Case: 6000789/2023

EMPLOYMENT TRIBUNALS

Claimant: Gavin Lee

Respondent: Hull University Teaching Hospital NHS Trust

AT A HEARING

Heard at: **Hull and by CVP video link (a "hybrid hearing")**
On: **26th, 27th 28th & 29th February and 1st, 4th, 5th, 6th, 7th & 8th March 2024**

Before: **Employment Judge Lancaster**
Members: **D Wilks**
K Lannaman

Representation
Claimant: In person
Respondent: Mrs A Niaz-Dickinson, counsel

The unanimous decision having been announced at the conclusion of the hearing and the giving of reasons having been reserved until later, written reasons are now provided pursuant to rule 62 (2) of the Employment Tribunals Rules of Procedure 2013.

JUDGMENT

All claims are dismissed.

REASONS

The issues

1. In an ET1 presented on 3rd May 2023 the Claimant brought a claim then categorised by him as comprising complaints of unfair dismissal, of direct and indirect disability discrimination, of victimisation and of harassment related to disability.

2. As observed by Employment Judge Jones at the first preliminary hearing on 2nd August 2023 it was, however, "not possible to discern any obvious or clear complaint under the Equality Act 2010 from the contents of the claim form."

3. The Claimant was therefore given leave to make a written application to amend his claim form, and the case came back before Employment Judge Elliott for a further preliminary hearing on 11th October 2023. The Case Summary in her Order dated 13th October 2023 not only clarifies the discrimination issues in this case, but also precisely and definitively limits their scope. That is because leave to amend was only granted by Judge Elliott to include the issues listed in that Case Summary. Although still listed in paragraph 4.2.2 of the Case Summary as a head of claim there is in fact now no particularised complaint of indirect discrimination. The complaint of a failure to make reasonable adjustments at paragraph 4.2.3 and at paragraph 5 section 6 is a new claim, not previously identified in the original ET1. The complaint of disability-related discrimination particularised at paragraph 5 section 5 is also a new claim. The claim of direct discrimination at paragraph 5 section 4.1.16 adds a new complaint which post-dates the issue of proceedings. Claims of harassment and direct discrimination based on the same facts are , of course, mutually exclusive: an act which is found to constitute harassment cannot also be a detriment (section 212 of the Equality Act 2010).

4. That List of Issues has therefore provided the defined framework for the conduct of this hearing and also the specific template for our decision in terms of both factual disputes and the relevant legal provisions. We have , however, ignored obvious typographical errors in that List and have, only where appropriate, referred back to the Claimant's additional information in his amendment application to resolve any ambiguity in the terms of Judge Elliott's Order. That Case Summary, as it was originally drafted, is reproduced as an endnote to this Judgment[i].

5. In respect of the defined issues as to time limits Judge Elliott was, however, clearly unaware of the existence of a previous period of ACAS early conciliation which took place between 11th and 14th November 2022.Where there is already an earlier certificate, then in respect of the same matter the later certificate dated 2nd May 2023 and referenced by Judge Elliott is not for the purposes of limitation "a "certificate" falling within section 18A (4)" : per Kerr J in The Commissioners for HM Revenue and Customs v Serra Garau [2017] ICR 1121 EAT at paragraph 21. There can only ever be one period of Early Conciliation for limitation purposes. This means that, certainly in respect of the earlier alleged instances of discrimination, the extended time limit will have already expired before the dates of the conciliation period upon which Judge Elliott calculated that any claim arising before 28th December 2022 may not have been brought in time. Three months before the actual issue of proceedings , without any applicable extension, would only take the date upon which claims would clearly be in time back to 4th February 2023.

Unfair dismissal

6. We are satisfied that the Respondent has shown that the reason for dismissal was one which related to conduct, which is a potentially fair reason. That is the Claimant's behaviour towards his ex partner (also an employee of the Respondent), particularly his continuing to initiate contact with her after being expressly told in writing that he should not do so, and he apparently having acceded to that instruction at the time.

7. We have heard from both the chair of the dismissing panel, Wendy Page, and from the chair of the appeal panel, Julia Mizon. Both of them, we find, genuinely believed that

such conduct had occurred and that it met the definition of "harassment", the charge being framed as "That you have stalked and harassed another member of staff".

8. Within the context of that general allegation, both at dismissal stage and at appeal it was, we find also the genuine belief of the Respondent that the Claimant had failed to follow an express instruction of his manager, issued on 10th January 2023. At the appeal hearing another member of the dismissal panel, Liz Dearing, explicitly confirmed that "*we based it more on what happened after 10th*. There was some before the contact, and that was in dispute as to whether it was welcome contact or unwelcome contact, and we didn't base that as the actual evidence. The evidence was after the email, there was whole evidence of telephone calls and evidence of texts after that email had gone out to say do not…" (emphasis added). That failure to comply with the request in the email of 10th January 2023 was therefore, we find, the principal reason for dismissal.: section 98 (1) (a) Employment Rights Act 1996.

