EMPLOYMENT TRIBUNALS (SCOTLAND)

Cases Nos: 4106437/2023 and 4106438/2023

Final Hearing held in Glasgow remotely on 5 - 7 February 2024, deliberation day in chambers on 16 February 2024

Employment Judge A Kemp
Tribunal Member N Quinn
Tribunal Member A Shanahan

Mr James Donnelly	**Claimant** **Represented by:** **Mr N Paterson,** **Solicitor**
South Lanarkshire Council	**Respondent** **Represented by:** **Mr S O'Neill** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that

1. **The respondent is in breach of duty under sections 20 and 21 of the Equality Act 2010 ("the Act") in not making a reasonable adjustment by permitting the claimant to work from home when instructing the claimant to attend the respondent's office in a letter dated 9 May 2023.**

2. **The respondent did not harass the claimant under section 26 of the Act and that claim is dismissed**

3. **The respondent victimised the claimant under section 27 of the Act by said letter dated 9 May 2023 in withdrawing an offer of meeting one hour a day in the office for a temporary period and requiring him to attend the office.**

4. **The claimant is awarded the sum of SIXTEEN THOUSAND THREE HUNDRED AND SEVENTY SIX POUNDS EIGHTY TWO PENCE (£16,376.82) payable by the respondent as compensation for the breaches of the Act under section 124 of the Act.**

REASONS

Introduction

1. This was a Final Hearing held remotely by Cloud Video Platform into claims for discrimination under sections 20 and 21, 26 and 27 of the Equality Act 2010.

2. There were originally two claims with different case numbers, being 8000024/2023 (“the first claim”) and 8000449/2023 (“the second claim”). The two claims were then renumbered as 4106437/2023 and 4106438/2023 respectively, and were combined by a case management order on 25 October 2023.

3. There had been a Preliminary Hearing on 15 March 2023 at which various case management orders had been made. Arrangements for a Final Hearing were then made for 13 – 15 June 2023. That hearing was thereafter converted to a Preliminary Hearing on disability status, which was decided by a Judgment in favour of the claimant on 13 June 2023.

4. After that Judgment a Final Hearing was scheduled to take place on 20 - 22 November 2023. The claimant had originally been a party litigant but instructed his present solicitors on 14 November 2023. The Final Hearing for later that month was then postponed, and the present hearing fixed following a further Preliminary Hearing held on 20 November 2023.

5. The evidence was heard over three days but there was no time left for submissions. It was agreed that written submissions be sent by the agents

by 4pm on 9 February 2024, which was done, and the Tribunal considered them at a deliberation day on 16 February 2024.

Issues

6. The parties had prepared a draft list of issues, which had not been finally agreed between them, and a further list of issues had been set out in the Note following the first Preliminary Hearing. The issues appeared to the Tribunal to be the following:

1 Did the respondent know, or ought it reasonably to have known, of the clamant being a disabled person under the Equality Act 2010 ("the Act")?

2 If so, on which date?

3 Did the provision, criterion or practice applied to the claimant of a requirement to attend the respondent's office on one day per week put the claimant at a substantial disadvantage compared to someone without the claimant's disadvantage?

4 Did the respondent know, or ought it reasonably to have known, that the claimant was likely to be placed at that substantial disadvantage?

5 Did the respondent fail to take any steps which it would have been reasonable for them to take to avoid the disadvantage, in particular by allowing him to work remotely from home throughout the week?

6 Did the respondent harass the claimant by subjecting him to unwanted conduct related to his disability contrary to section 26 of the Act?

7 Did the respondent victimise the claimant for commencing the first claim contrary to section 27 of the Act?

8 If any claim is successful to what remedy is the claimant entitled?

Evidence

7. There was an agreed Bundle of Documents (or Inventory of Documents) before the Tribunal of 628 pages, and a Supplementary Bundle of 74 pages. The respondent provided some further documents at the start of the second day of the hearing, without objection. The claimant also provided then better copies of existing documents. At the start of the third day each party produced further documents, without objection. Most but not all of these documents were referred to in oral evidence.

8. Evidence was given by the witnesses orally, commencing with the claimant, who did not call any other witness. The respondent called Ms Yvonne Douglas and Mr Craig Fergusson.

Preliminary Matters

9. The respondent through Mr O'Neill confirmed that it accepted that it applied a provision, criterion or practice to the claimant of requiring him to attend the office one day per week. The claimant through Mr Paterson confirmed that he argued that the respondent knew, or ought reasonably to have known, of the claimant's disability from 9 September 2022. There was a discussion as to what the substantial disadvantage the claimant founded on was, with competing versions of that provided in a draft list of issues prepared by the agents, but it was agreed that in essentials it concerned an alleged exacerbation of the claimant's anxiety.

10. During the hearing it was clarified that when EJ Hosie gave oral reasons for the decision that the claimant was a disabled person on 13 June 2023 that was on the basis of the conditions of anxiety and depression.

Facts

11. The Tribunal found the following facts, which it considered to be the facts material to the issues before it, to have been established:

The parties

12. The claimant is Mr James Donnelly.

13. The respondent is South Lanarkshire Council, a local authority.

14. The claimant is a disabled person under section 6 and Schedule 1 to the Equality Act 2010.

Employment with the respondent

15. The claimant was employed by the respondent from 22 September 1997, latterly as a Finance Assistant. He had for about five years worked in the compliance part of the Audit and Compliance Team of the respondent, which had about ten members of staff. He had no formal disciplinary warnings issued to him.

16. His line manager was Mr Norie Wilson, the Compliance Manager. His manager was Ms Yvonne Douglas, the Audit and Compliance Manager.

17. The claimant worked for thirty five hours per week on a condensed hours basis, which meant that he worked Mondays to Thursdays and eight hours forty five minutes each day.

18. The team of which the claimant was a member worked remotely during the Covid-19 pandemic. He had a chair provided to him to assist with sciatica from which he suffered, which he had transported to his home address to allow him to do so.

19. The respondent has a Grievance Policy and Procedure. At paragraph 2.3 it states that it does not apply to allegations of discrimination which are dealt with by the Equal Opportunities Policy.

20. The respondent has Guidance for Managers in relation to seeking an Occupational Health Report, which includes that there are "Questions covered in the Report [which the Occupational Health Adviser will respond to] …….

    Does the employee have a condition likely to fall within the Equalities Act 2010?.

    Please specify if you have any additional questions and include any other information which may help the Occupational Health Adviser in this referral" after which there was a box to add questions or information.

21. It also has a policy on Work-related Stress, which includes that

> "All managers will
>
> - Undertake an assessment of stress, assess the findings and prepare and implement an action plan in a manner that best suits the team/individual(s) being managed and/or in accordance with any Resource/Service requirements
> - Monitor and review the stress assessment and action plan on a regular basis to ensure that it remains relevant and effective in reducing the overall stress levels within the workplace……."

22. The respondent has a policy on Work Related Stress which states that

> "5.2 Duties of managers
> All managers will
>
> - Undertake an assessment of risk, assess the findings and prepare and implement an action plan in a manner that best suits the team/individual(s) being managed and/or in accordance with any Resource/Service requirements
> - Monitor and review the stress assessment and the action plan on a regular basis to ensure that it remains relevant and effective in reducing the overall stress levels within the workplace……."

Disability

23. The claimant has suffered from intermittent depression since his teenage years. Since about September 2020 he has suffered from anxiety.

24. He was diagnosed with hypertrophic cardiomyopathy in about mid 2020. That has on occasion induced breathlessness, He has been treated with medication to reduce high blood pressure. He has been treated with an anti-depressant, Sertraline, in the period of about ten months until March 2022, and from November 2022 onwards as referred to below. He has mild bi-polar disorder. He has sciatica.

25. The claimant was off work ill between October 2021 and January 2022 because of anxiety and depression, including breathlessness which he thought was because of his heart condition. He completed a sickness report on 13 October 2021 referring to depression.

Return to office proposal

26. On 2 June 2021 an email was sent to the team about the possibility of returning to some form of office working in or around August 2021. It did not proceed at that time due to the circumstances of the Covid-19 pandemic worsening thereafter.

