RESERVED

EMPLOYMENT TRIBUNALS

Claimant: Mr S Jafrate

Respondent: Royal Mail Group Limited

HELD AT: Liverpool (by CVP) **ON:** 1, 2, 3,4,5, 8 & 30 August 2022 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr S Hussain
Ms F Crane

REPRESENTATION:

Claimant: In person
Respondent: Ms R Carney, solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Tribunal does not have the jurisdiction to consider the claimant's complaint of unlawful disability discrimination brought under sections 20-21 of the Equality Act 2010 in relation to the period between 2014 to 2018 which was presented after the end of the relevant time limit, it is not just and equitable to extend the time limit and the claimant's claims of unlawful disability discrimination are dismissed. In the alternative the claims not well-founded and are dismissed.

2. The respondent was not in breach of its duty to make reasonable adjustments between March 2020 and October 2020, the claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 for the period between March 220 and October 2020 do not succeed and are dismissed.

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3. The respondent was not in breach of its duty to make reasonable adjustments and the remaining claims brought under section 20 to 21 off the Equality Act 2010 do not succeed and are dismissed.

4. The respondent did not victimise the claimant under section 27 of the Equality Act 2010 and his claims of victimisation did not succeed and are dismissed.

5. The respondent did not harass the claimant in relation to all of the complaints with the exception of harassment allegation numbered 7.4 that on 17 December 2020 a member of staff shouted out three times so the whole office heard him, “I am not putting out the trays, I will go home". The respondent did harass the claimant in respect of claim numbered 7.4 under section 26 of the Equality Act 2010 which succeeds and is adjourned to a remedy hearing listed for 3-hours via CVP.

6. The parties will provide dates of their availability within 14-days of receiving this judgement and reasons and will be advised of the remedy hearing date and details in due course.

REASONS

Preamble

The hearing

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was CVP fully remote. A face-to-face hearing was not held because there was an error initially with the listing, and when it was proposed that the case should be in person at the Liverpool Employment Tribunal the claimant indicated he wished to continue with the CVP hearing due to his mental health and this was accepted with the Judicial Bench Book guidance in mind.

2. The claimant has mental health issues and giving oral evidence at this hearing has not been easy for him on occasion. He had noticeable difficulties at the start which required many breaks for the claimant to go away and calm himself (often making a cup of tea which he drank away from the screen) and assistance from the Tribunal who proposed the remaining 4-days should take place in person at Liverpool. The claimant was firm that the hearing should not take place in person, and as a reasonable adjustment to him it continued to be conducted via CVP which was the claimant’s strong preference as he was in his home, and at time family members, i.e. his 24-year-old son was around later in the afternoon but unable to sit with the claimant. The Tribunal also suggested the claimant made contact with his CWU representative who could sit with him during the hearing, but he refused this option stating he was giving the union a “wide berth.” The Tribunal also investigated the possibility of the claimant being supported by a PSU but the claimant rejected this option, adamant he did not want to take part in an in-person hearing, which was the Tribunal’s preference.

3. The claimant actively took part, had as many breaks as he wanted and it became apparent that he had issues or difficulties giving evidence on day 1 but matters improved as the hearing progressed. By the time it came to cross-examination the claimant refused and had no need for breaks until the last day of the final hearing when further breaks away from

the screen were given when the claimant became upset. The claimant assured the Tribunal he was well enough to proceed when an adjournment to another day was proposed, and he continued to cross-examine and made oral closing submissions without incident or too much difficulty. The claimant thanked the panel for the kindnesses shown to him at the end of the final hearing.

4. It is unfortunate the claimant's legal representation was withdrawn on the 6th June 2022, less than 2-months before the final hearing with witness statements still to be prepared according to the claimant who blamed the CWU. This late withdrawal has impacted on the claimant, bearing in mind the concession made by the respondent that the claimant was disabled with stress and depression and the witness evidence given by James McGovern, health and safety representative of the CWU that the claimant had significant mental health deterioration and had "battled" with disability since 2013. The claimant was left in a difficult position, representing himself in a complex case and the Tribunal has attempted as best as it could to even up the playing field between a legally represented respondent and the claimant who did not want to adjourn. It has not been an easy task bearing in mind the claimant's confusion as to some of the allegations he was bringing, the extended time period covered in the litigation when witnesses could either not recall what had happened, or in the claimant's case, not be relied upon to reflect the reality that existed at the time as opposed to what the claimant wanted to believe years later down the line. The claimant, when it suited his case, also refused to answer a number of questions on cross-examination despite being given time and breaks to do so.

5. The documents that the Tribunal was referred to are in a bundle of 742 pages, the contents of which I have recorded where relevant below. In addition, the Tribunal was provided with witness statements and a number of separate documents produced during the hearing including a combined agreed list of issues and medical records. The bundle included occupational health reports but not the GP records provided by the claimant, which were produced during the hearing at the Tribunal's request as they may have been relevant to the time limit issue. Both parties agreed the medical records were no longer relevant to disability status as this had been resolved by agreement, however the claimant urged the Tribunal to read all of his records, which it has done.

6. The parties also produced other documents during the hearing, a number of which are referred to below where relevant. The claimant referred to an email he had received from James McGovern after Mr McGovern had given oral evidence and left the hearing, which was not produced and nor was he cross-examined on it by the claimant.

<u>The pleadings</u>

7. The Tribunal has taken time to understand the claimant's claims and the issues in this case, which are wide-ranging but primarily involve two managers; Daniel Edwards and Graham Egan. The claimant is absent from work and still remains in the respondent's employment as an operational postal grade (OPG) based at Wallasey Delivery Office. The claimant has been employed for approximately 25 years in total.

8. In a claim form, which was not well-pleaded, received on the 23 December 2020 following ACAS early conciliation on 18 December 2020 claims the following:

6.1 Failure to make reasonable adjustments in respect of the claimant's disability contrary to sections 20, 21 and 39 of the EqA.

6.2 Harassment under section 26 of the EqA.

6.3 Victimisation under section 27 of the EqA.

6.4 Other payments. The claimant confirmed he had withdrawn this claim and agreed it was to be dismissed on withdrawal.

9. The claimant's case is that he was disabled by a physical impairment thyroid problems, and a mental impairment of anxiety and depression. The respondent accepts the claimant has had a disability of thyroid problems since March 2014 and a disability of anxiety and depression from October 2020. The claimant confirmed during cross-examination that the respondent's date of knowledge was not earlier than October 2020 for his anxiety and depression .

10. The date of knowledge is agreed between the parties as October 2020 for the disability of anxiety and depression..

11. In his witness statement the claimant referred to a personality disorder and confirmed he was not relying upon this condition as a disability under section 6 of the EqA. It is notable that the medical evidence (see below) concurs with the claimant's view, and it became apparent to the Tribunal that the claimant's personality affected his relationship with managers, particularly Graham Egan, his direct line manager, to whom the claimant refused to respond, ignored and disobeyed reasonable management instructions. The claimant was a difficult employee to control which culminated in an alleged incident involving Daniel Edwards before the claimant was suspended pending an investigation which is still ongoing. The difficult relationship the claimant had with his managers, colleagues and latterly the CUW (according to the claimant) formed the backdrop of the factual matrix in this case. It became apparent to the Tribunal that at some point Graham Egan kept his management of the claimant to a minimum and the burden fell on Daniel Edwards. The claimant has a total lack of awareness of his behaviour within the workplace and its effect on people, and this was also apparent at the final hearing.

Agreed issues

12. The parties were regularly taken to the issues from the first to last day of the hearing in an attempt to keep these proceedings on track. The parties agreed the issues as follows. The numbering set out in the list of issues has been duplicated by the Tribunal in this reserved judgment and these are the issues it decided after hearing all of the evidence, written and oral submissions.

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Disability

1 Was the claimant a disabled person pursuant to s6 Equality Act 2010 at all material times?

The claimant relies on the conditions of (1) thyroid problems, and (2) anxiety and depression as disabilities.

The respondent agrees that the claimant has had a disability of thyroid problems since March 2014 and a disability of anxiety and depression from October 2020.

Time limits

2 Were the discrimination and victimisation complaints made within the time limit of s. 123 of the Equality Act 2010?

3 Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

4 If not, was there conduct extending over a period?

5 If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension of the end of that period)?

6 If not, were the claims made within such further period as the Tribunal thinks is just and equitable?

Harassment

7 Did the respondent do the following:

7.1 Failed to carry out a disability risk assessment.

7.2 Failed to carry out a workplace adjustment assessment.

7.3 Did Mr Graham Egan say to the claimant on 27 September 2020, "*I can't have you standing around doing nothing"*?

7.4 On 17 December 2020, did a member of staff shout out three times so the whole office heard him, *"I am not putting out the trays, I will go home"* ? This comment was directed at the claimant due to the previous day's events where the claimant had to leave work partway through his shift.

7.5 *The claimant has been asked to provide the name of the person who made this remark but was unable to do so although he knows who it is – irrelevant Daniel Edwards knew full well.*

7.6 At the time the claimant submitted his claim to the Tribunal, had the respondent failed to take any action on the claimant's grievance, which the claimant submitted officially on 3 November 2020?

7.7 Did Graham Egan say to the claimant on 8 April 2021 *"stay at your fitting and I will get people to bring your mail to you"*? The claimant asserts this comment

was related to his disability because he was not wearing a mask in the workplace because of feeling nauseous which was related to his disability. The comment was insulting because it was said on the shop floor in front of colleagues and/or it violated his dignity.

7.8 Did Graham Egan present to Daniel Edwards in April 2021 a letter written by the claimant in March 2020 stating his request to cease to be a workplace coach? Had that letter been withdrawn in March 2020 by the claimant? Did Daniel Edwards process that letter in March or April 2021 without speaking to the claimant about it, resulting in a request from HR that the claimant repay £1,456 in respect of an allowance for acting as a workplace coach from March 2020 onwards? The claimant asserts this relates to his disability because the letter was written in 2020 when the claimant was suffering from stress and anxiety.

7.9 Did Daniel Edwards ask the claimant on 13 May 2021 whether he had taken the door-to-door advertising leaflets out of the walk 34 duties he was due to carry out that day? The claimant asserts he had done so because he had made those deliveries in the previous week and so there was no need for him to do so on 13 May 2021. The claimant asserts the unwanted conduct is Daniel Edwards not telling him he would not be undertaking the walk 34 duty on that day. The claimant asserts the sudden change in duties was contrary to a disability risk assessment which required him to have structure to his duties and not to be subject to sudden change. The claimant asserts this relates to his disability because it caused him stress and anxiety.

7.10 Did Daniel Edwards tell the claimant on 18 May 2021 that he was to be subject to investigation in respect of wilfully delaying the mail of the door-to-door leaflets on 13 May 2021, and that his case would be handed to a different manager to investigate? The claimant asserts this action violated his dignity and/or created a prohibited environment for him. The claimant asserts that the incident related to his disability because it arose from a disregard by his managers to the terms of his disability risk assessment.

8 If so, was this conduct unwanted?

9 Was this conduct related to the claimant's disability?

10 Did the conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

11 If so, was it reasonable for the conduct to have that effect?

Failure to make Reasonable Adjustments

12 Did the respondent apply a provision, criterion or practice ('PCP') of, between 2014 and 2018 requiring the claimant, as an OPG, to work outdoors for 4-5 hours?

13 If so, did that PCP place the claimant at a substantial disadvantage?

The claimant says that PCP put him at a substantial disadvantage in relation to his thyroid problem because it was far too much walking and too exhausting for him compared to someone without his disability.

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

15 Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage?

The claimant says that at this time he should have had 1.5 to 2 hours outdoor workload and the remainder should have been indoor duties.

16 By what date should the respondent reasonably have taken those steps?

17 Did the respondent apply a PCP of, between March 2020 and October 2020, requiring the claimant to carry out 3 to 3.5 hours of outdoor walking and the rest of his duties indoors on triple prep?

18 Did the PCP place the claimant at a substantial disadvantage?

The claimant says the PCP put him at a substantial disadvantage compared to someone without his disabilities because indoor work was too much for the claimant, affecting both his thyroid problem and his mental health problem of anxiety and depression. The volume of work on triple prep, preparing for his own delivery and for two other people, involves him in an excessive amount of work which was fatiguing and aggravated his depression and anxiety. The claimant also says that walking 3 to 3.5 hours was too much for his thyroid problems.

19 Did the respondent know or could it reasonably have been expected to know that the claimant was being placed at this disadvantage?

20 Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid a disadvantage?

The claimant says the respondent should have reduced indoor work back to double prep and should have reduced his walking duty.

21 By what date should the respondent reasonably have taken those steps?

22 Did the respondent apply a PCP of, when the claimant was off on leave, returning to work with the previous days mail and parcels requiring his preparation and attention?

23 If so, did that PCP place the claimant at a substantial disadvantage?

The claimant says this PCP put him at a substantial disadvantage compared to someone without his mental health impairment in that he felt stressed and anxious whilst on leave about the volume of work he was coming back to.

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

25 Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage?

The claimant says that the following adjustments would have been reasonable;

- *When the claimant was absent on leave, ensuring that the work was covered so that the claimant did not come back to outstanding mail and parcels.*

26 By what date should the respondent reasonably have taken those steps?

27 Did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to pick up additional duties?

28 If so, did that PCP place the claimant at a substantial disadvantage?

The claimant says that PCP put him at a substantial disadvantage as different duties made it more difficult for him to manage his symptoms of stress and anxiety.

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

30 Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage?

The claimant says that he should have been provided with a regular duty.

31 By what date should the respondent reasonably have taken those steps?

32 Did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to finish their indoor prep work within a certain timescale?

33 It was accepted by Daniel Edwards that there is a practice in place whereby OPG's were expected to finish their indoor preparation time within a certain timescale. If so, did that PCP place the claimant at a substantial disadvantage?

The claimant says that PCP put him at a substantial disadvantage as needing to finish the work allocated to him within a specific timescale exacerbated his symptoms of stress and anxiety.

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

35 Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage?

The claimant says that he should have had his indoor prep work carefully managed.

36 By what date should the respondent reasonably have taken those steps?

37 Did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to complete their assigned delivery route?

38 If so, did that PCP place the claimant at a substantial disadvantage?

The claimant says that PCP put him at a substantial disadvantage as he needs to use the toilet more often and he was unable to on his delivery routes or had to wait until he returned to the mail centre.

The claimant also gets tired easily due to his under-active thyroid.

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

40 Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage?

The claimant says that he should have had dedicated toilet stops planned into his delivery route and shorter walks or rest breaks planned into the delivery route.

41 By what date should the respondent reasonable have taken those steps?

42 Did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to use the designated staff rest area? The claimant was exaggerating the situation when there were options available to him, giving the claimant his own private room was not possible and did not amount to a reasonable adjustment as there was insufficient room. The evidence before the Tribunal was that there were few people

present at the first part of the shift, and it is highly unlikely the “quite room” would be in use in the early hours on the early shift.

43 If so, did that PCP place the claimant at a substantial disadvantage?

The claimant says that PCP put him at a substantial disadvantage as using the staff rest area made him feel stressed and caused him to have a breakdown due to his stress and anxiety.

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

45 Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage?

The claimant says that he should have been provided with a designated quiet room where he can go when he is feeling stressed.

46 By what date should the respondent reasonably have taken those steps?

Victimisation

47 Did the claimant do the following protected acts:

47.1 Present a grievance on 3 November 2020? The grievance on the 3 November 2020 amounts to a protected act according to the respondent.

47.2 Present a grievance on 21 April 2021?

48 Did this subject the claimant to a detriment?

The claimant relies on the following examples of detriments:

1.On 21 November 2020, Graham Egan asking the claimant to put trays out from the last van, something which was never agreed with Daniel Edwards on his guided chat on 21 October. This means the claimant had extra work to do.

2. On 8 April 2021, did Graham Egan say to the claimant “stay at your fitting and I will get people to bring your mail to you”?

3. On 21 April 2021, did Daniel Edwards present to the claimant a request that he pay £1,456 to have been wrongly paid to him in wages in respect of his role as a workplace coach from March 2020 onwards?

4. On 13 May 2021, did Daniel Edwards ask the claimant in the office whether he had taken the door-to-door advertising leaflets out of the walk 34 duties and did he also fail to tell the claimant that he would not be undertaking the walk 34 duties until 13 May 2021?

5. On 18 May 2021, did Daniel Edwards tell the claimant that he was to be subject to an investigation in respect of delaying the door-to-door advertising leaflets on 13 May 2021?

49 If yes, having regard to the burden of proof, was the reason for the detriment because the claimant presented the evidence?

Evidence

6. The Tribunal heard evidence under the claimant on his own behalf and from Jamie McGovern, CUW representative. On behalf of the respondent from Daniel Edwards, customer operations manager based in Formby, and Graham Egan, customer operations manager based at Wallasey.

7. There were a number of fundamental conflicts in the evidence to be resolved by the Tribunal, which it has clarified as set out in the findings of facts below.