9. The Respondent also, we find, had reasonable grounds for coming to those conclusions. In reality this is not in dispute. There is no doubt that his ex-partner had complained about the Claimant's contacting her both to the Respondent and to the police, and by the time of the dismissal the Claimant was on bail and an interim non-molestation order was in place. Also the evidence of texts and phone calls after 10th January 2023, including the use of the Claimant's work mobile, as referenced by Liz Dearing, was indeed clear. Upon this disclosed evidence the Claimant, through his union representative, conceded at the disciplinary hearing that "the evidence in the Appendices in the pack does tend to indicate is prepared to accept some but not all of those are factually attributable to him."

10. Nor is it in dispute, and this too was conceded by his representative, that the email of 10th January was perfectly clear. Although this is phrased as a request ("Please may I ask that to you avoid the Daisy Building, and specifically avoid contact with the individual concerned") it is also made clear that avoiding the place where his ex-partner worked was a "requirement". Also in a follow up telephone call the same day Tracy Fitzgerald reiterated the need to stay away from his ex-partner and the Claimant confirmed what he had said in his email, that he would not be contacting her again. On the strength of this the complainant was informed of what Tracy Fitzgerald had advised the Claimant , and could reasonably have expected therefore that there would have no been no further potentially distressing communication from him: this was not in the event the case. The Claimant cannot have been in any doubt that the Respondent was treating this as a potentially serious matter, because he was immediately transferred to work away from the Castle Hill site.

11. That is not to say that the Respondent's process in arriving at these genuine and reasonable conclusions is entirely without criticism. Although the terms of reference for the initial investigation into the allegation "That you have stalked and harassed another member of staff" also included (inter alia) specific consideration as to "whether Mr Lee failed to follow the instructions of he HR manager on the 10th January 2023 requesting that he is not to contact a member of staff", and the Claimant was informed of those full terms of reference at the outset, and they were detailed in the investigation report, the charge at the disciplinary hearing was never particularised to include this precise allegation. The invitation to a hearing merely repeated that the Claimant was charged with "That you have stalked and harassed another member of staff", with no details as to dates or circumstances. This invitation did not, unlike the earlier invitation

to the investigative meeting, also set out the full terms of reference. The Court of Appeal has, of course, stated that disciplinary charges should be precisely framed, and that evidence should be limited to those particulars — *Strouthos v London Underground Ltd 2004 IRLR 636, CA*.

12. However, even without further clarification or specific findings of fact as to what the Claimant had actually done on any particular occasion the admission of responsibility for at least some of the further contacts after 10th January 2023, in the context of what had happened previously between the Claimant and his ex-partner is sufficient to found a genuine and reasonable belief in misconduct properly falling under the general description of stalking and harassment. That previous context, of course, includes the Claimant making unsolicited contact with his ex-partner in the car park on 9th January 2023 on her first day at work in a new job based out of the Daisy Building at Castle Hill Hospital, and which triggered the first report to the Respondent.

13. We are also satisfied that the Respondent, at the point when the decision to dismiss was taken, had carried out a sufficient and reasonable investigation before concluding that the Claimant had in fact committed that misconduct. That must be the case where there is in effect an admission. The essence of the Claimant's argument on this point is that the investigating officer at an earlier stage in proceedings, Helen Birks was not an appropriate person to perform this function because of a "conflict of interest" so that he could never have had, as he puts it, a fair trial. We consider that argument in these circumstances to be misconceived.

14. Helen Birks is the Research Development and Innovation Matron, thereby holding a senior position with responsibility for the department where the Claimant's ex-partner worked from 9th January 2023 onwards. The holding of that position does not in any way mean that she cannot carry out an investigation into a complaint brought by a member of staff in one of the departments where she has management responsibilities. Prior to 9th January 2023 Helen Birks had had no knowledge of or contact with the complainant.

15. The Claimant is very animated by the fact that he believes that notwithstanding the lack of any previous contact Helen Birks should have disclosed that she had spoken to his ex-partner before she was formally appointed as the case investigator, and that her failure to do so does indeed amount to a conflict of interest. It is correct that Helen Birks did not, during the investigation or disciplinary process, specifically disclose that she personally had been spoken to by the complainant on 9th January 2023 when these concerns first came to light (though she did acknowledge that she had met her on her first day at work) nor that she had in fact attended a further meeting with her on 11th January 2023 – though the intention to hold a meeting on that date and the names of the proposed attendees was disclosed – or what was said on that occasion. There is no record of that discussion, and Helen Birks does not address in her witness statement the reason why no reference to that actual meeting nor to its subject matter was included in her investigation report.

