim was lodged on 30 July 2020. His claim is therefore out of time by approximately 6 months.

215 As such we must consider whether it is just and equitable to extend time so that the claim can proceed. In addressing this issue, we are reminded of the principles in S.33(3) of the Limitation Act 1980 and the decision of the EAT in British Coal Corporation v Keeble and ors 1997 IRLR 336. Although these factors are relevant, they are not a checklist and we have a wide discretion to consider the issues we feel are relevant in coming to our decision. Two issues are however almost always relevant to consider, being the length of, and reasons for, the delay; and whether the delay has prejudiced the respondents.

216 The claimant has not provided express reasons why he did not bring a claim within three months of 31 October 2019. That is not fatal. There is clear evidence that from 4 November 2019, the claimant was signed off from work with mental health issues. In December 2019, January and February 2020, the claimant did not attend Sickness Absence review meetings asking that he be left alone and that his GP told him he needed rest. He explained the various medical issues he was having and enclosed photographs of himself showing he was undergoing tests and monitoring. He said that he considered he was being bombarded with letters by the first respondent (including telling him about vacancies), that he was on medication which caused him to be drowsy and fuzzy headed and that he couldn't travel.

217 He did not return to work until 15 May 2020. He was clearly not fit enough to return to work in May 2020 despite him wanting to return and it resulted in his only being able to work for a short period. He resumed his sickness absence on 19 June 2020 when he was placed on directed sick leave by his manager. He was able to contact ACAS on 28 July, shortly after raising his grievance and his claim was submitted on 30 July 2020.

218 The correspondence throughout this period is of someone who has grievances and is fixated upon raising complaints internally, but because of his mental health issues is not in a position to do so. On 13 July, finally he was ready to submit his grievance and shortly afterwards commenced these proceedings. We consider that although he has not specifically addressed this issue, his mental health impacted his decision making during that period such that he focussed upon what he saw as the continuing pursuit of him, rather than the particular failure of the first respondent on 31 October 2019.

219 In deciding whether it is just and equitable to extend time, we must also consider what prejudice if any an extension of time would cause the respondents. There is the obvious prejudice that the claim against it will succeed if the extension is granted, but it has not suggested any other prejudice that it might suffer. The events of the time were mostly recorded in correspondence or notes, and these were available for the Tribunal to consider and the respondent's witnesses to refer to.

220 In balancing these issues, we conclude that there is little prejudice to the respondents whereas the claimant had understandable reasons for not submitting the claim at the time and having found that there was an adjustment which should have been made for him at the time, the balance of prejudice is in his favour.

221 Time is therefore extended. This claim succeeds.

Next Steps

222 The Tribunal apologises to the parties for the delay in providing this reserved judgment.

223 It was agreed with the parties at the outset of this hearing that the listing of any remedy hearing should await a further private preliminary hearing to consider the next steps in the second claim brought by the claimant. A notice of hearing for a preliminary hearing in the second claim will be sent to the parties.

Employment Judge Benson
Date: 21 July 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
24 July 2023

FOR THE TRIBUNAL OFFICE