8. The Tribunal has considered the documents to which it was taken in the bundle, the agreed chronology incorporated into the finding of facts, written and oral submissions, which the Tribunal does not intend to repeat and has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

Facts

9. The respondent is a large national company whose sole purpose is to deliver leaflets, mail and parcels. It is subjected to regulatory obligations setting out standards and targets that can result in the respondent being fined and its postal licence revoked if the mail is not collected or delivered in line with the targets set by government for which it is audited by OFCOM.

10. The respondent enters into contractual agreements with customers for the delivery of leaflets and adverts for businesses that are timed for delivery. These are known as “door-to-door items” (“DTD”) and the market is competitive with a range of companies offering a similar service.

Respondent’s policies and procedures relevant to this claim.

11. The respondent has a range of policies and procedures. The relevant policies for the period in question included the Royal Mail Equality and Fairness Policy dated 2 January 2018, Royal Mail Managing Absence and Disability Guide for Employees dated 1 April 2017, Royal Mail Sick Pay Policy dated 29 March 2013, Royal Mail conduct Policy dated 2 January 2018 and Royal Mail Group Grievance Policy dated 22 January 2018. I have referred to extracts below where relevant. In addition, the Royal Mail and CUW produced a “Joint Statement – Commit to Deliver” dated February 2017 and a document undated titled “Royal Mail Group Business Standards”.

The claimant

12. The claimant commenced his employment as an OPG grade (a postman) on the 26 October 1996 and was issued with a contract of employment. He remains in employment, although on suspension pending investigation. The claimant is a member of the CWU, during

his employment he has been a union representative and throughout had access to union support. The Tribunal did not find credible the claimant's evidence that he had no access to union assistance and representation outside the Wallasey office, and it finds that he was supported. Jamie McGovern confirmed he had acted as the claimant's CWU representative since 2019 and before that a different union representative had supported the claimant. Jamie McGovern's involvement was primarily in respect of the claimant's disability risk assessment as he possesses an expertise in this area and conducts most of the disability risk assessments on the Wirral. It is notable that the claimant blames the CWU for the withdrawal of legal representation 2-months before this final hearing and yet for years the claimant was supported and represented by the CUW. The claimant's evidence concerning the CUW's lack of support underlined the fact that he gave less than reliable evidence in relation to a number of the allegations before the Tribunal.

The contract

13. The claimant was issued with a contract of employment in May 1997 which required him to be mobile and work elsewhere other than the designated office in Wallasey – clause 6. At clause 14 there is a reference to the conduct code, grievance procedure and various statutory declarations set out in clause 20. The claimant was aware that delaying the mail could have serious consequences to the respondent and misconduct allegations being brought against him that could result in dismissal. There were no policies or procedures preventing the claimant from visiting his home in order to go to the toilet and the claimant's evidence that he was prevented from doing so was disingenuous and not credible; as recorded below the claimant was intentionally given a postal walk ("the Walk") that passed his house in order that he could visit the toilet and it had been agreed to by the claimant on this basis.

The claimant's health problems.

14. In his witness statement the claimant referred to a personality disorder. It is apparent from the GP medical records which claimant urged the Tribunal to read, that he was diagnosed with Grave's Disease for which he received treatment and by 27 February 2013 he was described as "feeling well." By the 30 August 2013 the claimant was feeling "extremely anxious with an extremely labile mood" and advised his thyroid function was not contributing to his mood.

Occupational health report 3 July 2013

15. The claimant was found fit to carry out his full duties, and should be considered disabled with Graves' disease.

16. By the 14 February 2014 the claimant was diagnosed with "classical features of hyperthyroid" and "some personality changes." Reference was made to his agitation and tiredness. Medication was prescribed.

Occupational health report 20 March 2014

17. Occupational health confirmed the claimant's hypothyroidism was being controlled by medication" and "**he remains on fully adjusted duties with reduced walking** and his thyroxine levels are being monitored . **He is currently at work and should be placed on temporary modified/adjusted duties until approximately 30 April 2014**. **Please allow current duties if sustainable or any duties with reduced walking, he could cope with**

50 % delivery while waiting to reach optimum medication level." A 3-week plan was suggested and an occupational health review week 5 for assessment during week 6. Reference was made to the claimant being "prone to opportunistic ailments for up to 3 months whilst optimising his thyroxine levels which at times of increased symptoms is likely to significantly affect his day-to-day activities and ability to attend work. Hence it is likely that he will have a higher-than-average level of sickness absence. Management needs to decide to what extent they will be able to accommodate this as a means of reasonable adjustment…whilst his clinicians optimise hid medication."

18. Occupational health suggested a **"maximum 1.5 walking delivery**…**refer back in 6-weeks then he can be re-assessed. He can continue with driving and prepping as usual**…**I have discussed the contents of this report with Mr Jafrate and have verbal consent to release this information to you**" [my emphasis]. The claimant's evidence was contradictory as to whether he had seen the report or not, and the Tribunal found that he had and credibility was further brought into question. The report does not say the claimant cannot do preparatory work referred to as "triple prep" when he was prepping "as usual."

19. In oral evidence the claimant stated he was unable to issue proceedings because the 2014 occupational health report had not been "disclosed to me…I was wiped out by the respondent…**I couldn't raise a claim because not aware of the 2014 report."** The Tribunal found the claimant's evidence was not credible concluding he was well aware of the 2014 occupational health report and in a position to seek advice from the CWU on the possibility of issuing proceedings when according to the claimant, the respondent applied a provision, criterion or practice ('PCP') of, between 2014 and 2018 requiring him, as an OPG, to work outdoors for 4-5 hours. The occupational health report confirms the claimant remains on fully adjusted duties with reduced walking" and the Tribunal preferred to rely on the medical evidence in contrast the claimant's less than credible evidence that no adjustments had been made.

20. It is apparent from the evidence before the Tribunal that (a) the claimant was not referred back to occupational health after 6-weeeks for a further assessment, (b) the claimant did not request a re-referral or chase it up and/or a copy of the report he knew was going to be sent to the respondent and (c) he did not incur a sickness absence from 2014 through to 22 February 2018, a period of approximately 4-years when there were no issues in the workplace including adjustments made to duty which suggests either adjustments referred to in the 2014 report continued or none were required by the claimant. The problem is that this period is undocumented and the events took place so long ago that Graham Egan, the claimant's line manager for most of this time, cannot recall any details, including the claimant's shift pattern and nor could the respondent find any documents. With reference to the time limits and balance of prejudice test it became clear to the Tribunal that the respondent was substantially prejudiced by the claimant's historical complaints, and given the evidence that adjustments had been made very little prejudice by comparison to the claimant.

21. The claimant has not satisfied the burden of proving a PCP existed requiring him to work outdoors for 4 to 5 hours which he said exhausted him. It is clear from the 20 March 2014 occupational health report that the claimant drove and prepped "as usual." The claimant had not raised any concerns at the time and there is no reference in the contemporaneous GP records to any difficulties the claimant had with his walking duties, which the Tribunal would have expected to see if this was the case.

22. Within the GP records in a report dated 17 April 2015 the claimant was referred to feeling tired and nauseous "on and off" and in a report dated 18 August 2016 to having "nausea symptoms ever day…1-4 episodes a day" and walking a lot as a postman. There was no indication that the claimant reported he was unable to or had difficulty carrying out his delivery duties.

Complex Needs and Personality Disorder Service 12 December 2017 report dated 5 March 2018

23. The claimant was referred to the Complex Needs and Personality Disorder Service on 12 December 2017 following which a report was produced on the 5 March 2018 after three sessions in which the claimant was described as having a "tendency towards angry, volatile behaviour. His propensity towards reacting to others in an angry manner appears to have become very entrenched…Steven has developed a rather rigid personality style. He prefers to operate within situations over which he has a high level of control. He struggles with situations in which people do not necessarily conform to his expectations of how they should behave…We concluded that Steven is unlikely to suffer from a personality disorder…He is aware he has significant issues around anger and control but seems somewhat ambivalent as to whether he wishes to give up his rigid controlling way of doing things. Steven has agreed to attempt to at least modify some of the more rigid aspects of his behaviour." The respondent was unaware of this diagnosis, although it had to deal with the claimant's behaviour in the workplace that reflected his angry and volatile personality.

24. The GP records reflect that as of 2 November 2017 the claimant "can smile and next minute extremely angry…has little ability to control anger and frustration…unable to see other people's distress…wife feels he is constantly blaming others…feels different to everyone around him and affects work (boss says does not get him)…finds it hard to communicate with people." Anger management sessions were unsuccessful. It is undisputed the claimant did not get on with some members of the public, his colleagues or managers, particularly Graham Egan who he had worked with for 25-years before the relationship deteriorated to such an extent that whatever steps were taken to assist the claimant was insufficient and lay the door open for argument and dissent on the claimant's part.

Diagnosis anxiety and depression 21 February 2018

25. The claimant was first diagnosed with anxiety and depression on the 21 February 2018 and prescribed sertraline. The GP notes references family difficulties and "difficulties working." A "new" MED3 was issued not fit for work, diagnosis "anxiety" 7 to 21 March 2018. The Med3 was repeated and the 21 March 2018 record reflects the claimant did not feel he was able to return to work due to "intermittent anxiety symptoms."

26. On the 21 March 2018 the problem diagnosed was "anxiety and depression" as recorded in the medical records.

Return to work meeting 13 April 2018

27. A return-to-work meeting took place with a manager on the 13 April 2018 signed by the claimant and manager on the same date following an absence of 42-days from 11 February to 4 April 2018 due to "family problems, really couldn't attend work due to the distress it was causing." The claimant who referred to being prescribed medication and had 4 sessions of CBT "but I didn't find this beneficial." The claimant informed management "I didn't realise how much of an impact delivery is having on me until I had this length of time

off. I have a long-term condition which is underactive thyroid and I'm struggling to put on weight." The claimant agreed to be referred to occupational health.

28. The Tribunal found on the balance of probabilities that the respondent was not put on notice by the claimant between 2014 and the meeting on 13 April 2018 that he was disabled with depression given the fact this was the claimant's first absence (which was for anxiety with a reference to family issues) for a number of years, there was nothing to put the respondent on notice that he was or could be disabled due to anxiety and depression. The position changed by the 8 May 2018 occupational health report when the Tribunal found the respondent was put on notice that the claimant may be disabled at that time (but not in the future) as a result of the impact his depression, lethargy and tiredness had on him. There was then a gap until October 2022 with no apparent issue with the claimant concerning anxiety and depression. As indicated above, the parties agreed that the date of knowledge for the claimant's disability of anxiety and depression was October 2022.

8 May 2018 occupational health report

29. The report recorded the claimant reporting "struggling with" the symptoms of tiredness, lethargy and depression" and the impact they have "on his ability to do work, which as a delivery postman is quite physically demanding…scores indicate a significant level of depression and anxiety." Reference was made to the claimant's medical condition having "impact on his ability to do work as he has reduced energy…management may wish to discuss…whether some adjustments to workload may be feasible in the interim" whilst the claimant was assessed for an up-to-date medical opinion.

30. The occupational health report recorded the claimant had applied for a transfer to indoor work "as he feels this will be less onerous for him physically..."

Transfer to the Book Room.

31. In or around this period after the production of the 8 May 2018 occupational health report it is undisputed the claimant was transferred at his request to the "Book Room" (known as the "Caller's Office") which included dealing with the public, for example, handing across parcels. The claimant was not required to deliver mail and nor did he work outside and no adjustments were necessary.

32. The respondent did not apply a provision, criterion or practice of, between 2014 and 2018 requiring the claimant, as an OPG, to work outdoors for 4-5 hours and so the Tribunal found. The claimant, who remained an OPG, continued to work indoors until he asked for outdoor OPG work again. There was no issue with his indoor duties until 1 February 2020 when the claimant "resigned" due to problems he had dealing with the public (see below). During this period the respondent was not in breach of its duty to make reasonable adjustments and so the Tribunal found.

33. The claimant wen off work ill and he returned to work and the 26 September 2019. The GP record conformed he was feeling "much better…circumstances at work and domestic stress resolved."

34. The 11 December 2019 GP record confirmed the claimant was "struggling at work dealing with the public." The claimant's problem was described as anxiety and depression (new)." Approximately 16 months had passed since the prognosis in the 8 May 2019 occupational health report without issue for the claimant in respect of anxiety.

35. The medical record entered on the 19 December 2019 records a MED3 was issued for a month and "tried to return to work today…has self-certified." Reference was made to a number of personal problems and the claimant "spoke to boss and had to go home…**boss very supportive and advised him to have time off**" [my emphasis].

36. The medical evidence before the Tribunal covering the period 2014 to 2018 and beyond, undermines the claimant's case that he was too unwell to issue proceedings within the statutory time limit and so the Tribunal found.

37. A further MED3 was issued on 19 December 2019 to 16 January 2020, and on 14 January 2020 to 11 February 2020 with a suggestion the claimant may benefit from a phased return to work. The claimant reported "having a meeting with boss and having a panic attack", corroborating that discussions were taking place regarding the claimant's health and return to work. During this period one of the claimant's line managers was Graham Egan, and there was no satisfactory evidence before the Tribunal that the claimant's mental and physical health "has been Mr Egan's own personal game for many years, and that frightens me. It is something out of a horror film…he played Russian roulette with my health." The evidence is to the contrary and the claimant was not found to be a credible witness. He had a very poor recollection of events and did not perceive the reality of what was going on at the time, namely a manager who agreed to a move indoors at the claimant's request, and described in the contemporaneous GP records as "very supportive." The Tribunal also found Graham Egan to have acted in a supportive way towards the claimant to such an extent that the claimant had a considerable say over the duties, including their extent, he was to carry out as an OPG.

38. A Med 3 was issued on 6 February 2020 to 21 February 2020 and "the claimant referred to meeting "with the boss to discuss time off". Nothing was said and nor could it be inferred from the records that Graham Egan was being less than supportive and the claimant was "frightened" as if he were in a horror film, and the Tribunal finds this was not the case.

39. In the record entered on 19 February 2020 the claimant reported to his GP that "work happy for a phased return when ready." A MED3 to 8 March 2020 was issued. No record of the discussion or phased return could be found in the bundle, however based on the contemporaneous GP records it is clear that discussions were ongoing and the claimant's returned to work on a phased return on 8 March 2020 after an absence of 89 days.

<u>Before the claimant's designated return to work date he informed the respondent that he no longer wanted to work indoors in the Book Room and preferred to deliver post instead.</u>

<u>Claimant's "resignation" from indoor duties 1 February 2020 and as a workplace coach. Daniel Edwards taking over as manager</u>

40. The claimant had not worked as a workplace coach for approximately 12-months and continued to receive extra payment including when the claimant was off work. Nothing was said by the claimant about him receiving these payments until the additional monies paid was to be recouped, despite the fact that throughout the period of 12-months he had not approached a manger for workplace coaching work and nor had he been approached by a manager, which was the usual process. Other people carried out the workplace coaching.

41. Daniel Edwards joined the department in early 2020 while the claimant was off sick. It is notable that he has carefully documented his dealings with the claimant and his witness

evidence is supported by contemporaneous documentation. He acknowledged the claimant had been absent from work quite a lot in the past, and it was noticeable how he and Graham Egan were careful in the way they treated the claimant.

42. Graham Egan had also been absent from work and he had been working at other depots. When he returned to Wallasey his relationship with the claimant deteriorated. It was evidenced from the contemporaneous documents the claimant ignored his managerial instructions and refused to talk to him. The claimant's disrespectful and dismissive attitude came strongly across to the Tribunal when the claimant was cross-examining Mr Egan. The claimant gave evidence that Graham Egan was "forced" to move from Wallasey as a result of an internal investigation which was not the case in reality. The claimant attempted to show Graham Egan in a bad light and the Tribunal found he was mistaken in his recollection as to the reason why Graham Egan left Wallasey and in relation to the "mask incident" referred to below, which epitomised the claimant's attitude and perception. As a result of the claimant's behaviour Daniel Edwards took over the majority to the claimant's management although Graham Egan still continued to have dealings with him. No formal action was taken against the claimant until much later on in the chronology when his attitude escalated in relation to Daniel Edwards.

43. Daniel Edwards found in his new office the 1 February 2020 note written by the claimant in which he confirmed the following; "relinquished my duty in the callers office with immediate effect," an office position that he had requested earlier as a reasonable adjustment which was granted thus avoiding the claimant undertaking outdoor duty i.e. walking delivering the mail. The note also confirmed the claimant "relinquished" his position as a work place coach "with immediate effect" under which the claimant (or a manager according to the claimant had handwritten the date 4 March 2020. Daniel Edwards was aware the claimant had been a work coach in the past, but as he had not performed the duty for some time thought that he had relinquished it some time ago.

44. The claimant's evidence is that unbeknown to Daniel Edwards he had spoken with the previous manager asking him to put the resignation of work place coach on hold. There is no evidence of such a conversation taking place in the contemporaneous documents and the Tribunal concludes there was a genuine issue as to whether the claimant was eligible to receive the extra payments given the fact that it is uncontroversial he did not carry out any workplace coaching duties.