16. However the contact between Helen Birks and the complainant, whether before or after the formal commencement of the disciplinary investigation, was solely limited to the context of these immediate complaints. There is no breach of natural justice in an investigator having prior knowledge of the subject matter of their investigation, provided that they are not personally involved in the events under consideration.

17. Whilst it is noted that the Claimant was informed om 18th January 2023 that no further action would currently be taken in respect of these allegations, it is clear from the original drafts of this email to him from Tracey Fitzgerad that the reason was because the police were still conducting their inquiries. Once the Clamant had in fact been arrested, which was on 20th January 2023, and his ex-partner had made a further complaint by email dated 23rd January 2023, there is nothing unfair in a disciplinary process then being initiated. On 24th January 2023 David May, the Deputy Head of Facilities, therefore appointed Helen Birks as the investigator. Whoever had been so appointed would necessarily have had to be apprised of the interactions between the complainant and management between 9th January and 24th January 2023. The fact that Helen Birks was already personally aware of those events having been reported does not give rise to any "conflict of interest".

18. The conduct of the preliminary investigation itself is wholly unobjectionable. The complainant was interviewed on 30th January 2023. Two witnesses to events in December 2022, colleagues and friends of the complainant, were interviewed on 1st February 2023. Helen Marks also collated additional information which had been provided to HR by the complainant (including photographic evidence and screenshots of text messages or phone logs). The Claimant himself was then interviewed on 6th February 2023 with his trade union representative present , and he signed to confirm the accuracy of the minute of that meeting on 14th February 2023. As is customary at the investigation stage the evidence was not disclosed to the Claimant, so that he was not aware at that time of any of the precise details of any of the allegations that were put to him. Helen Birks also accessed the Claimant's work phone records to compare these with the dates on which he was said to have made contact with his ex-partner. An investigation report was then prepared with the evidence in appendices.

19. Helen Birks was not herself a decision maker. She did not even determine whether there was a case to go forward to a disciplinary hearing, that was the decision of David May.

20. Initially the Respondent's intention was to disclose the investigation report no later than 7th May 2023, seven days before the hearing, by which date the Claimant was also told that he should "exchange" his statement of case together with all relevant documents and written information. Had this timetable in fact been strictly insisted upon it would have been palpably unfair. An employee facing disciplinary charges cannot be expected to set out their defence before they have been informed of what the precise case against them is.

21. In the event the Respondent's have belatedly in the course of this hearing established that a hard copy of the investigation pack was delivered for receipt by hand on 3rd May 2023. The Claimant had therefore had sight of this documentation for two days before he submitted his own voluminous paperwork on 5th May 2023.

22. It is still unclear whether or not that "pack" sent to the Claimant did in fact include all the written information from his ex-partner that was referenced in the appendices, though on balance it is more likely that it did. However it not in dispute that the hard evidence of messages and of phone logs was included and that the admissions made through his representative followed the Claimant having seen and considered this material.

23. The complainant was not called to give evidence at the disciplinary hearing, and the Claimant was advised in advance that this would be the case. This was on police advice as criminal charges were pending. There was therefore no opportunity to challenge her, but this does not make the process unfair: Santamera v IEC Ltd. t/a Express Cargo Forwarding [2003] IRLR 273. Her two colleagues did give evidence and were cross-questioned. The Claimant was not permitted to ask all of his pre-prepared questions, but this is because they were not relevant to the matters directly in issue. These witnesses were not, of course material to the crucial allegations after 10th January 2023.

24. The key question is, therefore, whether having regard to that reason which we find to have been established by the employer it was fair or unfair to regard that as sufficient justification for having dismissed this employee.

25. Part of the reason for imposing the sanction of dismissal, both in the oral decision announced by Wendy Page and in her follow up letter, was undoubtedly the fact that the Claimant was subject to a final written warning. This had been substituted as the sanction following a successful appeal (notified on 13th June 2022) against dismissal on an earlier occasion (on 20th April 2022) for his involvement in the disposal of waste via a third party for sale. Similar criticisms apply to that previous charge as in this present case. The allegation was framed as "over a lengthy period of time Mr Lee is responsible for the theft of Trust property and fraudulently gaining from the sale of Trust Property." Although there was no finding of dishonesty on the part of the Claimant, nor indeed the third party, the decision was apparently taken on the basis that the terms of reference for the investigation also incorporated consideration of a failure to follow established procedures and a pattern of behaviours incompatible with Trust values.