27. The claimant sent a text message to Ms Douglas' private mobile number on 22 December 2021 stating "I'm going to be chucking work soon, Yvonne….thanks for all your support….No hard feelings." She did not reply, and he did not resign from employment.

28. In or around February 2022 the claimant contracted Covid-19. He suffered symptoms similar to a cold or influenza for a period of about two weeks.

29. On 13 April 2022 the claimant and colleagues met Mr Wilson about a proposal to return to the office on an hybrid basis. He sent an email to Mr Wilson that day raising matters connected with his health and a preference not to return to the office. Mr Wilson referred that to his manager Ms Yvonne Douglas.

30. The claimant was off work again from May 2022 to November 2022, during which period he was on half pay.

31. Ms Douglas met the claimant online on 23 June 2022 to discuss the issue, with Kirsty Kirkland of Personnel in attendance. The claimant was accompanied by his union representative Ms Sarah Bradburn. The written record of the meeting made by Ms Bradburn is a reasonably accurate record of it. Ms Douglas explained that the team was expected to be in the office one day per week. The claimant raised his heart condition, sciatica and mental health issues, and that his anxiety would be "very high for the duration of being in the office." Ms Bradburn said that a reasonable adjustment would be for him to work from home. Ms Kirkland said that the

next step was a referral to occupational health to see if the doctor decides on any reasonable adjustments.

32. On 23 June 2022 Ms Douglas wrote to the claimant referring to the medical referral, and said "To allow me to do this, can you…." She then asked three questions. He answered them, referring to medication he was on, high blood pressure, and depression.

33. Following the meeting the claimant completed a tailored adjustment form, seeking adjustments in particular continuing to work from home. He referred to sciatica, his heart condition, and "mental health issues – my heart condition/breathlessness and the emergence of Covid over the past two and a half years combined to form a high level of anxiety/stress for me in October 2021 which resulted in me being off work for 4 months with depression and going on to medication to help with this issue."

34. On 5 August 2022 Ms Douglas informed the claimant that she had sent a medical referral form, but did not send him the form. She did not inform him of the questions referred to the Occupational Health Adviser. She did not inform the Adviser of the details provided by the claimant as to his medication or conditions of high blood pressure or depression. She did not specifically ask whether there were any reasonable adjustments required for the claimant.

35. An Occupational Health Report was received by the respondent in relation to the claimant from Occupational Health Adviser Roseanne Dixon on 9 September 2022. It did not answer a standard question of whether the employee had a condition likely to fall within the Equality Act 2010. It concluded that he was fit to work one day per week in the office provided that the workplace complies with guidance and "considers James' health condition within a thorough risk assessment process, identifying suitable control measures to reduce Covid-19 transmission whilst also considering James' underlying anxieties."

36. No formal written risk assessment was undertaken.

37. On 20 September 2022 Ms Douglas emailed the team of which the claimant was a member about returning to work in the office one day per

week. She also raised issues in relation to remote working. The claimant exchanged emails with Ms Douglas on 21 and 22 September 2022 in relation to his circumstances. Ms Douglas stated in an email on 22 September 2022 that she was happy to talk through reasonable adjustments for him but "this wouldn't extend to permanent home-working…."

38. Ms Douglas held that view as the work of the Compliance Team was at a level of less than 50% of the recovery of European Union grants, which would end on 31 December 2023. Recovery of such grants had been materially affected by the Covid-19 pandemic. That was in the context that a very large amount of documentation required for such claims was in paper form, in hundreds of boxes at the respondent's office. A claim often required work by different team members which had to be collated before presentation. She considered it essential that the team work collaboratively to recover as much of the total grants, of about £21.5 million, as was possible. Her view was that remote working entirely would not achieve that, and that some working in the office was essential in order to do so.

39. She also considered that that would allow greater collaboration between team members, a greater momentum towards recovery of the sums, and better relationships within the team. She wished that all of the team of which the claimant was a member attend the office one day per week, on a Wednesday, for that reason.

40. On 27 September 2022 the claimant through his union representative raised a grievance in relation to the refusal to allow him to continue to work from home. He alleged that it was a reasonable adjustment given his heart condition or mental health issues, and that it was disability discrimination.

41. On 12 October 2022 the claimant obtained a letter from his GP which he passed to the respondent. It stated "James has a diagnosis of hypertrophic cardiomyopathy. In addition, he has symptoms of anxiety and low mood. Some of these symptoms are related to his medical diagnosis however these are also exacerbated with the thought that he has to stop working from home."

Grievance

42. A grievance meeting was arranged for 14 October 2022. The claimant attended with Ms Bradburn, and it was held before Mr Craig Fergusson, Head of Finance (Transactions) with Fiona Menzies a Personnel Officer also in attendance. A note of that meeting was taken but not provided to the claimant at that time.

43. On 4 November 2022 Mr Fergusson wrote to the claimant to reject his grievance, and setting out in detail his reasons for doing so. He considered that the requirement to work in the office one day per week, on a Wednesday, was reasonable.

44. The claimant appealed that decision on the same day.

45. On 6 November 2022 the claimant sent Mr Fergusson and others an email with comments on what he thought were inaccuracies, misrepresentations and omissions from the letter dated 4 November 2022.

46. On 7 November 2022 the claimant emailed Mr Wilson and a colleague Ms Susan Milligan asking about the return to the office on Wednesdays, amongst other questions. Both replied. They stated that that day in the office had been less productive than working at home. Mr Wilson did not have any difficulty with the quality or quantity of the claimant's work done remotely.

47. On 8 November 2022 the claimant felt increasingly anxious and depressed, and commenced a further course of Sertraline, which he continues to take.

48. On 9 and 18 November 2022 the respondent wrote to the claimant in relation to correspondence he had sent which was said to be in breach of Dignity at Work procedures. He continued to email Ms Douglas after those messages including on 14 November 2022 and 15 November 2022.

Appeal Hearing

49. An appeal hearing was heard before Ms Gail Robertson, Personnel Adviser of the respondent, on 17 November 2022 at about 1pm. The

claimant attended remotely with Ms Bradburn also attending remotely. No note of the appeal meeting was kept by the respondent. It lasted about 45 minutes. It was a review of the position in advance of consideration by an Appeal Panel.

50. At about 2.30pm on the same day a Teams meeting of the claimant's team was held. Mr Wilson ended it after about five minutes as he was concerned about the claimant's behaviour, and then raised this with the claimant when the claimant had said that he was not okay, but was drunk.

51. After the meeting the claimant emailed colleagues stating "nice working with you guys, thanks for all your support and gratitude for me holding the team together over the past couple of years."

52. His colleagues were upset by his behaviour. Ms Douglas spoke to them about it. It was arranged that Attendance Support Meetings be undertaken temporarily with someone other than Mr Wilson in light of what had happened.

53. At 5.19am on 18 November 2022 the claimant emailed Mr Wilson to apologise for his behaviour and stated that he had not been drunk but had taken four or five Sertraline tablets in the morning, in advance of the appeal hearing.

54. Ms Robertson wrote to the claimant on 18 November 2022 rejecting his appeal. She stated that her role was to review the appeal and ensure that what he sought as an outcome was in accordance with the respondent's policy and something that could be presented to an Appeal Panel. She noted that the claimant had referred to the Equality Act 2010.

55. She stated that although the respondent had a duty to consider any request for reasonable adjustments "this does not mean[- sic] that they have to be agreed to." She referred to the provision in the Equality Act 2010 in relation to the definition of disability. She stated

> "My view is that the Service have made a reasonable decision not to permit you to work from home on a full-time basis and that the instruction to return to the office, albeit one day a week, was a reasonable one.

> As a solution to your grievance, you want to be able to work from home permanently. You will recall that I indicated that outcomes sought require to be within the gift of an Appeal Panel to grant and this does not include changes to Council Policy or procedures."

Early Conciliation and first claim

56. The claimant started early conciliation on 18 November 2022.

57. The claimant commenced a period of absence from work on 27 November 2022

58. The Certificate was issued on 16 December 2022. The claimant presented the first Claim Form to the Tribunal on 16 January 2023.