45. The claimant has raised an issue with the date of 4 March 2020 at this liability hearing stating he was absence on work that day so could not have put that date in suggesting the note was fraudulent, it had been "tampered" by a manager as he had written it on the 1 February 2020. The claimant maintained the previous manager had "disposed" of the note and Graham Egan had passed it across to Daniel Edwards to make trouble for the claimant. There was no evidence of this and supposition on the part of the claimant which made no sense given the factual matrix. The claimant accepted he had written both notes and signed them, so the only issue was whether the note was dated 1 February 2020 or 4 March 2020. The Tribunal is satisfied neither Graham Egan nor Daniel Edwards changed the date; there was no need for them to do so. Daniel Edwards believed the claimant's request had been actioned and placed the note in the claimant's file. Nothing hangs on the date and the Tribunal is satisfied the claimant resigned from his work at the Book Room/ Callers Office where he had dealt with the public, handed parcels across and managed special delivery items when he was not required to carry out mail delivery and walking "the Walk" in the expectation that he would be required to deliver post, which he wanted to do and had intended to resign as workplace coach.

46. The claimant requested and accepted going forward his duties that consisted of delivering mail and carrying out preparations beforehand as a reserve delivery postman. A reserve delivery postman did not have a set duty but covered duties of people who were absent for whatever reason and therefore the claimant would have covered different duties and Walks each week had a reasonable adjustment not been made by Daniel Edwards to take into account his mental health and requirement to reduce the amount of walking. He understood from Graham Egan the claimant had "been through a lot" and that management "took things easy" with regard to his absences and work load, which was reduced so that the claimant would walk for less hours than expected of other OPG's.

The claimant being offered and accepted "Walk 6" in or around March 2019

47. The claimant accepted when giving oral evidence under cross-examination that when he gave up the indoor duty work he did not make the respondent aware that he would have difficulties walking 3 to 3.5 hours per day.

48. The Tribunal is satisfied a discussion took place with the claimant's managers whereupon the claimant asked for outdoor duties having given up his permanent indoor role. He was actively seeking a "Walk" and adjustments were made when the claimant was allocated "Walk 6." Walk 6 was an adjusted duty designed for a diabetic employee as it was closer to the office and originally the claimant covered the whole walk a 2 to 3 hour walk according to Graham Egan's evidence, which the Tribunal preferred to the claimant's evidence that as Walk 6 was an adjusted duty for the diabetic employee it was not an adjusted duty for him as he did not have diabetes. The Tribunal did not agree and is satisfied that Walk 6 was agreed to by the claimant because it was close to the office in case he needed to go to the toilet and was a to 3 hour walk which the claimant deemed he was capable of doing.

49. The claimant accepted the offer of Walk 6, it suited him at the time and there was an option of option of a van picking up the claimant who did not dispute this was available to him. The claimant started work at 4am and it is accepted he had more time compared to his colleagues (who started much later at 6.30/6.45am) to carry out the preparatory work before performing Walk 6 at approximately 8/8.30 finishing his shift at approximately 11/11.30am.

50. The claimant had moved from the indoor customer facing role in or around March 2019 following his absence from work with stress and it must follow that prior to this date there could not have been an issue with adjustments as the indoor work itself was a reasonable adjustment made for the claimant. The claimant's managers were on notice the claimant had a thyroid disability and absent from stress, the claimant had been off sick for 89 days and yet there was no written record of any discussion concerning his return to work and adjustments. In short, there was no record of a return-to-work meeting and the Tribunal did not hear evidence from the manager who was there at the time, and dealing with the claimant when Graham Egan was absent for which the respondent can be criticised. However, on the balance of probabilities the Tribunal accepted that the claimant (a) activity sought an outdoor walk role and (b) accepted Walk 6 that included adjustments.

Daniel Edwards joined Wallasey in or around early/April 2020

51. Daniel Edwards joined the Wallasey branch in or around April 2020. He did not know the claimant beforehand, but over time as the claimant's second line manager and in light of Graham Egan's absence from work with stress and the problem he had in managing the

claimant, Daniel Edwards essentially line managed the claimant and from this point on the document trail improved.

52. By 30 July 2020 the GP recorded the claimant "still has some panic attacks at work but managed to control this."

53. From March 2020 to 6 October 2020 the claimant continued to work on Walk 6, starting at 4am which gave the claimant more time to prepare for his walk indoors, from 4am to approximately 7.45/8.00am when the claimant went out on the "walk.". The other PG's started work later at 6.30am approximately. The claimant had approximately 4 hours indoors to prepare, which reduced the amount of time available for him to carry out his work. The claimant was on occasions was given triple preparation work to carry out (known as "triple prep") that entailed carrying out the preparation for his round, and two additional rounds. The claimant was required to sort out the mail and parcels Into the relevant rounds in walk order. There were occasions when the claimant's round was so light that had he not carried out double or triple preparation he would have no work to do, and as a consequence was required to carry out double preparation and on occasion triple preparation when he had the capacity. Graham Egan's method of dealing with the claimant complaining about triple preparation was to agree that he should not do it whenever the claimant asked not to and therefore an adjustment was made as and when required by the claimant and so the Tribunal found.

Conclusion – see below

54. The Tribunal found on the balance of probabilities that the respondent did not apply a provision, criterion or practice of expecting OPGs to pick up additional duties. There does exist a PCP of expecting OPG's if their existing workload is very light to carry out double or triple preparatory work. The Tribunal on the balance of probabilities did not find the claimant was placed at a substantial disadvantage because the workload was light, he had capacity and if he objected with good reason then he was not required to do the work.

Harassment allegation 7.3: Mr Graham Egan say to the claimant on 27 September 2020, "*I can't have you standing around doing nothing"*?

55. On the 27 September 2020 the mail volume was "very low" as conceded by the claimant in cross-examination. As a consequence OPG's including the claimant, were asked to carry out "triple prep" by preparing their own route, which was in the claimant's case Walk 6, followed by prepping for a number of different routes. The claimant complained he was expected to do three people's jobs, which Graham Egan disputed with him on the basis the mail was so light it would take him the same amount of work to prepare 3 delivery routes as it would 2 and the claimant when he finished his own delivery route would have no work to do. Graham Egan told the claimant this was not acceptable and said "I can't have you standing around doing nothing" because had he not carried out the triple prep the claimant would have nothing else to do for the rest of his shift. The Tribunal preferred Graham Egan's version of events to that of the claimant's version of events which was that he was "arguing" over the indoor work being too much and Graham Egan's comment related to his medical condition.

56. It is notable that this conversation took place before the "Guided Conversation" (see below) that reduced the claimant's workload from triple to double prep and it must be interpreted in context of the overall factual matrix. The claimant started work early at 4am in order to reduce the amount of outside work he was required to do and it gave him more time

to carry out the inside work in comparison to his colleagues who started a lot later. The Tribunal accepted on the balance of probabilities Graham Egan's evidence that the mail volumes were particularly low and when employees carried out double/tripe prep this redressed the balance. The claimant was given no triple prep work to do approximately one month/a number of weeks before the 27 September 2020 and the Guided Conversation. The issue for the claimant at the time was if he did not have enough time to carry out any triple prep work, for whatever reason, he had to ask his managers not to give him triple prep, which he should not have to do as he had a disability, it increased aggravation in the workplace and the claimant's feelings of anxiety. The issue for managers was that if the workload was light the claimant would have the facility to carry out triple prep taking into account adjustments. It is uncontroversial that if the claimant said his workload was such that he could not carry out triple prep this was accepted by management.

Conclusion – see below

57. On the balance of probabilities the Tribunal finds, taking into account the explanation given by Graham Egan, that the comment was not intended to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him, but an explanation that as the mail was so light other duties could be carried out taking into account the additional length of time the claimant had to carry out indoor duties in comparison to his colleagues agreed as an adjustment in accordance with the claimant's request. The Tribunal is no in doubt that had the claimant been overworked (as he now alleges) Graham Egan would not have asked him to carry out the triple prep work.

58. A workplace adjustment assessment was carried out and held on the respondent's PSB system on a date between October and December 2020.

Knowledge of anxiety and depression

59. The respondent knew the claimant had anxiety condition but Ms Carney submitted, was unaware that he was disabled by a mental impairment of anxiety and depression until October 2020, as agreed between the parties on the issue of knowledge. The Tribunal found that the claimant's absence for stress, depression and personal issues as indicated by the claimant to the respondent, and this was touched upon as early as 8 May 2018 in the Occupational Health report and GP records. The Tribunal is not satisfied on balance, that the date of knowledge was earlier than October 2020 bearing in mind there was a large gap in time when there were no issues, no absences and occupational health advised the respondent the claimant was not covered by the Equality Act in March 2020 in respect of stress and depression (although the respondent is not bound by the occupational health advice it was not unreasonable for the respondent to be guided by it). In short, the fact the claimant was suffering from family issues in 2018 and suffering from depression as recorded in the 8 May 2020 occupational health report does not mean that he continued to be disabled by the mental impairment of depression in October 2020 throughout that period, or the respondent was aware that the depression could reoccur in the future. The respondent was put on notice that the claimant may be disabled by the 8 May 2018 occupational health report, however by October 2020 the respondent had actual knowledge that the claimant was disabled by anxiety and depression as agreed between the parties.

60. The respondent was aware the claimant had a tiredness issue and required regular toilet stops as a result of the thyroid condition, and the Tribunal found on the balance of probabilities that adjustments had been made by transferring the claimant to the Book room and placing the claimant on Walk 6, and the claimant was aware that he could return to the

office at any time and take a break, (and did). He could also approach managers if he found it difficult to carry out tripe preparations work with the result that he need not do so. The claimant has not pointed to any incident when he was forced to carry out triple preparatory work against his will.

61. The first reference in the GP record to an increase in workload or any issues at work was recorded on the 6 October 2020 "feeling too stresses in work **reports increase in workload** and boss not being helpful" [the Tribunal's emphasis]. This was the last GP medical record before the Tribunal.

Absent 6 October to 20 October 2020

62. The claimant was absent 6 October to 20 October 2020 (15 days) with stress, and upon his return Daniel Edwards completed a Welcome Back Meeting, which is essentially a return-to-work meeting after sickness absence no matter how long for. A Guided Conversation for Stress was also held and documented. The claimant's CWU representative was present throughout.

21 October 2020 Welcome Back Meeting and Guided Conversation for Stress

63. It is accepted by the claimant that when he agreed to undertaking Walk 6 in March 2020 at no point did he raise at the outset that he needed adjustments in respect of triple prep work or duty. The first mention of this was during the discussion with Daniel Edwards on the 21 October 2020 and there was nothing to put the respondent on notice that undertaking triple prep work put the claimant at a substantial disadvantage, and nor could the respondent reasonably have been expected to know that the claimant was likely to be placed at a disadvantage if he had light duties and carrying out triple prep would pick up the slack. The meeting of 21 October 2020 changed this, and so the Tribunal found.

64. The notes of the meetings reflect the claimant believed he did not have the right amount of work and was not taking breaks until "all at the end", the work environment was "bad…too much expected of everyone" and the **canteen "depressing…Felt as if workload was too much, more so indoors, felt better this morning on dual prep**" [the Tribunal's emphasis]. Under the heading "Support" it was agreed the claimant would be re-referred to occupational health as the current report was out of date. The claimant confirmed the medication he was taking meant he had to go to the toilet a lot and the duty he was on; "6 Walk are right next to the office so he can break off." Daniel Edwards understood the from the claimant he was suffering from work related stress due to his workload.

65. An action plan was agreed; the claimant would have "6 and 4 dual prep…await further guidance." With reference to outdoor workload he had a "full delivery" and would instead take the "top 2 rows Manor Road." The claimant and Daniel Edwards reached an agreement on the adjustments made to work type and workload pending further guidance from occupational health and "potentially another guided conversation in 4-weeks' time".

66. The Welcome Back Meeting notes confirmed a risk assessment will be carried out when the occupational report "was back" and this was agreed with the claimant, who signed the form along with Daniel Edwards.

The adjustments agreed

67. Once the respondent became aware of the claimant's health which he described as "work related stress" and its effect on workload, further adjustments were made whereby the claimant did not have to carry out any triple preparation work and walk 6 was reduced by 50 percent with the claimant retaining the walk nearer to the office in order that he had access to the toilets as and when required. The respondent knew the thyroid disability came with tiredness as a symptom and it was for the claimant to inform his managers, having accepted Walk 6, an adjusted limited duration walk, if he could not cope with it. The Tribunal was satisfied that the claimant would have raised a complaint in no uncertain terms had he found Walk 6 too onerous, and he did not until the 21 October 2020 which was the first indication and the respondent acted immediately on receiving it.

68. The claimant complained about the canteen being "depressing" and the kitchen had zero facilities. The upshot of the discussion was that the claimant could use a designated quiet room if he wanted to take time out. The claimant's evidence in respect of the offer made to him was not credible, he has attempted to underplay the existence of a second room for breaks on the basis that it was sometimes used by management for meetings, such as the ones the claimant had. The claimant, who started work early, had the option of using the quiet room whenever he wanted, and he did not make use of it. The Tribunal found there was no PCP expecting OPG's to use the designated staff rest area referred to as "the canteen." The claimant did not use the canteen and made his own arrangements. The claimant was provided with access to a designated quite room and it was not a reasonable adjustment for him to be provided with his own quite room and it was sufficient for a room to be available, and if the claimant wanted to make use of it when he was feeling stressed he could have done so, but chose not to.

69. A stress assessment at work was carried out, which was referred to by occupational health in the report.

<u>29 October 2020 occupational health report</u>

70. The report confirmed the claimant "has been undertaking an adjusted duty for the last 3-weeks…I consider Mr Jafrate is fit for his current supported return to work plan without change, but also with inclusion of the stress assessment action points. Mr Jafrate said he is keen to continue his current early morning shift…**he is pleased to undertake proportionally more indoor work and less outdoor work- all as at present- and which I understand is not the normal role….Re-refer is advice for late November to take into account the effects from the stress risk assessment implementation**, effects from the recently started medication, review with the local doctor and effects as a result of the suggested ongoing return to work plan and at such a time, it should then be possible to offer advice about when and whether Mr Jafrate will be fit for full duties in the near future, or whether ongoing adjustments to the role will be required" [my emphasis]. Occupational health advised the claimant was likely to be considered disabled.

71. In response to questions asked by Daniel Edwards occupational health indicated "I cannot be clear at present whether Mr Jafrate will be fit for full duties in the future…**is not fit for full duties at present, but coping strategies may become more enhanced over the next month and which may impact positively in relation to future fitness for full duties**…"

72. Daniel Edwards understood that the claimant, who had authorised the release of the 21 October 2020 occupational health report to him, was in agreement that he should wait until the claimant was re-referred as advised and there was no request by occupational

health, the claimant or CWU for a disability risk assessment and/or workplace assessment bearing in mind the claimant's future fitness could change. The adjustments agreed with the claimant and referenced by occupational health were kept in place. The evidence before the Tribunal was that the managers were "fluid and flexible" in their approach to the claimant and would have agreed any changes he wanted and asked for had he made them aware and so the Tribunal found.

Allegations 7.1 & 7.2 harassment

- Failed to carry out a disability risk assessment.
- Failed to carry out a workplace adjustment assessment.

73. The Tribunal concluded on the balance of probabilities the respondent had not failed to carry out a disability risk assessment or a workplace adjustment assessment. As agreed with the claimant additional adjustments had been made and he was aware the next step, would be to re-refer him to occupational health before a disability risk assessment or workplace adjustment assessment were carried out.

Conclusion (see below)

74. The decision made by Daniel Edwards in this respect was not unwanted as the claimant and his union representative were aware the assessments would be carried out once Daniel Edwards had further information via occupational health, and the decision to approach it in this way did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant who had agreed to the adjustments put in place and so the Tribunal found.

3 November 2020 grievance

Allegation 7.6: harassment:

> At the time the claimant submitted his claim to the Tribunal, had the respondent failed to take any action on the claimant's grievance, which the claimant submitted officially on 3 November 2020?

75. The claimant issued a grievance on the 3 November 2020, unfortunately a copy was not before the Tribunal as it could not be located by either party. It is undisputed the claimant phoned HR and the grievance was completed online.

76. The grievance outcome letter dated 9 April 2021 was in the bundle and it is apparent from this that the claimant's grievance related to the 2013 and 2014 occupational health reports not being followed. The grievance was not upheld (see the outcome below) as the reports were not deemed current or relevant and the claimant had raised no issues with the reports before.

77. The claimant confirmed in evidence he had raised a written grievance in relation to occupational health reports dated 2013 and 2014 alleging the advice had not been followed by managers, and he had not received copies until 2018. The claimant's case is that Daniel Edwards used the report "to play on my mental well-being" for which there was no supporting evidence other than the claimant's say so. It is notable that despite the claimant's protestations he was aware Daniel Edwards was taking action in respect of the grievance which he could not progress until the occupational health reports were provided to him, which the claimant did not do and so the Tribunal found having concluded the claimant's evidence that he did provide copies of the reports was not credible and unsupported by any contemporaneous documentation e.g. an email trail following Daniel Edward's request through to the claimant attaching the reports. The claimant in oral evidence accepted he had been sent to 2014 occupational report by special delivery in 2018 and yet he failed to provide Daniel Edwards the information he needed to deal with the grievance, and the ensuing delay was largely attributable to the claimant's own actions.