26. We remind ourselves therefore of the principles set out In Wincanton Group plc v Stone [2013] ICR D6, EAT, by Mr Justice Langstaff, then President of the EAT. Firstly, rarely will a past disciplinary record be irrelevant when contemplating dismissal and the tribunal should take into account earlier warnings issued in good faith. In this case the fact that the final written warning was issued on a successful appeal points clearly to that panel having acted in good faith. Where a warning was issued in good faith, the tribunal should take account of any relevant proceedings, such as internal appeals, that may affect the validity of the warning, and give them such weight as it considers appropriate. Although the Claimant had further sought to challenge the warning under a so-called grievance, the disciplinary process had been exhausted so that no such "appeal by the back door" could be permitted. The tribunal, therefore, may not 'go behind' this valid warning to hold that it should not have been issued or that a 'lesser category' of warning should have been issued. The fact that the matter was evidently carefully considered on appeal and a finding made in the Claimant's favour is again a clear pointer to the fact that this a sanction was not, in any event, manifestly excessive. We do however take into account the factual circumstances giving rise to it. There is a considerable difference between the circumstances giving rise to the first warning and those considered later. We remember, however, that a final written warning always implies, subject only to any contractual terms to the contrary, that any subsequent misconduct of whatever nature will usually be met with dismissal, and only exceptionally will dismissal not occur.

27. Most significantly, however, we conclude that the reasoning of the Respondent was not based primarily upon the existence or otherwise of this warning, and that it would have dismissed in any event based upon the immediate misconduct. That was explained at the appeal hearing, and we accept the evidence given before us that this was indeed the case. The Claimant was always informed that the allegation could lead to dismissal and in the decision letter the case was expressly found to be one of gross misconduct.

28. The Respondent, we accept, considered all the potential mitigation advanced on behalf of the Claimant, including submissions as to the impact of his ADHD and determined that this was insufficient to warrant it rowing back from the sanction of dismissal. That is a decision which falls within the range of reasonable responses open to a reasonable employer in these circumstances. The Claimant had admitted failing to follow the directions of his manager which were designed to safeguard another employee, despite his assurances that he would comply with these restrictions. He had (whatever the circumstances and irrespective of however much the Claimant may now protest his innocence in respect to those earlier matters) been subject to a non-molestation order in respect of a previous relationship. He also did not, which is relevant, have a clean disciplinary record. Even though there is no suggestion that there was anything in the Claimant's communications which was inherently threatening, let alone that it indicated any potential resort to violence against his ex-partner, and even though there had at the time of dismissal been no recurrence since 18th January 2023 the Respondent was entitled to treat a proven allegation of harassing one of its employees as sufficient to justify termination of employment. We may not and do not interfere with that decision.

29. Furthermore, on 21st August 2023 the Claimant pleaded guilty at Hull Magistrates Court to an offence of stalking involving serious alarm/distress between 18/1/2022 and 18/01/2023. The time frame covered by the criminal charge expressly included the period after 10th January 2023. Although the Claimant says that he was under pressure to plead guilty because the police had confiscated evidence held upon his mobile phone, which has never been returned, he has not appealed that conviction and we do not go behind it. That guilty plea is the clearest possible evidence of culpable contributory conduct, so that even if we had held this dismissal to have been unfair in some respect the basic award and any compensation would have been at least substantially reduced, and almost certainly in fact entirely extinguished.

Direct disability discrimination (Equality Act 2010 section 13)

On 15 September 2021 Steve Roberts referred to the Claimant's disability as AC/DC

30. This admittedly did happen. We are satisfied on the Claimant's evidence that it was a deliberate use of an incorrect, though similar acronym with an entirely different meaning, and not as has subsequently been suggested in private correspondence by the manager who investigated it at the time, a mere slip of the tongue. It is however more properly addressed as a harassment claim as there is no obvious detriment, that is no reasonably perceived actual disadvantage in the work place suffered by the Claimant by reason of this single comment having been made: cf Shamoon v Chief Constable of the RUC [2003] 2 All ER 26

31. In the absence of any evidence from Steve Roberts himself, who has long-since left the Respondent's employment , we are not however able to establish whether this was in some way intended to cause upset, was intended to be humorous or was – as was acknowledged by the Respondent in a letter of apology date 29th June 2022, and which we think would be the most apt way of describing it – "ill-considered", or thoughtless. The Respondent is self-evidently therefore prejudiced by its inability now to call Steve Roberts to provide evidence on this point.

32. In any event this was a single incident which took place more than nineteen months before the issue of this claim, and where an apology had been issued which was never in fact retracted. Indeed it is highly probable that this was also the subject matter of the withdrawn claim from November 2021 to which Employment Judge Elliott refers in her Case Summary, The fact that the Claimant learned through a subject access request after the end of employment that the manager in whose name that apology had been sent out by HR had not himself agreed with the way in which it was worded on his behalf does not make it just and equitable to extend time by such a lengthy period.

Over the period July 2022 to February 2023, isolated C from team meetings and restricted him from carrying out his normal duties of his job role.