Events in 2023

59. On 18 January 2023 Ms Melanie McCafferty wrote to the claimant in relation to his absence from work and offered support to him. It noted his mental health in November 2022 and referred to his suicidal thoughts and that his doctor thought that he had suffered from a nervous breakdown.

60. On 6 March 2023 a further Occupational Health Report was issued in relation to the claimant. It stated that he was temporarily unfit for work. His symptoms included low mood and anxiety, and affected his sleep. A review in 6 – 8 weeks was recommended. There was no advice given as to whether or not the claimant was likely to be a disabled person under the Equality Act 2010.

61. On 28 March 2023 Ms McCafferty wrote to the claimant following a meeting held the previous day with Ms Bradburn and Ms Brown of the respondent also present. She noted that he had referred to stress, the principal source of which was the forthcoming Tribunal Hearing in June, with a secondary factor being an outstanding fact-finding process, and that the council's stress management tool was used to facilitate a wider discussion.

62. On 29 March 2023 a fact finding investigation report was issued in relation to the claimant. The allegations against him were of:

- "Inappropriate email communication
- Inappropriate behaviour at a team meeting on 17 November 2022 whereby he presented unfit during working hours due to being under the influence of alcohol or drugs
- Actions are in breach of [the respondent's] Code of Conduct, IT Acceptable Use Policy and Dignity at Work Policy."

63. The conclusions of the report included that the claimant "partly accepts that he has continued to send excessive messages to Ms Douglas…..[and he] accepts that the wording and tone of his emails could be viewed as inappropriate at times." The report included appendices which included the wording of emails sent by the claimant. The conclusions also addressed the meeting on 17 November 2022 at which the claimant accepted that he was slurring his words and behaving unusually, and that he had said "I'm not OK, I'm drunk", but that he had sent an email the following morning to state that his behaviour was not because he was drunk but due to anti-depressant medication.

64. No disciplinary action has been taken on the report as yet by the respondent because of the present Claim.

65. On 17 April 2023 the claimant commenced a programme at Able Futures to seek to assist him in returning to work.

66. On 26 April 2023 a further Occupational Health Report was issued in relation to the claimant by Dr Milosevic. It stated the opinion "based on discussion and assessment" that the claimant was

> "medically fit for home (remote) working only. The reason for this is his anxiety related to workplace issues which may be aggravated if he attends work in person. Further I am also concerned that it may cause flare up of his chronic mood disorder. It would be very helpful if this could remain in place until the end of pending Employment Tribunal. Resuming work would, in my opinion, help boost confidence and improve overall health and wellbeing. His return should be phased with a gradual increase of his working hours and workload over the period of 4 weeks."

67. A meeting was held between the claimant, Ms Bradburn and Ms McCafferty on 2 May 2023 to discuss the Occupational Health Report, at which Ms McCafferty said something to the effect that the claimant would continue to work from home remotely.

68. Ms McCafferty emailed Ms Douglas and others that day to ask about the position in light of the Occupational Health Report, and Ms Robertson of Personnel stated “My advice is still that he will be expected to attend the office one day per week in line with the team and you will link in with the service on his rtw [return to work] details.”

69. Ms McCafferty wrote to the claimant that same day. The letter referred to the meeting, noted that the claimant felt able to return to work, referred to the Occupational Health Report and stated that it had been passed to the Service for consideration when agreeing a return to work plan for him.

70. A remote meeting was arranged between the claimant and his line manager Mr Wilson on 9 May 2023. Gillian McCann a Personnel Officer of the respondent also attended, although the claimant had not been advised of this in advance. At the meeting the claimant was informed that he was required to attend the office for an hour at the end of every Wednesday to meet Mr Wilson, until the first claim was determined at a Final Hearing which had been due to take place on 13 – 15 June 2023. Mr Wilson said that returning to the office was for the claimant’s own good.

71. On 9 May 2023 Mr Wilson wrote to the claimant about that meeting, referred to the claimant feeling “stressed”, set out a phased return in terms of which by the fourth week the claimant would work normal hours, required him to check in with him three times per day which inter alia was “to confirm your continuing fitness to work and provide any support where required” and referred to the offer of a temporary option of attending for an hour at the end of each Wednesday to meet with him [Mr Wilson]. It recorded that the claimant expressed his concerns regarding face to face meetings and that until the “Employment Tribunal case had been heard [he]would not be returning to the office.” He then stated that the temporary option had been withdrawn; he said that this was because Personnel had informed him that the Hearing had been postponed until further notice.

The letter stated that he was "expected to attend the office each Wednesday in line with the rest of the team, week commencing 15 May 2023. Failure to do so may result in this being deemed a conduct issue….."

72. The claimant was upset and distressed by that letter. He was made anxious by it. The use of the word "stressed", with inverted comments, he took to be questioning whether he was stressed. He was upset that the advice from the Occupational Health doctor that he was not fit to return to the office was being ignored, in his view.

73. The claimant commenced a period of absence from work on 10 May 2023 as a result of receipt of the letter of 9 May 2023. The claimant was on half pay for the period from 12 May 2023. He consulted his GP.

74. On 16 May 2023 the claimant emailed the Scottish Government stating that he had worked in the Compliance section of the respondent since approximately October 2018, making allegations against the respondent stating "Just after I started in Compliance I was advised by the Compliance Adviser, Norie Wilson, that a claim had recently been submitted to the Scottish Government, at the insistence of the Audit & Compliance Manager, Yvonne Douglas, despite the fact that it had not been checked/verified by Compliance. This information was corroborated at the time by another employee in Compliance, Karen McAleenan…..".

75. The allegations were investigated and later found by the Scottish Government to be without merit on the basis of the evidence before them. Ms Douglas was required to answer the allegations before the Chief Executive, and others.

76. On 27 June 2023 the claimant commenced a series of email exchanges with Mr Wilson about attending a meeting to review his absence from work, which then involved Fiona Brown of Personnel. He was required to attend under the respondent's Maximising Attendance Policy (which policy was not before the Tribunal). He said in reply that he would not do so.

77. A meeting was held on 13 July 2023 the terms of which Mr Wilson addressed in a letter to the claimant of the same date. At that stage the claimant's fit note lasted until 10 September 2023. The claimant was

advised that the respondent "could not sustain [his] absence indefinitely" and that it "may need to consider capability."

Second claim

78. The claimant commenced Early Conciliation again on 7 August 2023. A Certificate in relation to the same was issued on 9 August 2023.

79. The claimant presented a second claim to the Tribunal on 8 September 2023. It alleged breaches of sections 26 and 27 of the Equality Act 2010.

Suspension

80. On 23 November 2023 the claimant was suspended on full pay pending a disciplinary investigation.

81. The period of half pay ended on 23 November 2023. During the period of half pay the claimant received £4,907.64 less than he would have done if he had been on full pay, and had £469.94 less in pension contributions (those figures having been agreed by the parties). He received a total of £1,914.06 in Employment and Support Allowance, on which he will be taxed at 20%.

82. On or around 22 December 2023 the claimant came across Ms Douglas when both visited a supermarket. They spoke briefly. At 22.28 on 24 December 2023 he sent her a text message referring to "the fact that you have obviously discriminated against me on the grounds of disability…".

83. On 31 January 2024 a fact finding investigation report was issued in relation to allegations that the claimant had made false allegations deliberately and maliciously to the Scottish Government, and that he had made inappropriate access to the respondent's systems.

84. No disciplinary hearing in relation to the allegations made against the claimant by the respondent has yet taken place. The respondent deferred doing so in light of the present proceedings.

Other matters

85. The respondent continues to employ the claimant. He remains suspended on full pay.

86. Ms Douglas did not have a budget from the respondent to recruit additional staff members for the team of which the claimant was a member. She considered that she was not able to deploy resource from elsewhere within the respondent. She conducted personally the work that otherwise the claimant would have carried out had he attended the office one day per week. That included her working very late at night to do so as well as her other tasks.

87. The claimant attended a TV studio in Glasgow at some point in 2021 to participate in a quiz show called “Eggheads”.

88. The claimant met his daughters at a restaurant, and his sisters at another restaurant, after the commencement of the Covid-19 pandemic on about two or three occasions on dates not given in evidence.