78. Daniel Edwards did not have the 2013 and 2014 occupational health reports and requested a copy from occupational health on the 18 November 2020, which was not forthcoming. The claimant was sent a consent form on the 18 November 2020 for release of the reports, and by the 1 December 2020 the claimant had sent in the release form. Daniel Edwards requested the reports be released directly to him.

79. By the 2 December 2021 the claimant made telephone contact with HR about the lack of progress. Daniel Edwards was told by HR that they were waiting for the reports and he asked HR contact occupational health and "speed things along." The claimant was informed about the reasons for the delay and yet he still failed to provide a copy of the reports in his possession.

80. There was an issue with the claimant's consent form and Daniel Edwards asked the claimant for a copy of the reports which the claimant had received in 2018. The claimant emailed Daniel Edwards on the 31 January 2021 but did not attach the occupational health reports. Despite requests the claimant failed to provide a copy of the reports having promised to do so. Eventually occupational health, and not the claimant, provided copies and Daniel Edwards invited the claimant to a grievance meeting on the 25 February for the 26 February 2021 by which time all the medical reports had been received. The claimant was aware Daniel Edwards intended to arrange a grievance hearing when they both returned from annual leave, and he was fully aware of the reasons why there had been a delays, namely obtaining occupational health reports directly from occupational health. It was always open from the outset for the claimant to have provided a copy for the reports, and avoid delay once he knew the respondent was having difficulties obtaining them, but he chose not to provide the copies and expedite his grievance.

81. A further delay took place as a result of Daniel Edward's absence due to personal difficulties. On Daniel Edward's return to work he was unable to arrange a meeting with the claimant due to his intention to get union representation. The grievance meeting finally took place on the 26 February 2021 and the outcome meeting was delayed as a result of annual leave, Daniel Edwards between 1 March and 6 March 2021, the claimant 22 to 28 March 2021 and claimant's sick leave 29 March to 3 April 2021. Had the claimant provided the reports in his possession the delay would have been avoidable. Daniel Edwards' delay was attributed solely to this lack of occupational health reports, annual leave, personal difficulties at home and the stance taken by the claimant.

Conclusion (see below).

82. There was no causal connection with the delay in the respondent dealing with the grievance and the claimant's disability, and the conduct did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and so the Tribunal found on the balance of probabilities.

Allegation 1 victimisation:

> "On 21 November 2020, Graham Egan asking the claimant to put trays out from the last van, something which was never agreed with Daniel Edwards on his guided chat on 21 October. This means the claimant had extra work to do."

83. In his witness statement the claimant alleged Graham Egan "broke" the Guided Chat by asking him to put trays out from the last van, referred in evidence as triple preparatory work ("triple prep") and "he continues to ask me every day." The Tribunal did not find the claimant's evidence credible on this point; he was unable to refer to a time or date with the exception of the 21 November and 16 December 2020 allegations.

84. The evidence before the Tribunal was that the claimant had finished all his preparation work and was asked to put some trays out, the claimant refused and this was accepted by Graham Egan who believed the claimant had the capacity to put out the trays which would have taken him approximately 30 minutes. The claimant's case is that because putting trays out was not mentioned in his 'Guided Chat' then he should not have to carry out the work because it was outside the scope of what had been agreed, it was an act of victimisation by Graham Egan because he had raised the grievance on the 3 November 2020. The Tribunal preferred the evidence of Graham Egan and concluded the claimant was not subjected to a detriment by being asked to the work when he had completed his duties, and the reason why the claimant was asked was causally connected to one matter, namely, the claimant had finished his duties and other work needed to be done. There was no causal connection with the claimant's grievance the contents of which was not known by Graham Egan at the time.

85. Graham Egan in his role as a manager was entitled to ask the claimant to undertake any work that needed to be carried out. It was normal for a manager to allocate tasks to employees, including the claimant, if they had finished their preparation work. There is only the one complaint, and it is not as if Graham Egan asked the claimant to carry out extra work all of the time. The claimant, once he finished his double preparation, was not prepared to carry out any other work that had not been mentioned in the "Guided Chat", even if the workload that day was light and he had nothing further to do taking into account his breaks.

Conclusion – see below

86. The Tribunal found there was not causal connection between the earlier grievance (which Graham Egan had not seen) and the request on the 21 November 2020 that the trays are wheeled from the van into the office and placed on people's desks given the claimant had finished his work and had capacity.

Occupational health report prepared dated the 8 December 2020

87. The claimant was re-referred and the occupational health report prepared on the 8 December 2020 confirmed the claimant "is fit for work with ongoing long-term adjustments." Reference was made to the claimant's grievance and a recommendation that the claimant be allowed amended duties on a medium to long term basis…his amended duties may include duties such as undertaking preps before undertaking his outdoor work…" A risk

assessment was recommended and an occupational health review in 5-weeks' time. It is undisputed that a disability risk assessment was provided on the 8 March 2021.

88. The adjustments agreed with the claimant continued without issue.

Harassment allegation 7.4:

> On 17 December 2020, did a member of staff shout out three times so the whole office heard him, *"I am not putting out the trays, I will go home"* ? This comment was directed at the claimant due to the previous day's events where the claimant had to leave work partway through his shift.

89. On the 16 December 2020 Daniel Edwards asked the claimant to put the trays out which the claimant refused to do. The claimant alleges he was "confronted by both managers" including Graham Egan, had an anxiety attack and went home. It is undisputed the claimant said he would not be putting out the trays and will go home. The notes taken of the incident record the claimant shouting, swearing and being asked to calm down on numerous occasions. Daniel Edwards decided that an occupational health report was necessary due to the claimant's behaviour in the workplace and concern over his mental health. It is undisputed the claimant started work at 4am at his request and it gave him more indoor work and less outdoor delivery time in comparison to other employees who all started their shift later at 6.27am with the result that the claimant had an extra 2 and a half hours to complete his work including if the workload was light and he had capacity putting out trays.

90. On the 17 December 2020 a member of staff was asked to put the trays out, which he refused repeating the gist of claimant's words three times loudly "I am not putting out the trays, I will go home" and staff laughed at the joke. The comment was overheard by the claimant.

91. In the claimant's amended witness statement this allegation is not dealt with, the basis of the claimant's complaint was that his managers broke the "Guided Chat" by asking the claimant to put the tray out, and were complicit in their non-compliance of it. Graham Egan confirmed that the employee in question directed this comment specifically to the claimant, and the Tribunal found it would have been clear to all that a reference was being made to the claimant's behaviour the day before, and it did not accept Ms Carney's submissions on this point preferring the claimant's evidence that he took it that the words used were directed towards him. The claimant was upset, he took umbrage and "squared up" to the employee in question, threatening to fight him outside. The claimant, who did not get on with his colleagues, complained that the comment made him feel "really small."

92. The incident was investigated and the union, who represented the claimant, became involved. The employee in question described it as "office banter," Ms Carney submitted that he did not mean to upset the claimant and was shocked at his reaction, however, the employee in question did not attend the final hearing and nor could he be cross-examined on why he made the comments and whether they had the purpose or effect proscribed in section 26 of the EqA. The Tribunal accepted the claimant's evidence as credible that his colleagues were aware of his mental health and absences and that the comment made could not have been aimed at anyone else other than the claimant.

93. The matter was dealt with informally on the basis that no action was taken against either employee for their behaviour and there were no issues since between them. In oral

evidence on cross-examination the claimant accepted Daniel Edwards "can be commended because he took action immediately."

Conclusion – see below

94. The undisputed evidence was that the claimant had a difficult relationship with his work colleagues and he was not always liked. Taking this into account it is more likely than not the comments were made as a jibe aimed towards the claimant who would react, which is exactly what he did.

95. The Tribunal did not hear evidence from the employee in question and on the balance of probabilities concluded that without hearing from the employee in question and accessing his evidence such the comment repeated three times was intended to violate the claimant's dignity and it created a degrading, humiliating or offensive environment for him taking into account his personality issues and sickness absences as recorded above that was clearly evident within the working environment by the claimant's behaviour. The claimant's personality issues were not covered by section 6 of the Equality Act 2010, however his refusal to carry out any work that was not covered by the "Guided Chat" agreement was conduct relating to the claimant's disability, no matter how questionable and irksome it was for the claimant's colleagues to witness the claimant refuse reasonable managerial instructions and get away with it when he decided that he'd worked enough even when the workload was light or very light.

96. The claimant had been absent with stress for one day on the 15 January 2021, and on his return he was invited by Daniel Edwards to a Welcome Back Meeting to discuss the earlier guided stress assessment and complete a new stress risk assessment. It was agreed the claimant would be re-referred to occupational health. The claimant confirmed he was coping with his workload. Taking the factual matrix into account the Tribunal did not accept the claimant's submission that the respondent had failed to carry out a disability risk assessment or workplace adjustment assessment in the circumstances as there was no issue with the claimant's duties at the time and further up-to-date medical evidence was required.

Allegation 3 failure to make reasonable adjustments;

> Did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to pick up additional duties? The claimant says that PCP put him at a substantial disadvantage as different duties made it more difficult for him to manage his symptoms of stress and anxiety.

97. The claimant's evidence is that on 19 January 2021 (the only occasion relied upon) he was asked to "lapse" 4 Walk against the backdrop of the claimant being given approximately 4-hours to complete his preparatory work during which his workload was managed taking into account the adjustments. The claimant had actively sought and was aware that his role as reserve delivery postman entailed him picking up additional duties, and he never raised an issue with "lapsing" which he completed on the 19 January 2021 without problem.

98. Graham Egan's undisputed evidence is that it was "very rare" for OPG's to pick up additional duty, and it was usually if the mail day in the office was very light and they had finished their own duty, or in the claimant's case parts of other duties given he was employed as a reserve OPG.

99. Graham Egan's undisputed evidence is that if the claimant finished his work early he was allowed to go home early, and he was only asked to carry out other work if his preparation was light or very light with the result that he had little to do, i.e. the claimant would be prepping for 30 minutes or so in the 4 hours that he had. It is against this background that on the 19 July 2021 the claimant was asked to carry out preparation work "lapsing" for Walk 4 which he seemed happy to do and completed without issue. It is notable that in the occupational health report that followed on the 25 January 2021 the claimant being required to undertake "lapsing" was not mentioned, and the claimant confirmed he did not feel under pressure at work.

Conclusion – see below

100. The respondent did not breach its duty to make reasonable adjustments when the claimant was asked to and did carry out lapsing on the 19 January 2021.

Occupational Health Report dated 25 January 2021.

101. The report made reference to the October 2020 workplace stress assessment and adjusted duties the claimant had been undertaking. The claimant was considered "fit for his currently supported return to work plan without change. **Mr Jafrate reported he is coping with his current shorted-outdoor delivery work and the rest of his full shift allocated to indoor work…he does not feel under pressure at work**. Mr Jafrate reported having concerns about role security and that in general terms, he feels the Royal Mal does not support staff with disabilities" [my emphasis]. It is notable the claimant did not complaint he was not being supported, and the occupational health report indicates that he was and occupational health was "currently optimistic that Mr Jafrate will be fit for full duties by late February 2021."

Disability Risk Assessment

102. On the 8 March 2021 a Disability Risk Assessment was carried out by Daniel Edwards with the agreement of James McGovern and the claimant. The claimant at this liability hearing attempted to argue that the risk assessment had not been signed and therefore it was incomplete. The Tribunal has considered the exchange of emails between James McGovern and Daniel Edwards concluding that the Disability risk assessment had been concluded which included the following risks "chronic fatigue from overworking…due to thyroid which reduce his working capacity e.g. triple walk prep would be a task that creates significant risk…currently prepping 4 walk and 6 walk is manageable and some delivery work with access to toilet is feasible…lethargy and tiredness can have an effect on daily work and capacity and regular conversations must take place (dual responsibility)." In short, the disability risk assessment concerned managing the claimant's workload which the respondent had been doing over a substantial period of time as recorded by the Tribunal above in the factual matrix when adjustments had been made over the years including conversations about workload and triple walk prep if the claimant had completed his duties when light or very light that day.

103. The claimant's case is that the disability risk assessment should have been carried out no later than 9 December 2020, and the respondent should not have waited for up-to-date occupational health reports despite occupational health's advice to this effect. The claimant alleges that the Disability Risk Assessment was delayed by Daniel Edwards because he had raised a grievance. There was no causal connection between how Daniel Edwards handled the claimant's risk assessment and the claimant's grievance.

Conclusion – see below

104. The Tribunal did not agree; Daniel Edwards did not delay the grievance and he acted on occupational health advice which made sense as the claimant's health could have improved with the result that he could return to ordinary duties. The claimant in oral evidence was unable to explain why carrying out the Disability Risk assessment on the 8 March 2021 as opposed to the 9 December 2020 related to harassment or amounted to unwanted conduct, and the Tribunal found that it had not. The fact of the matter was Daniel Edwards had agreed with the claimant adjustments which satisfied him and was awaiting up-to-date medical evidence as there was a possibility the claimant's position may have changed, and the conduct did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Face masks

105. Royal Mail employees were designated key workers during the Covid19 Pandemic.

106. Face masks during the Covid19 pandemic were handed out to all employees by the respondent, who expected them to be worn unless the employee was medically exempt. Employees were concerned about the spread of Covid 19 and the 50 percent absence was having an adverse effect on the business, delaying mail delivery when priority was given to the increased number of packages. It was a difficult period for employees, managers and the business because employees were frightened of catching Covid 19 and the respondent concerned with their well-being and absences.

107. The claimant was aware of the importance of wearing face masks and had regularly worn one until it became compulsory for all employees with the exception of those exempted on health grounds. When face masks became compulsory the claimant did not always wear one, and at no stage did he inform the respondent or his managers that it was because he felt nausea and so the Tribunal found. The claimant was provided with masks as were all employees, and if they forgot to put on the mask they would be reminded by managers.

Allegation harassment 7.7 and victimisation 2:

> Graham Egan said to the claimant "stay at your fitting and I will get people to bring your mail to you" on 8 April 2021. The claimant asserts this comment was related to his disability because he was not wearing a mask in the workplace because of feeling nauseous which was related to his disability. The comment was insulting because it was said on the shop floor in front of colleagues and/or it violated his dignity.

108. On the 8 April 2021 the claimant was seen by Graham Egan standing away from his workplace in in another isle talking to other employees, shouting and laughing without his mask on, the claimant having come into work wearing his mask. Graham Egan was aware other employees were frightened of catching Covid and had on numerous occasions before reminded/instructed individuals to put on their masks which they had done without issue. Graham Egan asked the claimant to put on his mask and the claimant responded "no" and refused to do so, the Tribunal preferring Graham Egan's evidence on this issue to that of the

claimant. It is undisputed by the claimant that he wore a face mask when it was not compulsory but refused to wear one on occasions when it was and was not wearing one on this occasion.

109. After the claimant refused and explained he was exempt from wearing a mask, Graham Egan told him to "stay at your fitting and I will get people to bring your mail to you" in short, that he would arrange for other people to bring his mail to his frame. Graham Egan had in his mind his duty as a manager to stop the claimant from walking around the office without a mask, mindful of the fact that the claimant sprays saliva when he shouts at people and this was a health and safety issue.

110. The claimant's claim is that he was unable to wear a mask due to feeling a bout of nausea and informed Graham Egan of this. The claimant maintains nausea was linked to his disability. Graham Egan disputes this, and his account that the claimant said he was exempt from wearing a mask is preferred to the claimant's evidence. In an email to the CEO dated 19 May 2021 the claimant sets out a number of complaints including the following "08 April 2021…On this day I had to remove my mask. I was then asked to put it back on by Graham Egan to which I replied no, he asked why and **before I could answer** he shouted you stay at your fitting and I will get people to box you off…**if he would of gave me chance to answer his response may have been slightly different**" [my emphasis]. The claimant's account given nearer to the incident was he did not inform Graham Egan that he was unable to wear a mask due to feeling a bout of nausea, the claimant made no reference to nausea and he was found by the Tribunal to be an inaccurate historian when he stated on cross-examination "…I responded and asked Mr Egan if he was discriminating against me and he said you need an exemption certificate."

111. The claimant's case is that Graham Egan said the words alleged above to humiliate him and it made him feel like a "leper and idiot." In evidence he stated the reference to him being exempt was not said and nor could it be implied; he had told Graham Egan that he was not exempt. The claimant also gave evidence that Graham Egan shouted at him on the shop floor. This allegation had not been included in his pleadings or list of issues and the Tribunal inferred that this was because it did not happen. It is not credible the claimant, when he refused to wear his mask and disobeyed a reasonable management instruction, did not give an explanation for his behaviour. The Tribunal accepted Graham Egan's evidence that he believed the claimant when he said he was exempt and did not ask for proof, pointing away from the claimant's less than credible allegation that Graham Egan frequently humiliated him. It would have been entirely appropriate for a manager to have demanded evidence of the claimant's exemption which he could not have produced as he was not exempt and then taken the matter forward to disciplinary proceedings. Graham Egan did not take this step.