33. Following his successful appeal against dismissal the Claimant returned to work from 12th July 2022. That was under a reintegration plan as recommended by the appeal panel, the particulars of which were then discussed and agreed with the Claimant and set out in a written document.

34. Having initially been transferred out of the waste department in January 2022 pending the disciplinary investigation and then having been out of work entirely following his dismissal in April the Claimant had been out of role for six months. Reinstatement does not mean simply turning the clock back to January 2022 where there had in the meantime been operational and personnel changes in the team. Also, of course the Claimant was returning whilst subject to a final written warning which was material difference to the situation when he had last worked in the department. The reintegration plan was effectively a phased return to work, not immediately undertaking operational duties, and was initially on reduced and varied hours which precluded attendance at Monday meetings. Attendance at team meetings was not from the outset a specific element of the reintegration plan. The Claimant also took significant periods of leave to attend training with the Fire Service. In addition there were acknowledged to be relational issues with members of the team, potentially involving mediation, which were required to be addressed if possible.

35. We are satisfied that the Claimant was not deliberately isolated from team meetings, and the delay in returning him to a full operational role was simply a consequence of the reintegration plan which was put in place. Even though the situation was no doubt less that ideal, there is no evidence whatsoever that this was implemented because the Claimant was disabled. We are satisfied that any employee returning after a lengthy absence in these circumstances would have been dealt with in the same way.

Over the period July 2022 to February 2023, not allow C to *re*commence his job role and not provide him with correct equipment for auditing duties.

36. Although the Claimant had previously in reality carried out significant amounts of auditing, this was not a required element of his role as a manager. and the duty had substantially been devolved to more junior members of the team. The Claimant was not immediately provided with his own tablet which would be necessary equipment if he were in fact to undertake audits. We accept, however, that communal tablets were available, the Claimant was then personally allocated an unused tablet in December 2022, which he signed for, and was then assigned a new one early in 2023, where there were admittedly some minor delays in ordering and setting up IT.

37. Again, even though the situation was no doubt less that ideal, there is no evidence whatsoever that this was implemented because the Claimant was disabled. We are satisfied that any employee returning after a lengthy absence in these circumstances would have been dealt with in the same way.

On 6 January 2023, not include C in a team project announced on the intranet.

38. The Claimant had submitted a proposal for a sustainability project , with a view to bidding for government funding. Other proposals were also submitted. In the event the bid which was pursued was one with the Claimant's line manager, Gary Usher taking the lead and Amy Lockyer from Capital Development resourcing that project. The Claimant was invited to a team meeting on 24th February 2023 but did not attend, and the development was still in its infancy at the date of his dismissal.

39. This had nothing to do with the fact that the Claimant is disabled.

On 30 August 2022, Gary Usher attempting to force the Claimant to sign a long list of NHS Policies to keep his job

40. In the context of the agreed reintegration plan, as recommended by the appeal panel as part of their decision to overturn the dismissal, the Claimant was required to confirm his familiarity with relevant policies and procedures. These apparently had never been formally included as part of his induction when first commencing employment, but had assumed significance because of the allegation of his having failed to comply with established waste disposal practices.

41. It is a mischaracterisation of this context, therefore, to claim that he was forced to sign these "to keep his job". Also, it has nothing to do with his disability. Furthermore, the claim would be substantially out of time, it is not part of a series of acts and it would not be just and equitable to extend time, where the Claimant was not in fact subject to any sanction even though he did not in fact ever sign to acknowledge that he had read and understood these policies.

On 2 December 2022, following a training session delivered by the Claimant about his ADHD, in a meeting with Gary Usher he saw negative comments written in the notes of Karen Alexander about his ADHD.

42. From September 2022 the Claimant was involved in the development and writing of a training module on ADHD.

43. That was delivered by the other person involved on 2nd December 2022, but the Claimant was in fact not himself present.

44. Karen Alexander is an employee of Mitie, but is accepted for these purposes to be an agent of the Respondent, working closely alongside the waste management team and indeed sharing an office with the Claimant's line manager, Gary Usher. She in that capacity attended the training on 2nd December 2022.

45. She did not know that it was the Claimant who had written that training module, nor that he himself had ADHD.

46. On her working note pad she recorded three questions to ask the trainer, specifically related to the diagnosis of ADHD in adults, where she had previously only had any knowledge of childhood ADHD. These were:

    "Diagnosis easily manipulated??
    Can focus on whet interests them??
    Excuse to be giving special treatment?"

47. She continued to use that same note pad to record subsequent work matters, and left it on her desk. Gary Usher then, in the course of work, invited the Claimant into the shared office and he sat at Karen Alexander's desk where he saw her notebook,

48. The Claimant took a photograph of the note pad, and we accept Gary Usher's evidence that he immediately and angrily stormed out alleging "I'm not having this, this is discrimination".