89. The claimant attended a local shop from time to time to buy groceries after the commencement of the Covid-19 pandemic, doing so early in the day when numbers attending were likely to be low. He avoided public transport. He did not generally attend social events. He was anxious lest he contract Covid-19 and that that cause him substantial harm in light of his heart condition. He was not one of those required or advised to shield during the pandemic.

90. The claimant attended the respondent’s office about three or four times in two years after the commencement of the Covid-19 pandemic. On one occasion he did so with Ms Douglas to carry out a check of Covid-19 arrangements. On another he did so with a colleague for a period of about three hours. On another he attended alone to carry out archiving work.

91. Mr Norie Wilson and Ms Gail Paterson remain employed by the respondent.

Submissions for claimant

92. The following is a very basic summary of the claimant’s written submission (with not all of the authorities referred to included in the summary below).

The claimant was an impressive witness whose evidence should be accepted. Account should be taken of his disability status. The outstanding disciplinary allegations are irrelevant. His stress and anxiety caused any conduct issues. Ms Douglas's had not always provided an answer to questions asked and her position appeared to be that if there was a service need that would trump the claimant's disability. Neither she nor Mr Fergusson had considered disability.

93. On the issue of reasonable adjustments, there is no requirement for a direct comparator because there is no requirement for a "like-for- like" comparison with a disabled person ***Archibald v Fife Council [2004] ICR 954***. What is required is a general comparative exercise which will normally include a class or group of non-disabled comparators which, in many cases, will clearly be discernible from the PCP being applied by the employer ***Fareham College Corporation v Walters [2009] IRLR 991.*** The substantial disadvantage must arise out of the PCP applied ***Nottingham City Transport Ltd v Harvey UKEAT/0032/12.*** An adjustment will be reasonable if there is a prospect – which need not even be a good or real prospect – that doing so would prevent the claimant from being at the relevant disadvantage [***Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10***]. However, reasonableness still requires consideration of the whole circumstances, including whether it imposes a disproportionate burden on the employer. Reference was made to the EHRC Code of Practice. There had been harassment and victimisation given the circumstances. Reference was further made to the burden of proof. On remedy he should recover the financial losses and be awarded £30,000 by way of injury to feelings, with interest.

Submissions for respondent

94. The following again is a very basic summary of the respondent's written submission. The claimant was evasive, inconsistent and often vague in evidence. The respondent's evidence should be accepted. The respondent did not have actual or constructive knowledge of the claimant's disability until the Judgment by the Tribunal. Reference was made to ***Gallop v Newport City Council [2013] EWCA Civ 1583***. There was in any event no substantial disadvantage, as the claimant did return to the

office voluntarily on occasion. The reason for anxiety was his belief that working in the office was not necessary. The respondent did not have actual or imputed knowledge of any substantial disadvantage.

95. A return to office working on Wednesdays was necessary for the team as explained by Ms Douglas. Claims to the Scottish Government had been put on hold for 18 months. Tarbuck v Sainsbury Supermarkets Ltd [2006] UKEAT 0136 held that consultation with the employee was unnecessary, but the respondent did so. The claimant's suggested adjustment was not reasonable, and those proposed by the respondent were. ***Secretary of State for the Department of Work and Pensions v Alam [2009] UKEAT 0242*** is authority that where the employer does not know of disability there is no duty to make adjustments.

96. There was no harassment. Reference was made to the authority of ***Dhaliwal*** below. There was no victimisation. The letter of 9 May 2023 explained the reasons for the action taken. There was no evidence of action taken because of the grievance made. If remedy was considered it should be at the lower end of the ***Vento*** bands. From November 2022 the anxiety and illness the claimant experienced should be viewed taking into account his own conduct.

The law

97. The Equality Act 2010 ("the Act") provides in section 4 that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute the Disability Discrimination Act 1985 but there are some changes.

98. Section 20 of the Act provides as follows:

> **"20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial

disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage……"

99. Section 21 of the Act provides:

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

100. Section 26 of the Act provides

"26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

……

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are

….disability….."

101. Section 27 of the Act provides:

"**27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

……

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

102. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……."

103. Section 123 of the Act provides

"**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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…….

(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."

104. Section 136 of the Act provides:

> "**136 Burden of proof**
> 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. But this provision does not apply if A shows that A did not contravene the provision."

105. Section 212 of the Act states:

> "**212 General Interpretation**
> In this Act - …….
> 'substantial' means more than minor or trivial".

106. Schedule 8 to the Act, which has provisions as to making reasonable adjustments, states at paragraph 20:

> "**Part 3**
> **Limitations on the Duty**
> **Lack of knowledge of disability, etc**
> **20**
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

107. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5

as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

108. The Directive was retained law under the European Union Withdrawal Act 2018 and from 1 January 2024 is known as assimilated law under the Retained EU Law (Revocation and Reform) Act 2023.

109. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

Knowledge

110. The issue of what was actually known by the respondent, or what has become known as constructive knowledge, which the respondent ought reasonably to have had, is one on which the onus falls on the respondent. In ***Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283*** the EAT held that the correct statutory construction

of s 4A(3)(b) [the predecessor provision in materially the same terms as the 2010 Act] involved asking two questions;

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

111. In ***IPC Media Ltd v Millar [2013] IRLR 707*** it was held that it is necessary to determine who the alleged discriminator was (ie whose mind is in issue and who, in an appropriate case, becomes 'A' in sub-s (2)). It was subsequently held by the EAT that the knowledge of one element of the organisation (eg HR or Occupational Health) is not automatically to be imputed to the manager actually taking action against the employee; if that manager lacks the requisite knowledge, sub-s (2) may operate: ***Gallop v Newport City Council [2016] IRLR 395***. Separate acts can amount to discrimination - ***Reynolds v CLFIS (UK) Ltd [2015] IRLR 562*****.**

112. The provision asking whether an employer could be 'reasonably expected to know' means that an employer may be under a duty to make enquiries to establish whether a person is suffering from a qualifying disability. The Code of Practice at para 6.19 gives the example of an employee who has depression and cries at times at work and says that it is likely to be reasonable for the employer to discuss with the worker whether their crying is connected to a disability and whether a reasonable adjustment could be made to their working arrangements. The Court of Appeal in ***Gallop v Newport City Council [2014] IRLR 211*****,** held that it was essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment, rather than rely on advice from OH. In ***Donelien v Liberata UK Ltd*****,** ***[2018] IRLR 535*****,** the Court of Appeal clarified that, and emphasised that the case of ***Gallop*** should not be seen as discounting the value of OH reports generally, rather that an unquestioning reliance on an unreasoned report will not be sufficient.

113. In the context of a section 20 claim, the knowledge that the respondent ought to have known extends both to the fact that the claimant was disabled, and that the PCP was liable to disadvantage her substantially (***Wilcox v Birmingham CAB Services Ltd (2011) EqLR 810***)

Reasonable adjustments

114. There was no dispute in this case that there was a provision, criterion or practice (PCP) applied by the respondent to the claimant of being required to be in the office on one day per week, which in practice was on a Wednesday.

115. The second question is whether or not that put disabled persons and the claimant at a substantial disadvantage in comparison to someone not disabled. The word substantial in this context bears the section 212 meaning. It is applied to disabled persons, and the claimant himself, separately. The former is measured on an objective basis by comparison with what the position would be if the disabled person did not have a disability. Guidance was given in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090***.

116. If so, the third question is whether the respondent failed in its duty to take reasonable steps to avoid that disadvantage. Guidance on the reasonable adjustments required was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

117. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make

> an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

118. The duty to make reasonable adjustments does not extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

119. In ***Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06/*** stated that "the only question is, objectively, whether the employer has complied with his obligations or not… If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant."

120. The duty may however involve treating disabled persons more favourably than those who are not – ***Redcar v Lonsdale UKEAT/0090/12.*** When considering the issue of reasonable adjustments, the Tribunal can consider those made as a whole – ***Burke v College of Law and another [2012] WECA Civ 37.***

Harassment

121. Guidance was given by the then Mr Justice Underhill in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) [from the predecessor provision] is there to deal with

unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not *per se* a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason) [this aspect requires amendment as the 2010 Act introduced the concept of "related to" which is different, but there does remain the need for a connection between the conduct and protected characteristic for it to be "related to" it]; and (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

122. Similar views on the last aspect were expressed in ***Land Registry v Grant 2011 IRLR 748*** referring to the words "intimidating, hostile, degrading, humiliating and offensive" as to which it was said that "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught".

123. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** EAT 0039/19). Guidance was given by the Court of Appeal in ***Pemberton v Inwood*** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill:

> "In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

124. In ***Hartley v Foreign and Commonwealth Office Services 2016 ICR 17*** the Employment Appeal Tribunal held that an Employment Tribunal

considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses *"*will not readily volunteer*"* that a remark was related to a protected characteristic.

125. ***Warby v Wunda Group Plc EAT 0434/11*** is authority for the proposition that the conduct should be viewed in context in assessing whether the conduct is related to the protected characteristic.

126. In ***Kelly v Covance Laboratories Ltd [2016] IRLR 338*** an instruction not to speak Russian at work, so that any conversations could be understood by English speaking managers was not related to race or national origins, even though it potentially could have been. The conduct was because the employer was suspicious about what was being said and could not understand. Viewed in the context of the company's business and risks the employer's explanation for the conduct was accepted and the conduct was not related to race or national origins.

127. Paragraph 7.9 of the Equality and Human Rights Commission Code of Practice states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording. The test for "related to" is different to that for whether conduct is "because of" a characteristic. It is a broader and more easily satisfied test – ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.***

128. There can be harassment under this provision arising from an isolated incident; for an example, see ***Lindsay v London School of Economics [2014] IRLR 218***. It is not necessary for the claimant to have expressed discomfort or air views publicly ***Reed and Bull Information Systems Ltd v Steadman [1999] IRLR 299.***

Victimisation

129. There are two key questions – (i) has the claimant done a protected act (ii) if so did he suffer a detriment because he had done so, which is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ 425.***

130. On the issue of detriment the question is - "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" as explained in ***Shamoon v Chief Constable of the RUC [2003] IRLR 285.*** It is to be interpreted widely in this context – ***Warburton v Chief Constable of Northamptonshire Police EA-2020-000376*** and ***EA-2020-001077.*** The House of Lords confirmed in ***Derbyshire v St Helens Metropolitan Borough Council 2007 ICR 841*** that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances.

Burden of proof

131. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the relevant protected characteristic, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities.

132. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***

133. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

134. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment

> complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

135. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

136. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***.

137. The application of the burden of proof is not as clear in a reasonable adjustments' claim. In ***Project Management Institute v Latif [2007] IRLR 579***, Mr Justice Elias, as he then was, gave guidance of the specification required of the steps relied upon. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

The EHRC Code

138. The Tribunal also considered the relevant terms of the Equality and Human Rights Commission Code of Practice on Employment, under section 15(4) of the Equality Act 2006. Chapter 6 includes detailed guidance on issues relating to matters of disability, and the duty to make reasonable adjustments.

139. Paragraph 6.19 refers to knowledge of disability and substantial disadvantage, or that the employer ought reasonably to know. It states

> "The employer must, however, do all they reasonably can be expected to do to find out whether this is the case. What is reasonable depends on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

140. Paragraph 6.32 gives examples which includes the following –

> "**Assigning the disabled worker to a different place of work or training or arranging home working**
>
> **Example:** An employer relocates the workstation of a newly disabled worker (who now uses a wheelchair) from an inaccessible third floor office to an accessible one on the ground floor. ….Allowing the worker to work from home might also be a reasonable adjustment for the employer to make....."

141. Chapter 7 gives guidance on harassment and Chapter 9 gives guidance on victimisation.

Remedy

142. In the event of a breach of the 2010 Act compensation is considered under section 124, which refers in turn to section 119. That section includes provision for injured feelings under sub-section (4). Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

143. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

144. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is annually updated. In respect of claims presented on or after 6 April 2022, the Vento bands (from the Fifth Addendum) include a lower band of £990 to £9,900, a middle band of £9,900 to £29,600 and a higher band of £29,600 to £49,300. The Sixth Addendum increased those bands for claims presented on or after 6 April 2023 to a lower band of £1,100 to £11,200, £11,200 to £33,700 and £33,700 to £56,200 respectively.

145. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. The question is "what would have occurred if there had been no discriminatory dismissal ……. If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

146. It was stated in ***Chief Constable of Northumbria Police v Erichsen 2015 WL 5202327*** that what was required was an assessment of realistic changes, not every imaginable possibility however remote and doing so "taking into account any material and plausible evidence it has from any source".

147. There is a general duty of mitigation where losses are being sought, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum which failing the award may be reduced or negated. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

148. In ***Chapman v Simon [1994] IRLR 124***, the Court of Appeal emphasised the importance for tribunals to consider only the act of which complaint is made. Where loss has been caused by a combination of factors, including some which are not discriminatory, the award may be discounted by such percentage as reflects the apportionment of that responsibility - ***Olayemi v Athena Medical Centre [2016] ICR 1074***. In ***BAE Systems (Operations) Ltd v Konczak [2017] IRLR 893***: the Court of Appeal held that "the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong".

149. Compensation is awarded on the basis that "as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct" of the employer ***Ministry of Defence v Cannock [1994] IRLR 509***. The extent of the loss caused by the breach of duty was a factor considered in ***O'Donoghue v Redcar and Cleveland Borough Council [2001]EWCA Civ 701***.

150. Interest is to be applied to certain elements of the award under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. The awards for interest can include for injury to feelings, and for past financial losses but not future losses.

Observations on the evidence

151. We considered that all witnesses sought to give honest evidence. **The claimant** gave evidence that was on occasion evasive, did not directly address the question asked, and was exaggerated. That exaggeration included for example the initial period of time for which he took Sertraline, which according to a letter from his GP was from October 2021 to March 2022, at most six months, but which he said was for ten months. He alleged during a meeting that he had been off eight months when it had been 10 weeks.

152. He challenged the record of the meeting on 14 October 2022, but we preferred the evidence that the notes taken by a Personnel Officer, which Mr Fergusson saw shortly afterwards and considered were reasonably accurate, to be so, and that the claimant's description of them as inaccurate and misleading was not reliable.

153. Similarly he disputed the events outside a supermarket involving Ms Douglas shortly before Christmas 2023, but we preferred her evidence to his on that. His account was not assisted by the inappropriate message he sent late on Christmas Eve, shortly after it.

154. We noted that the claimant alleged bias and lack of impartiality by Mr Fergusson, which we considered wrong. It appeared to us that he sought to be scrupulously fair. There was no suggestion we considered of bias or partiality to any extent. That an allegation of that nature was made without any real basis to do so other than that the claimant disagreed with it was a further factor that affected our assessment of reliability. The circumstances at that time were materially different to those later.

155. We also noted that the claimant did not pursue a later grievance after the letter of 9 May 2023, although the circumstances at that stage had materially changed from the terms of the third Occupational Health Report to those in his grievance.

156. The claimant's behaviour has at times in our view been entirely improper. That included (i) excessive emails to Ms Douglas with content and tone that was at best unprofessional (ii) making unfounded accusations against those involved of bias or otherwise unethical or improper behaviour (iii) taking four or five Sertraline tablets on the morning of the appeal

hearing, when the prescription was for one per day, then saying at a meeting of the team that he was drunk, then emailing the team inappropriately, and on the following morning alleging that he had not been drunk but had taken those tablets. His behaviour at the meeting and afterwards was upsetting for his colleagues (iv) despite letters advising him not to continuing to send inappropriate messages in content, tone and volume particularly to Ms Douglas, (v) making what he alleged was a protected disclosure or whistleblowing allegation on 16 May 2023 in relation to events said to have taken place from what he had been told around October 2018 but which he had not raised then, and which included copying in the alleged perpetrator Ms Douglas. She considered that an attempt to intimidate her, not a genuine protected disclosure, which from the limited evidence before us on this aspect we agree with and (vi) sending Ms Douglas a text to her personal mobile late on Christmas Eve 2023, after a chance meeting three days earlier, in inappropriate terms.