Conclusion

112. The Tribunal resolved the conflicts in the evidence concluding on the 8 April 2021 the claimant came in wearing a compulsory face mask which he took off when talking to colleagues away from his station. He was instructed to put it back on, which he refused. The claimant did not explain that he was unable to wear a mask due to bouts of nausea, and he did not question whether he was being discriminated against. The claimant confirmed he was exempt and did not need to wear a mask which Graham Egan accepted, instructing the claimant to return to his station as a health and safety measure that had no connection with the claimant's disability but reflected the risk to the claimant's colleagues, their fears at catching Covid and protecting employees generally. Graham Egan's instruction did not have

the purpose or effect of the proscribed behaviour set out in section 26 of the EqA and it was not reasonable for the claimant, at the time, to think his conduct had that effect. The claimant knew it was a compulsory requirement unless exempt, he was not medically exempt and it was a perfectly reasonable solution for an employee who was putting colleagues at risk to remain working.

113. There was no causal connection to the claimant's grievance.

9 April 2021 grievance outcome

114. In a grievance outcome letter dated 9 April 2021 Daniel Edwards concluded the claimant's grievance was not upheld noting the claimant had not raised a current issue but one that went back to 2013 and 2014 regarding the claimant not receiving copies of the reports until 2018 when he allegedly became aware of them. Daniel Edwards concluded "this grievance is no longer deemed current to relevant, **as we have up to date OH reports that we are working with on a day-to-day basis**. Reference was made to "historical events that date back 8 years" and "officially adjusted duties being in place from October 2020…supported by up-to-date disability risk assessment…" [the Tribunal's emphasis]. As indicated above, the Tribunal was satisfied that the claimant's duties had been adjusted before October 2020.

Allegation harassment 7.8 and victimisation 3:

21 April 2021, did Daniel Edwards present to the claimant a request that he pay £1,456 to have been wrongly paid to him in wages in respect of his role as a workplace coach from March 2020 onwards?

Had that letter been withdrawn in March 2020 by the claimant?

Did Daniel Edwards process that letter in March or April 2021 without speaking to the claimant about it, resulting in a request from HR that the claimant repay £1,456 in respect of an allowance for acting as a workplace coach from March 2020 onwards? The claimant asserts this relates to his disability because the letter was written in 2020 when the claimant was suffering from stress and anxiety.

115. When he joined the Wallasey office Daniel Edwards was aware there were two workplace coaches at the Wallasey Delivery office and neither were the claimant. It is undisputed the claimant had not carried out any workplace coach duties such as training new staff, coaching sessions and extra activities. Daniel Edwards was unaware the claimant was a workplace coach and there was nothing to put him on notice that he was.

116. Daniel Edwards was requested to look into the payments of allowances made to all employees at the Wallasey delivery office, and he undertook this task as part of a national review into allowances when the claimant's name came up as receiving a workplace coach allowance for the entire period Daniel Edwards had been based in Wallasey. Daniel Edwards was aware the claimant had not carried out any workplace duties and it came as a surprise to him that the claimant was being paid extra for a duty he did not carry out. As indicated above, Daniel Edwards had seen the 4 March 2020 letter from the claimant relinquishing his position as workplace coach with immediate effect and set in hand a change on the respondent's system to remove the claimant's allowance in the future. The claimant's note was found by him in a previous manager's inbox and Daniel Edwards reasonably believed it

had been actioned, and so the Tribunal found as there was nothing to put Daniel Edwards on notice that the claimant ever worked in the role at the time and it is undisputed that he did not.

117. Daniel Edwards did not speak to the claimant first because as far as he was concerned the claimant had not been a workplace coach for approximately 12-months. He was aware the claimant had been over-paid but did not know by how much and made the decision to find out the figure before making contact with the claimant in order that he could inform him about the recoupment amount. In making this decision and taking into account the evidence given by Daniel Edwards concerning why he took the steps he did, the Tribunal was satisfied on the balance of probabilities that he waited for HR to confirm the position before making contact with the claimant and his decision in this regard had no causal connection with the claimant's grievance of 3 November 2020. The claimant's grievance of 21 April 2021 had yet to be submitted and could not have been causative of Daniel Edwards' actions. Taking into account the fact that there was nothing to put him on notice that the claimant had not resigned and he had been incorrectly receiving sums of money that could be recouped as an overpayment Daniel Edwards was acting in compliance with the requirements of the national review.

118. Daniel Edwards was informed the claimant had been overpaid allowances in the sum of £1,500 since March 2020 onwards, and he attempted to contact the claimant to discuss it on the 21 April 2021 at 11.06 in a text massage concerning the overpayment stating "I will go through it in the morning with you…" The claimant responded that he was still a workplace coach "unless you know otherwise." Daniel Edwards referred to the claimant's resignation note to which the claimant responded that he had withdrawn it and a previous manager was aware of this. Daniel Edwards wrote in response "OK don't worry about it then and we will sit down and sort it out in the morning" with a thumbs up emoji "thanks for the info." Daniel Edwards then made contact with the previous manager who confirmed the claimant had not resigned and he was satisfied that this was the case.

119. The claimant in oral evidence alleged Graham Egan had given Daniel Edwards the resignation note to make trouble for him, which was not supported by any evidence whatsoever and the Tribunal found this not to have been the case. The Tribunal is satisfied on the evidence before it that Daniel Edwards' text to the claimant was sent out at approximately the same time as HR had sorted the amount of money to be recouped. The claimant was aware of (a) the fact he had not carried out workplace coach duties for over a year, (b) that he had not made any request to carry out workplace duties, (c) other people carried out workplace duties and not him, and (d) Daniel Edwards had promised to sort it out. The claimant's case that Daniel Edward's deliberately caused him difficulties is not borne out by the contemporaneous documents, particularly the text exchange when he promised to sort it out despite the claimant being fully aware of the true position which is that he had been receiving extra payments when he had not carried out any work place duties for over a year.

<u>Conclusion- see below</u>

120. The Tribunal found the explanation given by Daniel Edwards plausible and supported by the contemporaneous documents. It is noticeable as soon as he had a discussion with the claimant who put him right, Daniel Edwards immediately made contact with HR and it was sorted within a matter of days. A hold was placed on the clawing back the monies from the claimant which the Tribunal is in no doubt made the claimant and his family anxious at

the prospect of making good an overpayment of £1,456.00 as recorded in the letter from HR sent to the claimant on 21 April 2021.

121. The Tribunal concluded that whilst the possibility of the clawback was unwanted by the claimant, it should not have come as a surprise given the fact he did not actually carry out any workplace coach activities for over a year. The conduct was not related to the claimant's disability, it did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and nor was it reasonable for the conduct to have that effect. It was not causally connected to the claimant's grievance.

Grievance 21 April 2021.

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122. The evidence before Tribunal was that the second grievance dated 21 April 2021 concerned exclusively the overpayment of the workplace coach allowance which was addressed to the claimant's satisfaction as he was not required to make the overpayment, and it went no further. In oral evidence under cross-examination the claimant conceded there was no reference to discrimination in the grievance.

123. There was no evidence to satisfy the Tribunal that the 21 April 2021 grievance concerning clawing back the overpayment was a protected act and it found that it was not. However, taking into account the Tribunal's finding that the fist grievance dated 3 November 2020 amounted to a protected act, for the purpose of establishing whether any alleged detriments were causally contacted, the existence of a second grievance is not conclusive way or another.

124. On the 24 April 2021 the claimant resigned as a workplace coach referring to the grievance he had lodged on the 23 April 2021 and alleging it was a "bitter twisted act towards a person with protected characteristics."

Allegation harassment 7.9 and victimisation 4:

> On 13 May 2021, did Daniel Edwards ask the claimant in the office whether he had taken the door-to-door advertising leaflets out of the walk 34 duties and did he also fail to tell the claimant that he would not be undertaking the walk 34 duties until 13 May 2021?

125. The claimant was aware of the respondent's Conduct Policy and the statutory requirement setting out legal obligations relating to the delivery of mail and the serious consequences of fines/revocation of licence, if mail is not delivered in accordance with national minimum standards/targets audited by OFCOM. There is also the possibility of a loss of business in a competitive market if "D2D" items such as advertisements and notices are not delivered in line with the contractual agreements between the respondent and company client. The claimant knew that any failures on his part in achieving these ends could result in serious disciplinary consequences for him.

126. In oral evidence given on cross-examination the claimant's explained that his case was Daniel Edwards should have informed him he was having an "informal chat" so the claimant could approach his union and have a witness. This was not part of the claimant's claim. The claimant stated he had taken D2D documents only from the section he was delivering (this was disputed by Daniel Edwards) and it was not reasonable to ask him about it, contradicting the oral evidence given later that Daniel Edwards was entitled to ask him about it but should have made it clear it was an informal chat.

127. On the 13 May 2021 Daniel Edwards asked the claimant in the office whether he had taken the door-to-door advertising leaflets out of the Walk 34 duties. Walk 34 duties had been shared between the claimant and a colleague as a reasonable adjustment for the claimant because it reduced his walk and he lived on route which enabled the claimant to go home whenever he wanted, for example, if he needed the toilet. An incident had arisen in that the claimant's colleague had worked his day off on overtime on the 11 May 2021 to catch up as he had been on annual leave, and he placed the D2D items in the frame ready for delivery.

128. The claimant started work at 4am the next day on the 12 May and immediately pulled out D2D items placed in the frame by his colleague, leaving them on the floor. When the claimant's colleague came in later at 6.27 he saw that his work had been undone by the claimant and went home upset suffering with stress. The claimant explained his actions by stating he had already delivered all his D2D the previous week on Thursday and Friday.

129. The Tribunal is unable to pinpoint the exact moment when the claimant was informed he would be undertaking Walk 34 duties instead of Walk 6/Walk 4, and find it was more likely than not he was informed on the 7 May 2021, preferring the evidence of Daniel Edwards to that of the claimant's on this point. By the 20 April 2021 the claimant worked Walk 4 with adjustments including allocation of the walk nearest the office and there were no issues.

130. On the 7 May 2021 Daniel Edwards had a discussion with the claimant concerning part of Walk 4 undertaken as his 1.30- hour delivery. Daniel Edwards made notes of the conversation as did the claimant, who denied the discussion had taken place which raises credible issues over the claimant's evidence. It is undisputed Walk 6 duties reverted back to the original duty holder who was returning with adjustments hence being placed on Walk 6. The claimant agreed Walk 4 followed by Walk 34 was a good alternative for him because he had a reduced round (performed a quarter of the round with his colleague the remaining three-quarters) and passed his house. The claimant, a reserved delivery postman, did not have a set duty but covered duties of people who were absent. It was apparent to the Tribunal that the respondent made every attempt to provide the claimant with adjusted duties that complied with the framework they had agreed in and after the Guided Conversation. It was also apparent that the claimant's agreement was sought, and the offer of Walk 34 duties was no exception to this whatever date the claimant was informed of the change and so the Tribunal found. It is notable that the claimant in his notes set out within the bundle records recorded "he chooses to tell me I'm being moved from 4 walk to walk 34 **as I live on this beat if I need toilet which is fair enough** but again with zero notice" [the Tribunal's emphasis]. The claimant's note undermined his evidence that he was unable to go into his house when delivering mail as this could result in allegations of gross misconduct and the claimant was found to be an inaccurate historian whose evidence could not be relied upon. The claimant clearly agreed to undertaking part of Walk 34.

<u>Conclusion – see below</u>

131. The Tribunal finds Daniel Edwards was entitled to ask the claimant about his actions concerning discarding the D2D leaflets on the floor, especially since the claimant's colleague who shared Walk 34 had been paid overtime to prep for the walk given the pressure on the respondent to meet their contractual obligations to clients, and the fact that the claimant's colleague was so upset he walked out and went home. There was no causal connection between the claimant's grievance either in connection with being asked about the incident or informing the claimant when he would be undertaking Walk 34.

Allegation harassment 7.10:

> Did Daniel Edwards tell the claimant on 18 May 2021 that he was to be subject to investigation in respect of wilfully delaying the mail of the door-to-door leaflets on 13 May 2021, and that his case would be handed to a different manager to investigate? The claimant asserts this action violated his dignity and/or created a prohibited environment for him. The claimant asserts that the incident related to his disability because it arose from a disregard by his managers to the terms of his disability risk assessment.

Allegation victimisation 5:

> On 18 May 2021, did Daniel Edwards tell the claimant that he was to be subject to an investigation in respect of delaying the door-to-door advertising leaflets on 13 May 2021?

132. In oral evidence eon cross-examination the claimant confirmed Daniel Edwards had spoken to him because he had appealed the grievance outcome. The Tribunal was satisfied on the balance of probabilities that there was no causal connection between the two events.

133. Daniel Edwards was aware that the claimant had been invited to a fact-finding meeting by another manager concerning his removal of door-to-door items from 34 Walk and there was a possibility that he could be faced with formal action under the conduct policy. In order to make sure the claimant was aware of the meeting due to be held on the 19 May 2021 he asked him if he had received the letter. As the claimant stated that he had not, Daniel Edwards took the claimant into his office and informed him of the manager who was going to conduct the fact-finding meeting with him. The claimant's response and alleged behaviour subsequent to receiving this information is the subject matter of an internal disciplinary. In short, Daniel Edwards believed he would have been attacked by the claimant had not the health and safety representative stepped in. The claimant then allegedly committed an act of aggression in the office before shouting and spitting when not wearing a mask, then leaving. The Tribunal is mindful of the fact that the claimant is subject to a conduct investigation arising out of this incident and has intentionally not made findings of facts in respect of it. It does however finding as a matter of fact that Daniel Edwards informed the claimant there was to be a fact-finding investigation the next day not to harass him but to make him aware of the meeting in order that he could arrange union representation if he wanted.

134. Taking into account the factual matrix and cogent explanation given by Daniel Edwards for his actions, the Tribunal found they were untainted by disability discrimination and there was no causal connection with the first grievance raised by the claimant on 3 November 2020, some 5-months before the alleged act of detriment and relied on him as a protected act.

135. The claimant also asserts this action violated his dignity and/or created a prohibited environment for him. The claimant asserts that the incident related to his disability because it arose from a disregard by his managers to the terms of his disability risk assessment.

Conclusion – see below

136. The Tribunal did not agree concluding the actions of Daniel Edwards did not meant the test set out in section 26(1)(b) of the EqA and his conduct did not have the proscribed effect i.e. the purpose or effect of violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for him, and nor could the claimant reasonably perceived the conduct to have that effect given his actions that required a disciplinary investigation. The claimant taking out door-to-door leaflets out of Walk 34 duties could be a serious matter and Daniel Edwards informing the claimant that he was subject to an investigation was not an act of victimisation; the issue was a matter for management to investigate and resolve with no causal connection with the claimant's grievance and so the Tribunal found.

Allegation 22: failure to make reasonable adjustments:

Did the respondent apply a PCP of, when the claimant was off on leave, returning to work with the previous days mail and parcels requiring his preparation and attention?

137. The claimant when returning to work from leave or a rest day may be required to deal with preparing the previous days mail and parcels (referred to as "backlogging") during the Covid19 Pandemic depending on the number of employee absences. As far as Daniel Edwards and Graham Egan was concerned this was not an issue for the claimant who did not complain that not having his work covered left him stressed and anxious.

138. The Tribunal was not informed of any specific dates the claimant was required to pick up work from leave or a rest day. During this period the claimant was worried about many things, and his perception that there was more work because there were less people i.e. people had Covid related absences was understandable. However, the claimant's workload was not affected by this as a result of the adjustments being made to it and the extend time in which he was given to carry out his indoor work, even when he started his shift later than 4pm as a result of changes made later during the Covid 19 Pandemic. The evidence before the Tribunal was that the claimant was on lighter duties, shorter walks near to either the office or his home which suited his toilet needs and they were all agreed with him.

Law

Disability discrimination – failure to make reasonable adjustments

139. The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

140. The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

141. In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

142. A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - Royal Bank of Scotland v Ashton [2011] ICR 632.

143. The statutory duty is for R to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" imports an objective standard - Smith v Churchills Stairlifts plc [2005] EWCA 1220. It is important to identify precisely the step which could remove the substantial disadvantage complained of - General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.

Harassment

144. The EHRC Employment Code provides that unwanted conduct can be subtle, and include 'a wide range of behaviour, including spoken or written words or facial expressions' para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

145. Section 26 EqA covers three forms of prohibited behaviour. In the claimant's case the Tribunal is concerned with conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b). The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

146. S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it

does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

147. In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question. All the other circumstances must also be taken into account (s.4(b)) - Pemberton v Inwood [2018] EWCA Civ 564.

148. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended - Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is submitted that a claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

Related to a protected characteristic

149. This is a very broad test, but some guidance about how the ET should approach the issue was provided in UNITE the Union v Nailard [2018] EWCA Civ. 1203. The ET should make findings as to the mental processes of the alleged harassers, which the Tribunal has done in relation to Daniel Edwards and Graham Egan.

150. Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 *EAT.* The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

Victimisation

151. S.27 EqA provides that: ‘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.’

152. To succeed in a claim of victimisation the claimant must show she was subjected to the detriment *because* she did a protected act or *because* the employer believed he or she had done or might do a protected act. The acts that are protected by the victimisation provisions are set out in S.27(2). They are

bringing proceedings under the EqA — S.27(2)(a)

giving evidence or information in connection with proceedings under the EqA — S.27(2)(b)

doing any other thing for the purposes of or in connection with the EqA — S.27(2)(c)

making an allegation (whether or not express) that A or another person has contravened the EqA — S.27(2)(d). The claimant relies on the grievance/letter before action letter dated 1 March 2021 as the protected act.

153. Section 39(4) provides that an employer (A) must not victimise an employee of A's (B):

as to B's terms of employment — S.39(4)(a)

in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training, or for any other benefit, facility or service — S.39(4)(b)

by dismissing B — S.39(4)(c), or

by subjecting B to any other detriment — S.39(4)(d). the claimant relies on S.39(4)(d).

Burden of proof

154. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

155. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Time limits

156. Section 123(1) [Subject to [sections 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.
(2) ...
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

157. The Tribunal was referred to the case of Bexley Community Centre v Robertson [2003] EWCA, Civ 576, a Court of Appeal decision that confirms that the Tribunal has a wide discretion over extending time in discrimination claims, British Coal Corporation v Keeble [1997] IRLR 336, which stated that the Tribunal's ability to extend time is as wide of that in the Civil Courts under s.33 of the Limitation Act 1980 and Department of Constitutional Affairs v Jones [2008] IRLR 128, which stated that it is the **exception and not the rule** to extend time.

Continuing acts

158. The Court of Appeal decision in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA, held when looking at continuing acts, the question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

159. The Tribunal was referred to Mensah v Royal College of Midwives UKEAT/124/94 the Employment Appeal Tribunal (EAT) stated that time runs from the date of the act itself, not from the dates the C acquired knowledge:

> Mummery J: "It is not correct to say that the time under section 68(1) only runs from the date when knowledge is acquired, for example, of a comparable person of a different race or colour who had received more favourable treatment ... An act occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory. Knowledge is a factor relevant to the discretion to extend time. It is not a pre-condition of the commission of an act which can be relied on as an act of discrimination."

Conclusion – applying the law to the facts

Burden of Proof

160. The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected him to the discrimination alleged in respect of the harassment and victimisation complaints bought under section 26 and 27 of the EqA respectively, with the exception of the allegation that on 17 December 2020, a member of staff shouted out three times so the whole office heard him, *"I am not putting out the trays, I will go home"* As conceded by Graham Egan under cross-examination this comment was directed at the claimant due to the previous day's events where the claimant had to leave work partway through his shift and the Tribunal found it amounted to an act of harassment under section 26 of the EqA..

161. The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected him to the discrimination alleged in respect of victimization or the failure to make reasonable adjustment complaints bought under sections 20 and 21, and 27 of the EqA.

Time limits

162. With reference to the allegation, namely, did the respondent apply a provision, criterion or practice ('PCP') of, between 2014 and 2018 requiring the claimant, as an OPG, to work outdoors for 4-5 hours which put him at a substantial disadvantage in relation to his thyroid problem because it was far too much walking and too exhausting for him compared to someone without his disability, the Tribunal found the claim was presented many years outside the statutory limitation period and for this the claimant has not provided a satisfactory reason.

163. The Tribunal was referred to the Court of Appeal decision in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23. The Court of Appeal stated that the Tribunal must not adopt a mechanistic approach to the factors set out under the Limitation Act 1980, of which the relevant factors are relevant to this case. In Mr Jafrate's case the Tribunal took into account the fact that there was not a good reason put forward by the claimant for the length of and reasons for the delay; the cogency of the evidence was severely impacted by the delay and the claimant did not act promptly at any stage either in 2013, 2014, 1018 to 2020 until proceedings were issued.

164. As indicated above in the finding of facts the Tribunal found there was nothing to prevent the claimant from issuing proceedings within the statutory time limit, even if it accepted (which it did not) that the claimant was unaware of the contents of the 2014 occupational health report. On the claimant's own evidence he was provided with a copy in 2018 and still failed to take action against the respondent for an alleged breach of its duty to make reasonable adjustments until the claim form was lodged on the 18 December 2020, which even then did not clarify the claims.

165. The claimant attempts to rely upon his mental health as a reason for his "late application." In oral evidence the claimant stated he was "incapable and in no state to communicate" for a period of 3 years between 2013 to 2017. The claimant was "in a worse place" in 2018, when the 2014 report was disclosed to him for the first time when he was too unwell with no access to the union other than a representative in Wallasey who had not been trained, to do anything about it. The claimant also stated he could not have asked for assistance because he was in no fit state. The evidence before the Tribunal did not support the claimant as it was clear he was not prevented from taking action and regularly complained to the respondent about a number of matters. The claimant was a union representative and had the support of the union throughout; he was aware of his rights and the Tribunal concluded that he chose not to take action inferring that the reason for this was a number of adjustments were made over the years which made it difficult for the claimant to formulate a case against the respondent under section 20-21 of the EqA. The claimant was found to be an inaccurate historian.

166. There was no satisfactory evidence the claimant was too unwell to undergo ACAS early conciliation and issue proceedings within the primary limitation period for the allegations relating to the period 2014 to 2018, the claimant has failed to provide any cogent reasons for his failure to issue proceedings in time and as a result of the delay the balance of prejudice falls on the respondent who has been unable to locate a number of documents and its witness Graham Egan unable recall what transpired so many years ago. The claimant's own evidence has also been confusing and less than satisfactory.

167. With reference to the issues regarding time limits, namely, were the discrimination and victimisation complaints made within the time limit of s.123 of the Equality Act 2010, the EC notification took place on 18 December 2019. The EC issued on the same date. The

claim form ET1 was received on the 23 December 2020. With reference to the claimant's allegations brought under section 20 to 21 of the EqA between 2014 to 2018, the proceedings were lodged outside the statutory 3-month time limit and the complaint did not amount to conduct extending over a period with the end of the period being later than 22 September 2020.

168. Ms Carney correctly submitted the claimant raised no allegations of discrimination by the respondent after 2018 until 2020 and there is no conduct extending over a period of time, dating back to 2014. Ms Carney submitted that a gap of two years between allegations cannot amount to conduct extending over a period. The Tribunal agreed.

If not, was there conduct extending over a period?

169. The Tribunal found there was no conduct extending over a period and the incident on 17 December 2020 was not part of an act extending over a period: Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the appropriate test for a 'continuing act.'

170. Ms Carney accepted that pursuant to s.123(3)(b) EqA 2010, any alleged failure to do something is to be treated as occurring when the person in question decided on it. In considering whether conduct extended over a period the Tribunal should look at the substance of the complaints and determine whether they can be said to be part of one continuing act by the employer, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed; Hendricks (above).

171. The Court of Appeal's decision in the well-known case of Aziz v FDA [2010] EWCA Civ 304, CA emphasised that in considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" and Barclays Bank plc v Kapur [1989] IRLR 387 at 392 reminding the Tribunal it was "in determining the existence of a continuing act, it is important to distinguish between the continuance of the discriminatory act itself (e.g. the schemes and practices in the above cases), and the continuance of the consequences of a discriminatory act, for it is only in the former case that the act will be treated as extending over a period and what claimant has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'".

172. The Tribunal is aware that a failure to make reasonable adjustments can amount to a continuing act over a substantial period of time; however in the claimant's case the evidence pointed away from this as recorded in the 26 March 2014 occupational health report referred to above. It is apparent from the agreed list of issues that there are no allegations of discrimination for the period 2018 to 2020, and another manager other than Daniel Edwards who had not joined the Wallasey office until February/March 20201 was allegedly responsible. Daniel Edwards took over management of the claimant as the relationship between the claimant and Graham Egon had deteriorated so as to become unworkable due to the claimant's difficult attitude.

173. The claim was not made within such further period as the Tribunal thinks is just and equitable. It was not just and equitable in all the circumstances to extend time taking into account the balance of prejudice between the parties. In the event of the Tribunal being wrong in respect of time limits, it has considered the substantive claims which in the

alternative would have been dismissed on their merits. In respect of this allegation the claimant has not shifted the burden of proof. It was apparent from the 26 March 2014 occupational health report the claimant "reported he remains on full adjusted duties with reduced walking…please allow current duties if sustainable or any duties with reduced walking…" The claimant's evidence that no adjustments were made was not credible, and the Tribunal preferred the contents of the occupational health report concerning the adjustments, which the claimant denied existed initially in oral evidence. The problem for the claimant is that he initially denied seeing the report when it was apparent from the final paragraph the report had been discussed with him and consent given by the claimant for its release to the respondent at the time, and this raised serious issues over the reliability of his evidence and credibility.

The Tribunal's observations

174. The Tribunal has observed that at times the respondent's record keeping has been less than satisfactory, and the claimant has a legitimate criticism concerning the fact that the 2014 occupational health report was not kept safely in his personnel file so as to make managers aware of his medical condition and the adjustments agreed with the result that the claimant and/or the existing manager would need to inform the incoming manager. This could be an uncomfortable process for the claimant, and does not assist in employee relations especially given the claimant's obstructive attitude towards management and his questionable behaviour in the workplace which had nothing to do with any disability as referenced above in the 2 November 2017 GP record confirming the problems the claimant had at work and home with his inability to control anger and frustration. The respondent can be criticised for failure to ensure the medical evidence and notes of meetings etc were retained in the claimant's personnel file. For the avoidance of doubt, the respondent's failures in this regard do not give rise to any successful discrimination complaints.

175. The Tribunal has noted that whilst Daniel Edwards retained comprehensive records detailing his dealings with the claimant as they took place in date and time, Graham Egan record keeping was unsatisfactory with the result that the Tribunal has taken a great deal of time to piece together the factual matrix. It would have assisted the Tribunal had Graham Egan taken the time to record the agreements reached with the claimant concerning the adjustments made including the dates of the various walks and details of their times etc taking into account the fact that Daniel Edwards joined the Wallasey Delivery Office in or around March 2020. There is also a total lack of any documentation generated by the previous manager from whom Daniel Edwards took over with the result that Daniel Edwards was unaware that the claimant had withdrawn his resignation from the role of workplace coach until the claimant informed him of the position.

176. The respondent can also be criticised for the fact that there was no return to work documented in the claimant's personnel file when he returned after a lengthy absence of 98-days, but no adverse inferences can be raised from this as the Tribunal was satisfied on the evidence before it that an agreement was reached with the claimant he could take on an amended Walk 6, a part duty near to the office which the claimant worked between 2020 and 2021.

177. The allegation that on 17 December 2020, a member of staff shouted out three times so the whole office heard him, *"I am not putting out the trays, I will go home"* was presented well within the primarily limitation period and it is noticeable that witnesses, including the claimant, had clearer memories as a result in direct contrast to allegations taking place between 2014 to 2018, some 4-years before proceedings were issued.

Harassment

178. With reference to the following agreed issues the Tribunal found as follows:

1. Allegation 7.1 & 7.2 : The Tribunal found respondent did carry out a disability risk assessment (DRA") and workplace adjustment assessment.

2. Ms Carney in submissions accepted that inaction could amount to unwanted conduct (Conteh v Parking Partners Limited [2011] ICR341) but disputed the respondent was inactive.

3. The Tribunal repeats its findings of facts above. It agreed with Ms Carney that the claimant has failed to discharge the burden of proof given the circumstances in which the Disability Risk Assessment was completed on the 8 March 2021. It also accepted the explanation put forward by Daniel Edwards encapsulated in Ms Carney's written submissions was untainted by disability discrimination. In short, the assessment was not completed in December 2020 as the medical report recommended a re-referral in 5 weeks' time, the January 2021 medical report did not recommend any re-referrals and was therefore the most appropriate time for the DRA to be completed and most important of all, there were a number of adjustments acceptable to the claimant in place and he was thus able to carry out his adjusted duties without issue.

4. A workplace adjustment assessment was carried out and held on the respondent's PSB system on a date between October and December 2020 and it is uncontroversial that adjustments were agreed and put in place for the claimant.

5. As agreed with the claimant additional adjustments had been made and he was aware the next step would be to re-refer him to occupational health before a disability risk assessment or workplace adjustment assessment were carried out. The decision made by Daniel Edwards in this respect was not unwanted as the claimant and his union representative were aware the assessments would be carried out once Daniel Edwards had further information via occupational health, and the decision to approach it in this way did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant who had agreed to the adjustments put in place and so the Tribunal found dismissing the complaints.

6. Allegation 7.3: The claimant was told by Graham Egan "I can't have you standing around doing nothing" on the 27 September 2020 as recorded above. The Tribunal refers to its findings of facts above including the claimant's workload that day being "very light" as conceded by the claimant and the explanation from Graham Egan as to why he made the comment given the claimant had the capacity to work on additional tasks on the basis that he would otherwise not be working. The comment needs to be put in context, and it was clear to the Tribunal Graham Egan's purpose or effect was not creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant but managing workload, and explaining to the claimant that he was not being asked to do the work of three people but given additional tasks because he had nothing else to do. It was not objectively reasonable for the claimant to think the comment related to his disability, when it clearly did not and nor was it reasonable for him to think the words had the effect set out in section 26 of the EqA.

7. Allegation 7.4: On 17 December 2020 a member of staff shout out three times so the whole office heard him, “I am not putting out the trays, I will go home” ? This comment was directed at the claimant due to the previous day’s events where the claimant had to leave work partway through his shift. The Tribunal has recorded above the circumstances in which this incident took place. Ms Carney’s submission that the claimant he has failed to explain how he states it related to his disabilities has some merit, however, the claimant is a litigant in person with mental health issues and it was apparent to the Tribunal that his refusal to put out the trays the day before and the way he behaved related to his disability in respect of the workload and the manifestation of stress and depression which resulted in the claimant’s reaction to his colleague and the upset it caused him.

8. Ms Carney is correct when she submitted Daniel Edwards took immediate action for which the claimant congratulated him, however what transpired in the aftermath including the claimant’s misconduct in threatening to fight, does not undermine the fact the words were used and aimed at upsetting the claimant, which they did. Taking into account the reverse burden of proof and the fact that the claimant according to the medical report dated 5 March 2019 had significant issues with anger control (which was not a disability) has been factored in by the Tribunal. The claimant proved primary facts from which inferences of unlawful discrimination can be drawn, and the person who said the words did not give evidence. The Tribunal cannot be satisfied that the claimant’s colleague did not known of the claimant’s disability as suggested by the respondent, and given the claimant’s absences, his behaviour at work towards managers, particularly Graham Egan, it is more likely than not the colleague was aware of the claimant’s adjusted duties at the very least and made the comment three times to get a laugh from co-workers at the claimant’s expense.

9. On the balance of probabilities the Tribunal concluded this conduct related to the claimant’s disability, it had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, it was reasonable for the conduct to have that effect and the claimant’s claim of harassment brought under section 26 of the EqA succeeds and is adjourned to a remedy hearing.

10. With reference to the remedy hearing the claimant will need to deal with the injury to his feelings arising out of this comment only as he has failed in respect of all other claims relied upon as a basis for an injury to feelings award, which could have the effect on the amount the claimant can recover bearing in mind he has succeeded on one small element of his claim, and on the claimant’s own account it was properly dealt with by the respondent and went no further in respect of the claimant and his colleague; both could have been facing serious misconduct charges. The claimant may wish to get legal advice on the realistic value before he puts against the claim for injury to feelings and inform the respondent of this prior to the remedy hearing.

11. Allegation 7.5 & 7.6: At the time the claimant submitted his claim to the Tribunal the respondent had not failed to take any action on the claimant’s grievance submitted on 3 November 2020. The Tribunal found action had been taken starting with Daniel Edwards ringing occupational health to obtain copies of all previous occupational health reports. Action continued to be taken before and after proceedings were issued in order to get to the bottom of the missing reports when the claimant had copies and never provided them to the respondent. It is difficult for the claimant to argue in light of his own actions that the conduct was unwanted, had be wanted the grievance to be expedited the medical reports could have been provided by him. There was no

causal connection with the delay in the respondent dealing with the grievance and the claimant's disability and the conduct did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and so the Tribunal found on the balance of probabilities.

12. The Tribunal found Daniel Edward's conduct was not related to the claimant's disability. It did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and it was not reasonable for the conduct to have that effect. The claims fails and are dismissed.