49. Again this is more properly a potential allegation of harassment as there is no obvious detriment, that is no reasonably perceived actual disadvantage in the work place suffered by the Claimant by reason of this single note book entry having been made.

50. Whilst the Claimant does appear to have interpreted this as a personal impugning of the genuineness of his own condition, there is no good objective basis for his having formed that view. Whilst he did not wish to have seen any comments indicating that a question had been raised as to whether diagnoses of ADHD might be manipulated, the conduct which he then identifies as unwanted is Karen Alexander not having deleted this page immediately after the training, so that there could be no possibility of it having come to his attention, even in circumstances where she did not know he had ADHD and could not reasonably have foreseen that he would see it in her private office.

51. The fact that Karen Alexander did not immediately tear off this page and throw it away, was not related to disability, but because it was still a working note book which she was using in her own office space.

52. Furthermore, the claim would be out of time, it is not part of a series of acts and it would not be just and equitable to extend time,

On 22 March 2023, Laura Jardine saying the respondent would not hear the Claimant's grievance submitted on 22 February 2023 on the basis that he was no longer an employee.

53. Although the grievance - which we accept that the Respondent only in fact received on 7th March 2023 - was submitted whilst the Claimant was still an employee, it could not realistically be addressed before the date of termination. This can only be a claim of post-employment discrimination.

54. The Respondent' s policy is to deal with post-employment grievances on the papers only. The primary purpose of a grievance is to address and seek to resolve outstanding issues within the workplace, which by definition cannot be achieved once the employment has ended. There is, in these circumstances, no obvious disadvantage to an ex-employee in not being invited to a meeting. An outcome was accordingly delivered, the Respondent did not refuse to deal with the grievance at all.

55. The reason why the Claimant was not called to a meeting, and why no hearings were conducted, was because he had by that time been dismissed. It was not because he was disabled,

Over the course of C's employment, failing to adhere to R's own WDES Guidelines for Education and Training regarding training staff in the claimant's management team or peer structure about ADHD.

56. The Respondent's Workforce Disability Equality Standards Annual Report for 2020 identifies an action point of supporting colleagues with disabilities and mental health training.

57. This does not mean, as the Claimant appears to suggest, that the Respondent should have immediately arranged training specifically related to each and every condition which may have had an impact upon the mental health of any individual employee as soon as it became aware of that condition.

58. The primary significance of such a policy in an Equality Act context is that failure, in practice, to comply would prevent an employer from relying upon the statutory defence in section 109 (4) that they had taken all reasonable steps to prevent discrimination occurring.

59. In this case there is, however, no evidence of anyone having discriminated against the Claimant in the course of their employment and which might have been prevented had they undergone further equality and diversity training.

60. In any event, the Claimant was actively involved in the preparation of training on ADHD, which was delivered on 2nd December 2022. Any claim arising from an alleged failure to provide such training up to that date would be out of time.

On 15 March 2023, Lucy Vere (HR Director) approaching the Disability Network chair and OD Manager and warning them not to provide the Claimant with support at work.

61. We unhesitatingly accept the evidence of Lucy Vere in preference to the merely hearsay assertion that the Claimant says that he was, on 15th March after he had been dismissed, told by two people who had been assisting him that they had been instructed not to support him.

62. These people, who were managed by Lucy Vere, were we find simply given perfectly proper advice as to the boundaries which they should set in terms of level of contact and accessibility out of hours. This was in fact in early March, and there is no evidence that they totally ever did in fact then stop all contact with the Claimant after that time and before his dismissal.

63. This was done in order to safeguard the well-being of her staff, and not because the Claimant was disabled. Indeed we note that Lucy Vere had particular responsibility for promoting equality and diversity, so that is highly implausible that she would have given an instruction not to support a disabled person at all, and we find she did not do so.

Confidential emails relating to the Claimant's health and disability being stored by Steven Roberts (from March 2020 until July 2022) on a multi-user accessible central folder

64 It is unclear to what folder this relates. We accept, however, the Claimant's evidence that information including personal details relating to members of Steve Roberts' team was accessible to anyone in that team. In his case that included the pre-diagnosis medical report upon his ADHD. There is no evidence that anyone else actually accessed that information. Steve Roberts is not available to give evidence .

65. We have also not been referred to any evidence that the Claimant ever raised an issue about this matter.

66. In any event by the time the Claimant returned to the waste management department after his six month absence from January to July 2022 this problem no longer existed. It had, therefore , been rectified by 12th July 2022 at the latest and the claim would be out of time.

67. On the evidence we have this is however something which happened because inadequate data protection measures were in place in respect of the details pertaining to all members of the team, and was not because of the Claimant's disability.