157. Overall we had some concerns over the reliability of the claimant's evidence on some aspects, but we did consider his evidence reliable in relation to a feeling of anxiety about a return to work in the office, and the risks for him if he were to catch Covid. He has clear support in that from the third Occupational Health Report, and a degree of support from his GP and consultant. Whilst the respondent argued that his actions were inconsistent, such that we should not accept his evidence, we considered that that made too much of the evidence of inconsistency. There were a few occasions on which he had a social event with family and about four occasions on which he attended the office voluntarily, but they were sometimes alone, generally for a specific purpose and restricted periods of time, and were not such as to cause us to consider his whole evidence on this aspect to be unreliable. Attending a quiz show was a particular inconsistency, but again we did not consider that that one incident undermined all of his other evidence.

158. The claimant has been found to be a disabled person on the basis of anxiety and depression. We do take that into account. His medical conditions are varied. The GP reports about him are however very limited.

There are records we were referred to briefly, as well as letters from his consultant and three Occupational Health Reports. There are within those documents a measure of explanation for some of the behaviours, but not all of them in our view. We noted that the claimant had had nearly 25 years of service without any issue formally raised. Ms Douglas in her evidence alleged that he had been sending inappropriate and unprofessional message to her for a number of years, but they were not in evidence before us and the claimant was not cross-examined on that point. We make no finding as to that.

159. We did not consider that all of the claimant's behaviours were explained as being a reaction to what he claims as disability discrimination. A part of it in our view might be, but a material part arises from his unduly combative style of interaction, the investigations that were undertaken into his behaviours in various respects. The claimant did not provide detailed medical evidence to establish any link between his behaviours and disability such that we could find that they had been caused by it other than to a relatively small extent.

160. This case is one specifically under sections 20, 21, 26 and 27 of the 2010 Act, not a more wide enquiry into some admitted or many alleged and disputed behaviours on his part, and his employment continues. We take all that into account in framing this Judgment.

161. **The respondent's witnesses** were all, we considered, credible and in general terms reliable. **Ms Douglas** had a firm and what proved unshakeable view that working in the office was required on one day per week. We accepted her explanation for that. Paper files required to be worked upon, a team effort was required, the team was of four people, and no other resource was made available to her. She was in our view in a very difficult situation from the need to recover grant moneys, but taking account of the claimant's situation. She herself picked up the slack from his not coming into the office, and that may well have affected her view of matters. But we concluded that she had a closed mind in relation to the claimant's disability, as it has been found to be, and did not fully take that into account in her decisions.

162. **Mr Fergusson** had we considered conducted a reasonable investigation and made what was generally a reasonable decision given what was before him at the time. Whether the correct procedure was followed was not clear to us, but the Equal Opportunities Policy referred to in the Grievance Procedure as an exception for discrimination matters was not before us, nor was the Dignity at Work Policy and certain other policies. Whilst the union did not challenge the process, it is for the employer to apply it. What he did not do fully was check about the risk assessment or the issue of anxiety that the Occupational Health Report had raised as qualifications to working in the office. Exactly what was meant by that was not clear from the report itself, but the issue was not checked with its author at any stage. At the point of time of his appeal however matters were different to those that arose later.

163. There are **other points**. We noted further that witnesses who might have been called by the respondent were not, in particular Mr Wilson who wrote the letter of 9 May 2023, and Ms Paterson who determined the appeal of Mr Fergusson's decision, in effect preventing it from being heard on the basis that doing so would be contrary to the respondent's policies and procedures, but not specifying what they were. Others might have given evidence including those from Personnel who were involved, and Ms McCafferty who conducted some of the meetings with the claimant. That failure to call these witnesses, most obviously Mr Wilson, is an issue we address more fully below.

164. There is also a general point to be made about the respondent's evidence. A material part of it was devoted to its allegations of misconduct on the part of the claimant. That evidence is not irrelevant, as it can be taken into account in relation to credibility and reliability, and may not be irrelevant to remedy if the claim succeeds. But it is not directly relevant to the issues as to liability before the Tribunal in the claim before us, in our view. It is often referred to as collateral evidence. It did not appear to us to have a direct bearing on whether or not the respondent ought reasonably to have known of the claimant's disability and substantial disadvantage, whether or not he suffered a substantial disadvantage from the PCP, and whether or not reasonable steps were taken to avoid that disadvantage.

Discussion

165. The Tribunal will address each issue separately. It reached an unanimous decision as to the outcome, although there was one area of difference as addressed below. Before we address each issue however we make a general observation. That is that each of the parties did not appear to us to have a proper appreciation of the position. The claimant appeared to consider that it was for him to decide whether working in the office was necessary. In our view it was not – that was a matter, subject to what follows, for the employer provided that it acted reasonably.

166. The respondent appeared to consider that it was for them to decide whether working arrangements were appropriate, and that if the claimant was made anxious by disagreeing with them that was irrelevant. That in our view does not take account of the duties of an employer under the 2010 Act where it ought reasonably to have known of disability status and substantial disadvantage, as we shall come to. At that point it is not a question of an employer having a discretion to issue an instruction where that is reasonable, with the focus being on the reasonableness of the instruction, rather it is a question of whether or not steps are required to avoid the disadvantage caused by the PCP, if there is a substantial disadvantage caused by the disadvantage and if taking the step is reasonable. The focus is therefore under the Act on the alleged disadvantage, and whether it is reasonable for steps to be taken to avoid it. It appears to us that the respondent did not ever address itself to that question, and was simply looking at matters from its view that the instruction to return to the office was reasonable, if not necessary.

167. Neither party in our view had therefore approached matters properly. It was also instructive that in a case of disability discrimination neither party saw fit to produce the policy on Equal Opportunities which is referred to as an exception in the Grievance Policy, nor the Dignity at Work policy referred to in evidence, nor the Attendance Management Policy (if that is the correct name for it) also referred to in evidence. To us that was surprising in such a case, in which the claimant was absent from work for lengthy periods, and the issue of disability discrimination was before us.

168. Not all the evidence that might have been put before us was therefore available to us. We required to decide the issues on the basis of what we had.

Did the respondent know, or ought it reasonably to have known, of the clamant being a disabled person under the Equality Act 2010 ("the Act")?

169. The Tribunal considered that the respondent did not in fact know that the claimant was a disabled person under the Act, but that it ought reasonably to have known. The grievance that the claimant presented made clear that it was a claim that there had been disability discrimination under the 2010 Act. It was clearly inferred from that that he was alleging that he was a disabled person under that Act. The respondent could have sought advice on that issue from Occupational Health, but the first report did not address that standard question, and the point was not followed up. That is in the context of guidance to managers from the respondent stating that that question would be answered, as well as the earlier meeting with Ms Kirkland had said that the issue of reasonable adjustments would be referred to Occupational Health. The respondent however did not do so – that question was not asked in the form, although there was a part to add specific questions. Information from the tailored adjustments form was not passed on within the referral.

170. The second had a "N/A" response, and the third did not address it. At no stage did the respondent ask for advice on the point, or ask the claimant for further detail as to his medical conditions so far as they bore on the issue of his return to work in the office. Given what the claimant said on the grievance form in particular enquiries ought to have been instigated then, and had that been done it appears to us very likely that it would have been apparent that he did meet the statutory test (as the Tribunal later found).

171. In submission the respondent argued that it did not know of the claimant's medical records, but it had been told that he had been taking Sertraline, for example. It was aware of the fact that he was taking medication from the tailored adjustment form.

172. The first Occupational Health Report did not simply state that the claimant was fit to attend work. It had qualifications. One was for a stress risk assessment. That was not done. The respondent sought to argue that reference to using a stress management tool was the same as a stress risk assessment, but we did not consider that that was the case. There was no written record of it, and it did not appear to us to be close to what was referred to in the Work Stress Policy.

173. The second qualification was to take account of the claimant's anxiety, but the respondent did not investigate that anxiety, and in effect disregarded it. There was something of a pattern of the respondent not wishing to investigate the issue of disability status, and we did not consider that it could use that failure to do so as a shield against imputed knowledge.

174. Given all of the details available we had no doubt but that the respondent ought reasonably to have been aware of the claimant's disability.