13. Allegation 7.7: Graham Egan said to the claimant on 8 April 2021 *"stay at your fitting and I will get people to bring your mail to you"* The comment was not related to the claimant's disability; it was made because he was not wearing a compulsory mask in the workplace. Graham Egan did not know the claimant was feeling nausea and allegedly unable to wear a mask because the claimant had not told him. The comment was said to protect the health and safety of employees working with the claimant. It was not reasonable for the claimant to consider the comment was insulting because it was said on the shop floor in front of colleagues and/or it violated his dignity. The claimant and his colleagues were aware of the importance of wearing masks, the claimant was not exempt from this and he refused to wear one underlining his attitude towards Graham Egan which supports the respondent's case that the claimant was obstructive and unreasonable particularly when it came to Graham Egan, even when he reached a sensible solution asking the claimant to remain in one place which did not prejudice the claimant in any way.

14. Ms Carney is correct in her submission that the claimant has failed to discharge the burden of proof under s.136 of the EqA given that there is a clear explanation from Graham Egan untainted by disability discrimination as to why this comment was made. Graham Egan's instruction did not have the purpose or effect of the proscribed behaviour set out in section 26 of the EqA and it was not reasonable for the claimant, at the time, to think his conduct had that effect. The claimant knew it was a compulsory requirement unless exempt, he was not medically exempt and it was a perfectly reasonable solution for an employee who was putting colleagues at risk to remain working. The Tribunal found Graham Egan's conduct was not related to the claimant's disability, it did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and not was it reasonable for the conduct to have that effect. The claims fails and are dismissed.

15. Allegation 7.8: Ms Carney is correct that the claimant has been unable to put forward any evidence to demonstrate that Graham Egan handed the letter across to Daniel Edwards; and the Tribunal took the view that the claimant was attempting to show Graham Egan in a bad light to bolster up the strength of his claim.

16. Graham Egan did not present to Daniel Edwards in April 2021 a letter written by the claimant in March 2020 stating his request to cease to be a workplace coach. The letter was found by Daniel Edwards in the previous manager's tray. The letter had been withdrawn in March 2020 by the claimant unbeknown to Daniel Edwards who processed the letter in March or April 2021 without speaking to the claimant about it. However, Daniel Edwards attempted to contact the claimant to discuss it and after the claimant informed him of the position the request from HR that the claimant repay £1,456 in respect of an allowance for acting as a workplace coach from March 2020 onwards went no further. The actions of Daniel Edwards did not relate to the

claimant's disability because the letter was written in 2020 and on the claimant's own case the respondent did not have knowledge of his disability of anxiety and depression until October 2020, and the causation test has not been met.

17. Ms Carney is correct in her submission that the claimant has failed to discharge the burden of proof under s.136 of the EqA given that there is a clear explanation from Graham Egan untainted by disability discrimination as to why this comment was made. The Tribunal found Graham Egan's conduct was not related to the claimant's disability. With reference to the conduct of Daniel Edwards it did not have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and not was it reasonable for the conduct to have that effect. The claims fails and are dismissed.

18. Allegation 7.9: The Tribunal refers to its findings above. Daniel Edwards did ask the claimant on 13 May 2021 whether he had taken the door-to-door advertising leaflets out of the Walk 34 duties he was due to carry out that day. The claimant's assertion that he had done so because he had made those deliveries in the previous week and so there was no need for him to do so on 13 May 2021 is not relevant; the issue was the claimant's behaviour and the impact it had on delivery of the mail and a colleague. The Tribunal does not accept the unwanted conduct was Daniel Edwards not telling him he would not be undertaking the Walk 34 duty on that day, and the sudden change in duties was contrary to a disability risk assessment which required him to have structure to his duties and not to be subject to sudden change. The claimant agreed to Walk 34 duties because it met his requirement for a reasonable adjustment and there was no issue with it being discussed with him. The Tribunal does not accept the claimant was caused stress and anxiety as he now maintains by the prospect of working on Walk 34 which passed his house and suited his purpose, concluding the claimant has exaggerated the impact on him for the purpose of this litigation.

19. The behaviour of Daniel Edwards did not have the purpose or effect of the proscribed behaviour set out in section 26 of the EqA and it was not reasonable for the claimant, at the time, to think his conduct had that effect. The claim is dismissed.

20. Allegation 7.10: Daniel Edwards did tell the claimant on 18 May 2021 that he was to be subject to investigation in respect of wilfully delaying the mail of the door-to-door leaflets on 13 May 2021, and that his case would be handed to a different manager to investigate. The claimant had been involved in a possible act of serious misconduct and Daniel Edwards wanted to ensure he was aware of the meeting in order that he could arrange union representation, the claimant having informed him that he had not received the invite letter. The actions of Daniel Edwards were of a reasonable manager faced with a difficult employee and taking into account the circumstances it was not objectively reasonable for the claimant to assert this action violated his dignity and/or created a prohibited environment for him. The Tribunal did not accept that the incident related to his disability because it arose from a disregard by his managers to the terms of his disability risk assessment preferring the evidence of Daniel Edwards that it arose because of the claimant's behaviour that could result in disciplinary action being taken against him. The claim is dismissed.

179. With reference to the issue, namely, was the conduct unwanted, the Tribunal accepted that the allegations reference above in harassment allegations 7.4, 7.7, 7.8, 7.9 and 7.10 only were unwanted by the claimant.

180. With reference to the issue, namely, was this conduct related to the claimant's disability, the Tribunal found with the exception of allegation harassment 7.4 it was not.

181. With reference to the next issue, namely, did the conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, with the exception of allegation harassment 7.4 the Tribunal found it was not.

182. With reference to the issue if so, was it reasonable for the conduct to have that effect, with the exception of allegation harassment 7.4 the Tribunal found that it was not.

Failure to make Reasonable Adjustments

183. Ms Carney referred the Tribunal to the EAT decision in Ahmed v Department for Work and Pensions [2022] EAT 107. The EAT stated that *"A PCP, simply put, is where the employer has an expectation of the employee, and either the same expectation is made of other employees or there is an element of repetition in the expectation with the particular employee".*

184. Section 20(3) sets out the first 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. The EHRC's Employment Code states that the term PCP 'should be construed widely including a "one-off" or discretionary decision.'. A Tribunal should adopt a liberal rather than an overly technical or narrow in order to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

185. In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins (above) the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

186. Failure to make reasonable adjustments issue 1: With reference to the issue, namely, did the respondent apply a PCP of, between 2014 and 2018, requiring the claimant as an OPG to work outdoors for 4-5 hours. the Tribunal found, as conceded by the respondent, that there was a PCP in place between 2014 and 2018 requiring OPG's to work these hours. However, there was no satisfactory evidence before the Tribunal that the claimant worked 4-5 hours outdoors throughout this period bearing in mind the occupational health report confirming the claimant was "on full adjusted duties and reduced walking." The claimant has produced no satisfactory evidence that he was substantially disadvantaged compared to non-disabled persons and the reasonable step for the respondent to have taken was reduce to 1.5 to 2 hours for a five year period when he was never absent off sick until February 2018 followed by an occupational health report and the claimant being transferred to the indoor work within the "Book Room" which continued until February 2020 when the claimant asked for outside delivery work again. The fact that the claimant transferred to indoor work as an OPG reflects the position that OPG's were not required to work outdoors for 4-5 hours and there were other alternatives available.

187. The Tribunal agreed with Ms Carney's submissions that there was nothing to put the respondent on notice that the claimant required reduced hours of 1.5 to 2 hours for the entire period, and it is clear from the 2014 occupational health report that the adjustments to the claimant's duties in hand and a re-referral in 6-weeks' time was suggested. Due to the passage of time what happened next cannot be established, there are no records and Graham Egan has no recollection of events that allegedly took place so many years ago. The fact the claimant delayed so long before issuing proceedings resulted in a substantial prejudice to the respondent which outweighed any prejudice to the claimant, as recorded by the Tribunal above when dealing with time limits. Had the claimant issued proceedings within the statutory limitation period the position would have been a lot clearer.

188. The claimant has not discharged the burden of proof in respect of the first victimisation allegation. Ms Carney correctly submitted that in the 8 May 2018 occupational health report there is no suggestion of the claimant requiring adjustments for the entire period, and the claimant himself was uncharacteristically silent about the respondent allegedly breaching its duty to make reasonable adjustments which suggests the respondent did not know and nor could it have reasonably known the claimant was placed at a disadvantage for the whole period. It is notable that once the respondent became aware, as it did via the 8 May 2018 occupational health report, immediate action was taken and this concurs with the evidence before the Tribunal that the respondent, including Graham Egan, listened to the claimant and when he was told the claimant did not have capacity to undertake additional duties, such as triple prep, he was not required to do so.

189. The claimant's claim that the respondent breached its duty to make reasonable adjustments in relation to allegation 1 is dismissed.

190. Failure to make reasonable adjustments issue 2: with reference to the issue, namely, did the respondent apply a PCP of, between March 2020 and October 2020, requiring the claimant to carry out 3 to 3.5 hours of outdoor walking and the rest of his duties indoors on triple prep, the Tribunal found it did not. The Tribunal accepts the claimant carried out 3 to 3.5 hours outdoor walking as Walk 6, an "adjusted Walk" took between 3 to 3.5 hours until it was split. OPG's who were provided with adjusted shorter Walks, as was the claimant, were not expected to walk outdoors the 4 to 5 hours OPG's usually waked. As an adjustment to the claimant Walk 6 was a shorter Walk, and when the claimant resigned from indoor duties asking to be put back on a Walk he was offered and accepted Walk 6 with no issues about the length of it being raised. In short, there was no PCP and the claimant did not make the respondent aware that he would have difficulties walking 3 to 3.5 hours per day on a Walk that already had been adjusted. It is undisputed the claimant had the option of asking a van to pick him up if he needed to visit the nearby Wallasey office for the toilet, an adjustment which further reduced the amount of walking.

191. The Tribunal did not accept the claimant was required to work the rest of his duties indoors on triple prep. The claimant was not. The undisputed evidence before the Tribunal was that the claimant prepared his own Walk 6 and a second walk with the possibility of a triple prep if the claimant had the capacity i.e. if the mail was light or very light and if he did not this was accepted by Graham Egan at the time. It is undisputed the claimant successfully applied to be a reserve OPG and his new role was to cover absences of other OPG's including Walk 6 which became available was a reduced Walk and the claimant, who started work at 4am was given approximately 2.5 hours to complete his preparation in comparison with other OPG's who started work at approximately 6.30/6.45am also as an adjustment.

192. Ms Carney is correct in her submission that the occupational health report dated 29 October 2020 did not mention that the claimant had been struggling with his duty since March 2020. The report noted that the claimant was working on an adjusted duty at the time of the report and that he was *"pleased to undertake proportionally more indoor work and less outdoor work – all as at present – and which I understand is not the normal role work".* She reminded the Tribunal that the claimant did not raise any formal complaints or grievances in relation to his duty between March and October 2020, and whilst the claimant would raise issues with the indoor triple prep work, on occasion, a discussion would always be had and work was not required to be carried out. This was the evidence before the Tribunal, and the claimant's case that he required further adjustments was not credible or supported by the documentation including occupational health reports.

193. The Tribunal accepted Ms Carney's submission that the claimant had failed to produce any objective evidence that he required further adjustments to his duty between March and October 2020, and placing him on Walk 6 (an already adjusted duty) rather than requiring him to cover different duties week by week, as per his reserve OPG role, was an adjustment in itself. It is undisputed the claimant started work 4 am and had up to 2.5 hours additional time per day to complete his indoor preparation work. The claimant has failed to provide any evidence to indicate that he was placed at a substantial disadvantage during the period March to October 2020, and in the alternative had the disadvantage existed (which for the avoidance of doubt the Tribunal found it did not) the respondent did not know, or could reasonably have been expected to know he was being placed at that disadvantage.

194. The Tribunal also found claimant did not spent the rest of his duties on triple prep and there was no PCP in existence that employees should do so that put the claimant at a substantial disadvantage. If the Tribunal is wrong on this point, in the alternative it would have gone on to find the claimant was not put at any disadvantage let alone a substantial disadvantage because reasonable adjustments concerning his workload were made as recorded by the Tribunal in the finding of facts above. There was no satisfactory evidence apart from the claimant's say so, which the Tribunal concluded was unreliable, to the effect that he carried out an excessive amount of work which was fatiguing and aggravated his depression and anxiety. Adjustments were made minimising and controlling the amount of work the claimant was required to carry out, and if for example he found it too much for whatever reason, managers would agree that the work need not be carried out. It is unfortunate that the position was never formalised by the respondent in any written document.

195. In conclusion, the claimant's claim that the respondent did not breach its duty to make adjustments during the period March to October 2020 fails and is dismissed.

196. Failure to make reasonable adjustments issue 3: With reference to the issue, namely, did the respondent apply a PCP of, when the claimant was off on leave, returning to work with the previous days mail and parcels requiring his preparation and attention, the Tribunal found that there was taking into account the guidance set out in Ahmed v Department for Work and Pensions (above). The Tribunal found that this was as a result of the difficult circumstances resulting from the Covid19 Pandemic. The claimant's evidence is that this happened on six occasions and he was unable to provide the dates. The respondent's evidence was that all work should be, where possible, completed in time allocated, the claimant had longer to do so that compared to other OPG's and would be sent home early, which the Tribunal accepted (see above). The Tribunal on balance accepted the claimant's evidence that parcels and mail could be left over from the day before and he had experienced this.

197. The claimant's case is that he was placed at a substantial disadvantage compared to non-disabled persons in that it caused him to feel stressed and anxious whilst on leave about the volume of work he was coming back to.

198. The Tribunal accepted Ms Carney's submission that the claimant has not provided any objective evidence to suggest that he was placed at this substantial disadvantage and/or that it was a substantial disadvantage that he was placed at in comparison to non-disabled persons, taking into account its finding that the claimant's managers proactively managed the claimant's workload and made adjustments to it as and when the claimant asked.

199. Ms Carney reminded the Tribunal that the claimant did not cross-examine Graham Egan or Daniel Edwards on this allegation, and the Tribunal accepted their evidence as credible that every duty is different, when mail traffic was low (for example if the prep work took 30 minutes as opposed to 1 hour) OPG's would prepare more than just their own work and there were occasions when having prepped the work if it was not delivered it would remain ready for delivery after a day off or week leave due to the high amount of absences as a result of Covid, described as "unprecedent times." The Tribunal accepted Daniel Edwards' undisputed evidence that the claimant did not put him or the respondent on notice that having his work covered whilst he was absent led him to feel stressed and anxious. The Tribunal notes that the claimant did not report the difficulties he was having to occupational health and there was no reference in any medical reports or records.

200. Taking into account the proactive management of the claimant's workload at the time, the Tribunal was satisfied that the claimant was aware of the fact that if he could not manage the workload then something would be done about it, for example, as in the case of triple prep which he was not required to do after discussion about workload.

201. The Tribunal accepted Daniel Edward's evidence as credible that getting other employees to cover the claimant's incomplete work whilst he was absent was not possible for a period of time during the Covid 19 Pandemic, and it concluded it would not have been a reasonable adjustment to have ensured the claimant's work was always covered against a backdrop of Covid related absences and the consequences of the Pandemic bearing in mind that the claimant always had the safety net of discussions with managers concerning workload and adjustments to it even had the respondent been aware or should reasonably have been aware that the claimant was placed at a disadvantage (which the Tribunal found it was not).

202. The respondent was not in breach of its duty to make reasonable adjustments and the claimant's complaint set out in issue 3 is dismissed.

203. Failure to make reasonable adjustments issue 4: With reference to the issue, namely, did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to pick up additional duties, the Tribunal finds that it did. The claimant complains of one incident described as "lapsing" referenced above in the findings of facts when the claimant was asked to "lapse" Walk 4 on the 19 January 2021. Nevertheless, the Tribunal finds a PCP existed which resulted in the claimant being asked to "lapse" on the one occasion he referenced.

204. The evidence before the Tribunal was that the claimant carried out lapsing on the 19 January 2021 without issue when his workload was light as set out in the findings of facts. The claimant did not mention this to the occupational health doctor who confirmed "he is

coping with his current shorted-outdoor delivery work and the rest of his full shift allocated to indoor work…he does not feel under pressure at work." The claimant's issue as at the 25 January 2021 was role security and he raised no complaints about lack of support or a failure on the part of the respondent to make reasonable adjustments, which is unsurprising as a number of adjustments had been made and this state of affairs continued into the future. It is notable the visit with occupational health took place a few days after he had carried out lapsing and yet the claimant failed to mention the disadvantage he had allegedly suffered either to the occupational health or the respondent who could not have reasonably know the claimant would be placed at a disadvantage.

205. In conclusion, the claimant has not discharged the burden of proving the PCP relied upon put him at a substantial disadvantage, given the fact that he consciously chose a role that required flexibility as he was required to undertake different duties in the role of reserve delivery postman. It is undisputed the claimant never applied for any of the other fixed duties advertised in the delivery office. There was no satisfactory evidence before the Tribunal that picking up different duties made it more difficult for him to manage his symptoms of stress and anxiety and had this been the case the Tribunal would have expected to have seen it reflected in the factual matrix including occupational health reports, welcome back meetings, Guided Conversation for Stress, which it was not.