On 15 July 2022, Duncan Taylor making comments about the Claimant via email to Zara Ridge

68. It is still not known what this complaint specifically relates to. Even if the alleged mail was only discovered on a later subject access request disclosure, any complaint from this date is still on the face of it substantially out of time.

On 17 October 2022, Gary Usher using the acronym ADHA when referring to the Claimant's disability and stating it was 'overtaking the Claimant's thought processes' within the risk assessment

69. This allegation relates only in fact to the hand-written stress risk assessment completed by Gary Usher on 23rd August 2022.. There is no evidence of any follow up email including any similar content. Although the apology dated 17th October does refer to a "typo", Gary Usher hitting the wrong key on the keyboard we observe that this letter was drafted by HR and only signed by him, and therefore appears to reflect a misapprehension on the part of the writer.

70. The risk assessment form contains two references to ADHD. One of them does not have a clear last letter and can potentially therefore be read as ADHA, and that is how the Claimant took it. On balance we are satisfied that it is in fact simply a bad figure, and that it does say ADHD, consistent with the other time the acronym is used in this document.

71. Even if it was ADHA, it is clearly a simple mistake, similar to a "typo".

72. In answer to the specific question on the form "Can you decide to take a break?" Gary Usher has recorded the response "ADHD can take over".

73. We are satisfied that this was a genuine attempt to reflect the Claimant's answer to this question, and was not any deliberate attempt to misrepresent the way in which his condition actually affects his decision making processes in any regard.

74. These matters are, therefore, not reasonably to be construed as placing the Claimant at any disadvantage in the work place.

75. Notwithstanding the actual position an apology for the alleged incorrect use of "ADHA" was issued and further steps taken to agree the wording of the risk assessment so that the Claimant could and did sign up to it. The matter was resolved, and any complaint up to that date of resolution would in any event be out of time.

Following the claimant's return to work in July 2023, requiring him to hot desk and to work different hours, affecting his mental health (as raised in an email of 12 January 2023 to Helen Penn)

76. When the Claimant first returned to work in July 2022 he was, for good operational reasons now based at Castle Hill and not at Hull Royal Infirmary (HRI), where he had previously been . At Castle Hill he was not require to "hot desk". It was however an open plan office, whereas previously he had has his own office at HRI (the one now occupied by Gary Usher and Karen Alexander). The Claimant did therefore use headphones to block out extraneous noise, but no complaint was made about his working arrangements. In particular the stress risk assessment of 23rd August 2022 said that he had no concerns about his working environment. Provision was made in this period for the Claimant to be allocated a desk at HRI on those occasions when he was required to attend there.

77. The Claimant was initially transferred to HRI on 10th January 223, and this was made permanent on 24th January 2023. This was because of the conduct issues at Castle Hill relating to his ex partner, who worked there.

78. Upon his transfer he was temporarily assigned to work out of the library, but at an allocated workspace.

79. We accept the evidence of Gary Usher that when he first complained about this location it was the Claimant, and not his manager who was aggressive. It is entirely plausible that the Claimant did indeed threaten Gary Usher saying "why do I have to put up with the office location problem whilst you and Karen Alexander are sat in my office, Matey?", and we find that this is what he did do and say.

80. This is the context in which the Claimant complained to Helen Penn after just two days that what he called "hot desking" was affecting his mental health and causing him anxiety , namely that he felt unwanted within the team and did not have a fixed base as he had had previously for four to five years.

81. We accept that as, expressed in Helen Penn's reply working from the library was a temporary solution and that alternatives were being explored, but that there was a lack of available space which is why hot desking generally was in place at HRI.

82. The Claimant's working hours had been adjusted as part of the reintegration agreement. It was not until the last OH report on 2nd March 2023 that there was any suggestion that these hours were affecting the efficacy of his taking medication. Prior to that the OH report of 8th August 2022 had not made any mention of working hours or place of work and that of 26th October 2022 had identified that the Claimant wanted a return to his original place of work and hours at HRI only because he "feels isolated and unsupported at Castle Hill".

83. The Claimant was not moved to a temporary workspace at HRI because he was disabled, but because he had to be relocated as a result of the serious complaints made against him, and which ultimately led to his dismissal and his guilty plea to the criminal charge.

On 9 February 2023 Gary Usher refusing reasonable and pre-agreed training requests.

84. In 2021, prior to his transfer on disciplinary grounds and his subsequent dismissal and reinstatement, the Claimant's previous manager had recommended in his annual performance that he be eligible to attend specific training.

85. The situation had however moved on, and this formed no part of his 16th December 2022 performance review objectives, and nor was it still considered appropriate in February 2023 when the Claimant made his request. In particular it was identified that there were other priorities for him to concentrate on as a part of the continuing reintegration process, particularly when he had already had significant periods of time off to undertake his Fire Service training.