If so, on which date?

175. In our view this was within 14 days of 27 September 2022 when the grievance was produced, which referred inter alia to his mental health condition and heart condition, in the context of the first Occupational Health Report of 9 September 2022 which also raised doing a stress risk assessment. Time was required for those matters to be considered, in our view, but had they been ought reasonably to have led to the conclusion that the claimant was a disabled person, thus by 9 October 2022. The 14 day period allows a reasonable time for that issue to be investigated with the claimant, or by reference to advice from Occupational Health.

Did the provision, criterion or practice applied to the claimant of a requirement to attend the respondent's office on one day per week put the claimant at a substantial disadvantage compared to someone without the claimant's disadvantage?

176. This requires to be considered at different points in time. The first is initially when the claimant raised the issue of tailored adjustments, the second when the claimant made a grievance, the third at his appeal, and the fourth after the second occupational health report and later letter of 9 May 2023.

177. The respondent argued that there was no substantial disadvantage for the claimant. It appears simply to have disbelieved him. That was partly as he did attend the office on some occasions, and partly as he had attended a quiz show in 2021, for example, as well as other concerns over his position.

178. There was we considered sufficient evidence of there being a substantial (in the sense of not minor or trivial) disadvantage from the evidence form the claimant so far as accepted, and from the terms of the third Occupational Health Report in particular. It stated that returning to the office may aggravate the claimant's anxiety and cause a flare up of the underlying chronic mood disorder. That followed a telephone consultation between Dr Milosevic and the claimant, but which the Doctor referred to further as an "assessment". His opinion was that the claimant was fit for home (remote) working only. To require the claimant to come to the office would, we consider, put the claimant at a disadvantage that is more than minor or trivial (the section 212 definition of substantial).

179. That the claimant did not always act consistently is a factor to take into account, but must be set in context. He did in fact modify his behaviours. He has been found to be a disabled person, despite the respondent's arguments to the contrary. The respondent got close to arguing that he had had Covid initially in February 2022 and could not have been that anxious about contracting it for a second time because it had not been too severe on that occasion. But that is a simplistic view at best. The claimant did have a heart condition, and his anxiety about it is supported to an extent by his GP, to an extent by his consultant, and more clearly by Dr Milosevic. Taking the evidence as a whole we did not consider that the respondent's position was correct.

180. Working back in time, we considered that substantial disadvantage arose from the time of the grievance being submitted.

Did the respondent know, or ought it reasonably to have known, that the claimant was likely to be placed at that substantial disadvantage?

181. The Tribunal considered that it did, particularly from the terms of the third Occupational Health Report received on 26 April 2023 which set matters

out clearly. By requiring him to return to the office there was a risk of the claimant suffering harm by exacerbation of his anxiety in particular, which may have led to a worsening of his chronic mood disorder, as the report stated.

182. We did not consider that the respondent ought reasonably to have known that the claimant was likely to be placed at a substantial disadvantage at an earlier time. Whilst the terms of Ms Douglas' email of 22 September 2022 indicated what looked like a closed mind, she did refer before then to the claimant seeing his GP. The GP report then produced however did not materially assist the claimant. At that stage the claimant was arguing that it was not necessary to return to the office, and it was not we consider clear from all that was before the employer at the time that doing so was likely to place him at a substantial disadvantage. Although there were qualifications to the fitness to return to the office in the Occupational Health Report they were more general ones as to undertaking a stress risk assessment, and considering anxieties to paraphrase, which we consider suggests checking whether other alterations in the workplace might be considered rather than not being there at all.

183. It was when the third Occupational Health Report was received that the position materially changed. It stated in clear terms that the assessment was of a risk of harm to the claimant's mental health if he returned to the office, as noted above, and it is at that point that the issue of substantial disadvantage was, in our view, something that the respondent ought reasonably to have known about. We therefore reject its submission that it did not. In our view it was the respondent's failure at that stage to appreciate firstly that the claimant was a disabled person, and secondly that the PCP did place him at a substantial disadvantage, that lies at the heart of the case. The respondent did in our view close its mind to those matters, as it was so intent on proceeding with the instruction to return to office working that it was adamant was a reasonable one. As stated above however, in our view that was the wrong way to approach the matter.

Did the respondent fail to take any steps which it would have been reasonable for them to take to avoid the disadvantage, in particular by allowing him to work remotely from home throughout the week?

184. This was a far from simple matter. The respondent's position is that it was making a series of other proposed adjustments including a possibly shorter working day, another room to use if the claimant wished to, and distancing, ventilation and sanitisation arrangements at the office, in the context of the work that needed to be done being in paper files within the office itself. The respondent argued that the real reason for the claimant not wanting to work in the office is his personal view that it was not necessary, contrary to that of his manager.

185. The claimant's position is that the arrangements did not address his anxiety, or the risk of exacerbating symptoms by being in the office the third Occupational Health Report referred to. He thought that a separate room was stigmatising him.

186. On that last point we did not consider that he was right – it was an option for him to use if he wished. But on the question of whether the proposed step of not requiring him to work in the office is concerned we have concluded that the claimant's position is to be preferred.

187. There is no real statutory guidance as to what is "reasonable" in this context. There is some assistance from the EHRC Code, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

188. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards, with examples given one of which includes home working, but the circumstances of that example are very different from this case.

189. We consider that to require an employee to carry out an action that an Occupational Health Doctor (not an Adviser) suggests may exacerbate a chronic mood disorder and therefore potentially cause harm, after having

carried out an assessment, as the report states, is not what a reasonable employer would do. That is not directly the test, but it is a factor to take into account in making the assessment of the reasonableness of steps proposed.

190. It is a reasonable adjustment to avoid the risk of such harm in the circumstances of this case, in our view. We take account of the fact that the respondent is a local authority. It was seeking a sum of several million pounds from a grant project and if a requirement from the 2010 Act meant that an employee should not attend work in person but work remotely, it seems to us that either alternative arrangements should be found, such as recruiting other staff, or the potential recovery of sums may be less, but that what is not reasonable is either to allow Ms Douglas (not that this was formally required of her) to work an additional number of hours above her existing workload to cover the shortfall herself, or to instruct an employee to act in a manner that the advice is may cause him harm.

191. If the claimant was incapable of carrying out the work required of him, on the basis that to do so required him to be in the office which (at that stage) he was not fit to do, that is a separate matter. The report was less than clear on the length of time that the claimant may not be fit, and matters were complicated by the Final Hearing being amended to a Preliminary one. One option was to investigate the claimant's capability to perform the role, and whether another role which could fully be undertaken remotely was possible. If not, consideration may require to be given to dismissal on capability grounds.

192. This was however not considered at all. The respondent did maintain its position that the claimant required to work in the office. We have concluded that doing so is in breach of its duties under sections 20 and 21.

193. We did not consider that the other aspects founded on had been established. Whilst there was a recommendation for a four week phased return and in reality a three week period was proposed there was a lack of clarity as to what exactly the phased return should be, and what the final week of the return would look like. It was not fully addressed in the

evidence before us and we consider that the claimant had not proved that aspect.

194. The request to meet three times per day was unusual, but in the context of the claimant's behaviour at a team meeting, at which he said he was drunk, and then said that he was not but had taken too many tablets of Sertraline. His colleagues were upset by his behaviour and later emails he sent that day. These were separate matters from the issue of the substantial disadvantage caused by the PCP being founded on.

Did the respondent harass the claimant by subjecting him to unwanted conduct related to his disability contrary to section 26 of the Equality Act 2010?

195. We considered that the claimant had not made out a *prima facie* case of harassment. Whilst his views of what happened were stridently held, we did not consider that there was a breach of the terms of section 26.

196. The first issue is whether there were unwanted acts established in evidence. We accepted that there had been. The second is whether it related to the claimant's protected characteristic of disability. We considered that that had also been established. The third is whether it had the purpose or effect as set out in the section. We considered that it did not. The claimant's perception is to be taken into account, but against a test of reasonableness, and considering all of the evidence. The respondent was seeking to manage matters. The claimant did not assist himself in how he responded to that. In our view it was not reasonable for him to regard the events on which he founds as having the purpose or effect within the statutory provision. We were concerned at some exaggeration in his evidence, as noted above.