206. In conclusion, the respondent was not in breach of its duty to make reasonable adjustments and the claimant's complaint set out in issue 4 is dismissed.

207. Failure to make reasonable adjustments issue 5: With reference to the next issue, namely, did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to finish their indoor prep work within a certain timescale, the Tribunal found that it did.

208. The claimant's case is that the PCP exacerbated his symptoms of stress and anxiety, however he did not refer to any specific dates when timescales were mentioned to him and nor did he refer to dates he was required to complete indoor preparation within the timescales and was unable to do so bearing in mind the adjustments that had been made to the timescales and the extent of the claimant's Walk. The respondent's undisputed evidence was that the amount of indoor preparation varied and it would depend on the extend of the delivery including the length of the Walk and how much mail was received on the day. It is undisputed the union was and continues to be involved in reviewing the delivery routes and preparation required beforehand.

209. It is undisputed the claimant had a shorter Walk compared to a number of his colleagues who did not need adjustments, and a much longer period in which to prepare for it with adjustments being made when requested, for example, workload if asked to carry out triple prep. The Tribunal is satisfied that the claimant's indoor preparation work was managed and whilst he was expected to prepare for the Walk which he had been allocated he could and did approached managers if he the workload became too much. Had the respondent not made the reasonable adjustments it did it is conceivable the claimant could have been placed at a substantial disadvantage in comparison to non-disabled persons. The Tribunal did not accept Ms Carney's submission that that the duty to make adjustments did not arise and/or that the respondent did not know and could not reasonably have been expected to know that the claimant was placed at any substantial disadvantage if the indoor prep he had to complete was not managed proactively.

210. The Tribunal is satisfied on the balance of probabilities that reasonable adjustments were made for the claimant and it accepted Ms Carney's submission that he was given an

amended start time of 4 o'clock am which gave him an additional 1.5 to 2 hours to complete his indoor preparation work, over and above what other OPGs were receiving. The claimant accepted in evidence that he did have additional time provided to him to complete his indoor prep work, and the Tribunal preferred the evidence given on behalf of the respondent that indoor prep work was carefully managed as a reasonable adjustment concluding as recorded above in the finding of facts that when the claimant raised an issue with the workload a discussion took place and further adjustments would be made. The Tribunal was reminded by Ms Carney of Graham Egan's undisputed evidence (which can be found in his written statement) that once the claimant informed him that the triple prep workload was too much after the second delivery van arrived at around 07:00am there was an agreement in place from an unknown date prior to the Guided Conversation whereby the claimant would perform triple prep until 7 o'clock am and then would go down to dual prep between 7 and 8am. After the Guided conversation for Stress in October 2020 (see above) the claimant permanently performed dual prep only.

211. In conclusion, the respondent was not in breach of its duty to make reasonable adjustments and the claimant's complaint set out in issue 5 is dismissed.

212. Failure to make reasonable adjustments issue 6: with reference to the next issue, namely, did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to complete their assigned delivery route, the Tribunal found such a PCP was in place.

213. The claimant's case is that the PCP placed him at a substantial disadvantage as he needs to use the toilet more often and he was unable to on his delivery routes or had to wait until he returned to the mail centre. The claimant also gets tired easily due to his under-active thyroid. The Tribunal accepts the PCP placed the claimant at a disadvantage, but it did not accept the claimant was unable to use the toilet on his delivery routes having found the claimant to have been an inaccurate historian when he gave evidence that he was unable to visit his home if he needed to go to the toilet in fear of disciplinary action for gross misconduct with immediate dismissal. The respondent was aware the claimant needed access to toilet facilities as a result of the medication he was on, and reasonable adjustments were made in respect of all the claimant's Walks after the claimant resigned from indoor duties in February 2020. The claimant was offered and accepted adjusted Walk 6 on the basis that it was the closest walk to the Wallasey office and he could ask for a van to take him to the office when on the Walk. Walk 4 was also close to the Wallasey office and toilet facilities and Walk 34 passed the claimant's house.

214. Graham Egan's evidence that Walk 6 was a smaller delivery duty and the claimant did not dispute this evidence. The claimant accepted Walk 6 because of his tiredness due to the underactive thyroid and the requirement to toilet facilities. Walk 6 was further reduced by being split into 2 different walks with the claimant undertaking the walk nearest to the Wallasey office after the 21 October 2020 meeting, and before this the claimant accepted in cross-examination that he had completed Walk 6 with no issues until he was absent due to anxiety and depression (and not underactive thyroid). The claimant's position is recorded in the notes of the meetings which took place on the 21 October 2020 as follows; "Felt as if workload was too much, more so indoors, felt better this morning on dual prep" and up until that meeting the respondent understood that the adjustments it had put in place for the claimant were effective and reasonable. There was nothing the claimant said or did up to that point to make the respondent aware he required further reasonable adjustments in respect of Walk 6, and the respondent did not know and could not have reasonably been expected to know that the claimant required a further adjustment to Walk 6 in regard to it being split into two walks.

215. The Tribunal is satisfied on the balance of probabilities that the respondent made reasonable adjustments in respect of the Walks undertaken by the claimant enabling him to use toilet facilities nearby when required and reducing the Walks taking into account the claimant's tiredness, balancing the extended period in which the claimant was required to carry out his preparation for the Walk and the Walk itself, with the result that there were occasions, according to the undisputed evidence given on behalf of the respondent, when the claimant having completed all his duties, left for home early.

216. In conclusion, the respondent was not in breach of its duty to make reasonable adjustments and the claimant's complaint set out in issue 6 is dismissed

217. Failure to make reasonable adjustments issue 7: with reference to the next issue, namely, did the respondent apply a provision, criterion or practice ('PCP') of expecting OPGs to use the designated staff rest area the Tribunal found that it did not for the reasons set out above in the findings of facts.

218. The claimant's case is that the PCP put him at a substantial disadvantage as using the staff rest area made him feel stressed and caused him to have a breakdown due to his stress and anxiety. At the 21 October 2020 meeting the claimant described the designated staff area as "depressing." The claimant did not inform the claimant that using the staff rest area made him feel stressed and caused him to have a breakdown due to his stress and anxiety. There is a difference between describing an area as "depressing" and maintaining it caused the claimant a breakdown, and the Tribunal concluded there was no evidence to this effect in the contemporaneous documentation (including medical evidence) and the claimant was exaggerating the effect of the designated staff rest area on his health for purpose of this litigation. The claimant's evidence was that he did not use the designated staff area and made other arrangements, undermining his case that the PCP existed.

219. Ms Carney submitted that the respondent was unaware of the alleged unsubstantial disadvantage until the 8 March 2021 when he was informed *"workplace does have a designated "quiet room" on site which can be used as an agreed control measure facility such as a breakout area for Mr Jafrate or even just for confidential meetings"*. The Tribunal found on the balance of probabilities that the duty to make adjustments did arise in this regard, and in the alternative, if such a duty existed, the respondent did not know and could not reasonably have been expected to know that the claimant was placed at any substantial disadvantage in this regard until 8 March 2021. At that meeting it was made clear to him that he could use the designated "quite room" if he needed a break to manage his anxiety, and the Tribunal repeats its conclusion set out above that it was not a reasonable adjustment for the claimant to be given sole access to a designated quiet room in case he felt stressed. It was sufficient for the claimant to have access to the "quiet room" which he could use as and when it was needed, and he chose not use it.

220. In conclusion, the respondent was not in breach of its duty to make reasonable adjustments and the claimant's complaint set out in issue 7 is dismissed.

Victimisation

221. With reference to the first issue the respondent and Tribunal accepts the claimant presenting a grievance on the 3 November 2020 was a protected act. The grievance presented on the 21 April 2021 was not a protected act, the claimant having conceded on cross-examination that there was no reference to discrimination and it was exclusively

concerned with threat of re-payment of salary which had no connection with the claimant's disability.

222. With reference to the issue, namely, was the claimant subjected to a detriment, the Tribunal found he was not.

223. Ms Carney referred the Tribunal to legal principles and the test for whether a detriment has occurred, namely, whether the treatment is of such a kind that a reasonable worker would or might take the view that in all circumstances it was to his detriment - Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). It is sufficient that a reasonable claimant might take the view that the conduct in question was detrimental, even if a reasonable Court or Tribunal does not think that it was - Warburton v Chief Constable of Northamptonshire Police EA-2020-00376-AT).

224. Ms Carney reminded the Tribunal there must be a link between the protected act and the treatment, however, the protected act need not be the main or only reason for the treatment, victimisation will occur where it is one of the reasons (paragraph 9.10, EHRC Services Code).

225. In determining whether any alleged treatment was because of the protected act the Tribunal asked itself what the mental processes were, conscious or subconscious, of the alleged discriminator and what facts operated on his mind in relation to each individual allegation of victimisation; *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* [2010] IRLR 136, SC

226. Taking the detriments individually as recorded above in the findings of facts the Tribunal found the following.

227. Allegation victimisation 1: "On 21 November 2020, Graham Egan asking the claimant to put trays out from the last van, something which was never agreed with Daniel Edwards on his guided chat on 21 October. This means the claimant had extra work to do." The Tribunal accepts that being asked to put the trays out was detrimental in the claimant's eyes, despite the fact that he had finished his duties. However, taking into account the factual matrix recorded above it found there was not causal connection whatsoever between the earlier grievance (which Graham Egan had not seen) and the request on the 21 November 2020 that the trays are wheeled from the van into the office and placed on people's desks. The protected act was not connected in any way to Graham Egan's attempt to manage the claimant's workload given the claimant had finished his work and had capacity, and it was not in Graham Egan's mind as he had no knowledge of the content of the grievance which had been received by Daniel Edwards.

228. The respondent did not victimise the claimant as alleged in allegation 1 and the complaint is dismissed.

229. Allegation victimisation 2: On 8 April 2021, Graham Egan said to the claimant "stay at your fitting and I will get people to bring your mail to you." The Tribunal agreed with Ms Carney that the claimant staying at his fitting and continuing with his duties when not wearing a compulsory mask during the Covid19 Pandemic is not a detriment that a reasonable worker would or might take a view that it was, objectively assessed. The claimant was putting his colleagues substantially at risk, he was laughing and shouting whilst at the same time spitting and flatly refused, for no good reason, to wear a compulsory mask. If the Tribunal is wrong on this point, it would have gone on to find in the alternative that Graham Egan's reasonable

management instruction was not connected in any way to the protected act; Graham Egan's sole concern was to protect the health and safety of the respondent's employees against a pandemic which had resulted in substantial absences, serious illness and well-publicised deaths. The United Kingdom and business, such as the respondents were in turmoil, and Graham Egan's evidence that employees were very worried was entirely credible. He had no choice but to instruct the claimant as he did, and the claimant's reliance on this as an act of victimisation further undermines his credibility. The claimant's attitude also highlights the difficulties he caused to his managers by refusing to wear a protective mask when it became compulsory and yet he wore one when it was not compulsory according to the undisputed evidence of Graham Egan and Daniel Edwards.

230. The respondent did not victimise the claimant as alleged in allegation 2 and the complaint is dismissed.

231. Allegation victimisation 3: with reference to the issue, namely, on 21 April 2021, did Daniel Edwards present to the claimant a request that the £1,456 to have been wrongly paid to him in wages in respect of his role as a workplace coach from March 2020 onwards, the Tribunal found that he did not as recorded in the findings of acts above. HR presented the claimant with the request after Daniel Edwards carried out a review of payments made to employees and wrote to the claimant referencing the overpayment. Daniel Edwards discussed the position with the claimant, accepted he was a workplace coach and promised to sort it out which he did to the claimant's satisfaction. Taking into account the factual matrix including the claimant not having taken part in any workplace coach activities for 12 months previously, the Tribunal concluded objectively assessed a reasonable worker would not conclude they were being caused a detriment by Daniel Edwards taking into account the exchange of supportive text messages. If the Tribunal is wrong on this point, it would have gone on to find in the alternative that Daniel Edwards was conducting part of a national review, he was unaware until the claimant told him he had not resigned as a workplace coach. Daniel Edwards was aware the claimant had not carried out workplace coach duties for 12-months and two other people carried them out. The actions of Daniel Edwards were not in any connected to the protected act.

232. The respondent did not victimise the claimant as alleged in allegation 3 and the complaint is dismissed.

233. Allegation victimisation 4: With reference to the issue, namely, on 13 May 2021, did Daniel Edwards ask the claimant in the office whether he had taken the door-to-door advertising leaflets out of the Walk 34 duties and did he also fail to tell the claimant that he would not be undertaking the Walk 34 duties until 13 May 2021, the Tribunal repeats its findings above. It concluded asking the claimant about his behaviour in the circumstances, objectively assessed, is not treatment of such a kind that a reasonable worker would or might take the view that in all circumstances it was to his detriment – Shamoon (above). If the Tribunal is wrong on this point, it would have gone on to find in the alternative that the actions of Daniel Edwards were not in any connected to the protected act but those of a manager dealing with potential gross misconduct.

234. Allegation victimisation 5: With reference to the issue, namely, on 18 May 2021, did Daniel Edwards tell the claimant that he was to be subject to an investigation in respect of delaying the door-to-door advertising leaflets on 13 May 2021 as recorded in the findings of facts the Tribunal found that he did. It concluded imparting this information to the claimant concerning the investigation into delaying the D2D items and the effect of the claimant's actions on his colleague in the circumstances, objectively assessed, is not treatment of such

a kind that a reasonable worker would or might take the view that in all circumstances it was to his detriment.

235. In relation to allegations 4 and 5 and having regard to the burden of proof, had the claimant been caused a detriment (which for the avoidance of doubt the Tribunal found that he had not) in the alternative it would have gone on to find was the reason for the detriment was not causally connected to the protected act. The actions of Daniel Edwards were not in any connected to the claimant's grievance and arose solely as a result of the claimant's behaviour that was subject to an internal investigation by another manager and Daniel Edwards wanted to give the claimant the heads up so he could arrange support/union representation.

236. The respondent did not victimise the claimant as alleged in allegation 4 and 5 and the complaint is dismissed.

237. In conclusion, the Tribunal does not have the jurisdiction to consider the claimant's complaint of unlawful disability discrimination brought under sections 20-21 of the Equality Act 2010 in relation to the period between 2014 to 2018 which was presented after the end of the relevant time limit, it is not just and equitable to extend the time limit and the claimant's claims of unlawful disability discrimination are dismissed. In the alternative the claims not well-founded and are dismissed.

238. The respondent was not in breach of its duty to make reasonable adjustments between March 2020 and October 2020, the claimant's claim of failure to make reasonable adjustments brought under sections 20-21 of the Equality Act 2010 for the period between March 2020 and October 2020 do not succeed and are dismissed.

239. The respondent was not in breach of its duty to make reasonable adjustments and the remaining claims brought under section 20 to 21 off the Equality Act 2010 do not succeed and are dismissed.

240. The respondent did not victimise the claimant under section 26 of the Equality Act 2010 and his claims of victimisation did not succeed and are dismissed.

241. The respondent did not harass the claimant in relation to all of the complaints with the exception of harassment allegation numbered 7.4 that on 17 December 2020 a member of staff shouted out three times so the whole office heard him, "I am not putting out the trays, I will go home". The respondent did harass the claimant in respect of claim numbered 7.4 which succeeds and is adjourned to a remedy hearing listed for 3-hours via CVP. This listing is generous taking into account any breaks the claimant may need whenever he wants during the hearing, as before at the liability hearing.

242. The parties will provide dates of their availability within 14-days of receiving this judgement and reasons and will be advised of the remedy hearing date and details in due course.

<u>Remedy case management</u>

243. Having made a finding of limited finding discrimination that had occurred over one short period of time on 17 December 2020, the successful claim is adjourned to the remedy

hearing to take place by CVP listed for 3-hours**.** The parties will advise the Tribunal if the estimated time for hearing can safely be reduced with no pressure on the claimant to do so.

244. The schedule of loss requires substantial amendment to reflect the Tribunal's findings, and in order the assist the parties prepare for the remedy hearing the following case management orders are to be complied with:

1. The claimant will send to the Tribunal and respondent an amended schedule of loss and remedy witness statement no later than 2-weeks after this judgment with reasons is sent to the parties.

2. The respondent will sent to the Tribunal and claimant a counter-schedule of loss one-week after it receives the claimant's amended schedule of loss.

3. The parties will indicate to the Tribunal if any documents are required, other than this judgment and reasons, for the remedy hearing. If there are, the parties will ensure that all relevant documents are exchanged no later than six weeks after the judgment and reasons is sent to the parties.

4. If documents other than the bundles already before the Tribunal are to be referred to by the parties, the respondent will prepare the paginated agreed bundle and it must also ensure that the claimant and the Tribunal have an electronic version of the hearing bundle in a form which complies with paragraph 24 of the Presidential Guidance on Remote and In-Person Hearings issued on 14 September 2020 no later than two-weeks before the remedy hearing.

Employment Judge Shotter
28.10.22

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

3 November 2022

FOR THE SECRETARY OF THE TRIBUNALS