Did the respondent victimise the claimant for commencing the first claim contrary to section 27 of the Equality Act 2010?

197. The claimant presented his first claim, which was a protected act. We were concerned that the letter of 9 May 2023 which (i) withdrew an offer of temporary meetings of one hour on one day per week with Mr Wilson in the office and (ii) imposed a new requirement of working a full day in the office one day per week were because the Final Hearing on 13 – 15 June

2023 was not to proceed. This was potentially at least something that arose from the presentation of the Claim, as after it had been presented and a Final Hearing fixed for those dates that hearing was converted into a Preliminary Hearing on disability status. That change in the nature of the hearing followed, obviously, from the Claim being presented. There was at least that connection between the claim and the letter of 9 May 2023. There is a difference between presenting a claim, and the conduct of that claim, but the latter follows the former.

198. This is in the context however of the Occupational Health Report also referring to the hearing, and the respondent not following the advice within it that the claimant was not fit to work in the office. Not following such advice does, in our view, add to the concerns from which a *prima facie* case can be said to arise.

199. It was further not easy to understand why, if one hour a week could be accommodated initially, that was then simply withdrawn hours after the meeting took place that day. The explanation that Ms Douglas could continue with her additional duties until the hearing, but not at all if the hearing was not to proceed, was hard to understand, although we appreciated her concerns that she was doing the work herself on top of other duties and that that included a change to her normal working which had been to have every second Wednesday off. But the withdrawal of that offer was a concern.

200. In our view, these facts together do raise a *prima facie* case that the decision in the letter of 9 May 2023 was because of the first claim. The burden in our view shifted to the respondent to prove that it was not to any significant extent. They did not however lead the person who signed that letter, and on the face of it decided that. Nor did they call anyone from Personnel. Ms Douglas denied that she had been the decision-maker. Without the evidence of the person involved in taking the decision set out in that letter we considered that the respondent had not discharged the burden. It followed that the claim under section 27 was made out, in our view in relation to the withdrawal of the proposal of a temporary period of a meeting for one hour a day with Mr Wilson.

201. For the other aspects founded on we did not consider that there was a sufficient connection to the commencement of the first claim to raise a *prima facie* case.

If any claim is successful to what remedy is the claimant entitled?

202. The issue of remedy is not simple. So far as injury to feelings is concerned there are a number of factors. Whilst we have found that there was victimisation, the claimant would not have accepted a return to the office of one hour per week, and that in any event was in contravention of the duty of reasonable adjustments. Whilst there had been a breach it did not we consider add materially to the issues which were to be compensated for in relation to the issue of reasonable adjustments.

203. In the context of the claim for reasonable adjustments we accepted that the claimant was materially upset by the letter of 9 May 2023. It did increase his level of anxiety. He did go off work thereafter, and was absent for about six months. We did not accept the respondent's argument that there was something else that caused that. It appears to us that it was most likely that the respondent simply failing to appreciate the duties incumbent on it on receipt of the clear Occupational Health Report was the principal cause of the absence. The claimant re-started Sertraline. Whilst there was not much detailed evidence of the effect on him, with no detailed medical report for example, we consider that he has proved that he suffered anxiety, depression and upset for that period of absence from work, and to a smaller extent beyond that.

204. We do take into account that there had been other matters that had occurred beforehand, in particular the team meeting at which his behaviour had been put into question by his own conduct. It was we considered an obviously wrong thing to do to take a higher number of tablets than prescribed, which is what he said he did. His behaviour is under challenge by the respondent and we shall simply state that the background of that and other matters was a part of the stress, anxiety and depression suffered, but not to a great extent in our view.

205. We also take account of the period of time during which the respondent maintained its position that the claimant required to attend the office in person, and that it did so in the letter of 9 May 2023 under the reference to conduct being raised as an issue if he did not do so.

206. We consider that this case is one that should in all the circumstances be compensated at the lower end of the middle ***Vento*** band. We consider that an award of compensation for injury to feelings of £13,000 is appropriate. Interest is due on that for the period from 9 May 2023 to the date of anticipated payment, we estimate as 9 March 2024, at the rate of 8% per annum, which we calculate at £1,906.67.

207. So far as financial losses are concerned, we consider that the position is more difficult. The claimant's absence was triggered by the letter of 9 May 2023, but we require to assess what was caused by it as a loss, so that that is just and equitable to award. It appears to us that if the respondent had concluded that working in the office was not possible for the claimant that they would then have considered his continued employment as addressed above, but as well the conduct issues which we have referred to. We appreciate that the respondent in fact did not undertake a disciplinary hearing, as that has been deferred because of this action, but had the adjustments been made as we have found were required matters would have been different, in our view. Where we assess the loss on the assumption that the respondent had acted in accordance with that duty, what then would have been likely to have taken place? It is, we consider, the loss flowing from that which the claimant suffered.

208. It appears to us that in that scenario a disciplinary process is likely to have taken about two months. We consider that it was likely that the claimant would have been dismissed for conduct issues within that period, as firstly he had sent a series of messages to Ms Douglas which were inappropriate in content and volume having been warned against doing so (which he did not dispute before us and as confirmed in the fact finding report), secondly he had conducted himself at the team's meeting and its immediate aftermath in a wholly inappropriate way (even if it is accepted that he took an excess number of tablets and was not drunk as he had at first claimed) which caused distress to his colleagues, including by his later emails to

them, such as can be considered to be harassment of them, and thirdly he sent a purported whistleblowing complaint related to an allegation several years earlier which, from the admittedly limited evidence we had, appears to us not to have been done in good faith, but as a reaction to the letter of 9 May 2023. That the respondent was in breach of duty itself does not explain or excuse his doing so, in our view. The Occupational Health Report from Dr Milosevic stated that he was fit to work from home. The emails sent, and the team meeting was held, from his home.

209. We take into account his disability, and have left out of account some other issues (such as the text to Ms Douglas on Christmas Eve which is outside the timeline we are concerned with), but we have concluded that the claimant would have been dismissed for gross misconduct by the end of that two month period had the adjustment we referred to been made, which is the hypothesis on which the assessment of loss caused by the breach requires to proceed in our view, in which event the decision not to proceed with disciplinary action because of the present proceedings would not have arisen, and that it is just and equitable to award the claimant one third of the financial losses he claims given all the circumstances.

210. In this respect the view of the Tribunal, on the basis of the evidence it heard, was that it was essentially certain that there would have been a fair and lawful dismissal by the respondent in such circumstances and in such a time. The Tribunal concluded that making an award for the period of two months only was that which was just and equitable in all the circumstances, as that was the loss suffered by the claimant. The loss was to be calculated on that basis.

211. During the period of half pay the claimant received £4,907.64 less than he would have done if he had been on full pay, and had £469.94 less in pension contributions, a total of £5,377.58. He received a total of £1,914.06 in Employment and Support Allowance, which reduces the sum to £3,463.52 but on which amount of benefits he will be taxed at 20%. That is a sum of £382.81. The total of these sums is £3,846.33. One third of that amount is £1,282.11.

212. Interest is due on that which is the sum of £188.04.

213. The total award for all elements is the sum of £16,376.82.

Conclusion

214. We find in favour of the claimant in respect of the claims as to reasonable adjustments and victimisation, against him in respect of the claim of harassment, and make the award set out above.

215. We have not made a recommendation, and the claimant did not seek that in the submission, but we do consider that there was, from the evidence before us, the appearance of some limitations in the understanding of the respondent's witnesses on matters of disability discrimination. The respondent may wish to review its practices and training in light of the decision we have made.

216. Finally, in this Judgment the Tribunal has referred to some authorities not the subject of submission, but where the Tribunal did not consider it necessary to invite parties to make further submissions in advance of issuing it, having regard to the overriding objective. If either party considers that they have not been able to make sufficient submissions an application for reconsideration can be made UNDER Rule 71referring specifically to such authorities and making whatever submission is thought to be appropriate in relation to them.

Employment Judge A Kemp

_____

Employment Judge
28 February 2024

_____

Date of Judgment
28 February 2024

_____

Date sent to parties