86. The private emails exchanged between management and HR at this time make it clear that a substantial reason for refusing the request at this time was also that by then the Claimant was facing serious disciplinary charges, and expenditure of this nature may not be appropriate to be authorised until the outcome of those proceedings was known.

87. The request was, in any event, not refused outright and there was an expressed possibility of the decision being reviewed in due course.

88. Although the further email from Gary Usher dated 10th February does state that "I am concerned that given your health struggles and what is going on outside of the workplace, now may not be the best time to take on additional and potential stressful courses.", we take Gary Usher at face value when he also says in that email that this "was not a factor in the decision making".

89. Even an express acknowledgement of a context which is potentially disability-related does not necessarily mean that that disability itself is a material factor in the process. In this case we find it was not. The request was not rejected at that point in time because the Claimant was disabled, but because it was not appropriate in the circumstances.

The respondent requesting evidence of the claimant's disability as part of the claimant's Tribunal claim (despite R holding records of C's disability dating back to October 2021, as evidenced by an email Jenny Jethwa wrote on 8 September 2022 to Duncan Taylor.

90. A medical diagnosis of ADHD is not, without more, conclusive as to whether in any particular case a person does in fact satisfy the legal definition of disability.

91. It is not subjecting the Claimant to a detriment to require him to prove that he was in fact disabled , which is an essential element of a claim which he has elected to bring in the Tribunal. That is particularly so where, as in this case, the claim of disability discrimination was not properly particularised in the first instance, and it could not therefore be ascertained what relevant incidents of any impairment were material.

92. The Respondent therefore, as well as requiring further particulars of the complaints, made no admissions in the ET3 as to whether or not the Claimant was disabled.

93. Employment Judge Jones at the first preliminary hearing, therefore ordered the Claimant to provide evidence of his disability, which he did, The Respondent then conceded both disability and knowledge of that disability by the due date, 13th September 2023.

94. Had it been considered that there was little reasonable prospect of the Respondent disputing the fact of disability, because the available evidence was already sufficient in all respects, Employment Judge Jones could have made a deposit order, He did not do so.

95. The email chain between Jenny Jethwa and Duncan Taylor on 8 September 2022, in fact shows that the Respondent had not at that stage identified any relevant medical records in their possession, and only knew of a first assertion that the Claimant had ADHD when he had appealed against a stage one attendance management warning in October 2021.

96. In any event this initial non-admission was because it was a perfectly proper response to the claim as brought at that stage, and was not because the Claimant was disabled.

On 8 September 2022, Duncan Taylor commenting that the Claimant rambled and that Duncan is not clear what his grievance was

97. The Claimant submitted a grievance on 30th August 2022. It was lacking in specific detail . Duncan Taylor replied the same date requesting additional information. The Claimant replied but it is clear that neither Duncan Taylor nor Jenny Jethwa in HR considered that it in fact made the position clearer. That then is the subject mater of their private email exchange on 8th September 2022, an exchange of which the Claimant only became aware after the end of employment when he received an answer to his subject access request.

98. The Claimant was not subjected to a detriment by reason of this private exchange at the preparatory stage of dealing with his grievance. A meeting was then held on 21st October 2022 when the Claimant attended with his trade union representative and was given the opportunity to clarify his grievance.

99. The outcome letter was sent by Duncan Taylor on 25th October 2022, but before it had been received, on 24th October 2022, the Claimant had submitted a further grievance, stated to be in response to the meeting on 21st. That prompted another private email from Duncan Taylor to Jenny Jethwa saying “a second grievance !!”. That comment is not any detriment to the Claimant.

100. A further grievance meeting was then held, again together with the Claimant’s representative, on 24th November 2022.

101. The reason for Duncan Taylor’s observations was not because the Claimant was disabled, but because of the manner in which he raised his grievances.

102. Although the Claimant was, of course, not aware of these emails until he received his subject access request, the primary time limit had by then already expired as the actual date of these events was more than three months earlier.

Dismissing the Claimant with effect from 14 March 2023.

103. As set out in paragraph 28 above, the Respondent did expressly consider the potential mitigation afforded by the fact of the Claimant’s ADHD. The fact that the Claimant disagrees with the weight afforded to this does not mean that the dismissal was discriminatory.

104. The Claimant was not dismissed because he was disabled, but because he was found to be guilty of misconduct.

Over the course of C's employment, not permitting C to work from home.

105. The Claimant's seniority (Band 5) within an operational role militated against home working. For this reason he also remained at work during the period of the covid pandemic, when otherwise home working might have been considered as an alternative to the previous arrangements in place.

106. It was not until the last OH referral that there was any suggestion that the Claimant was requesting home working as any form of reasonable adjustment, but this part of the referral was not expressly addressed in the report of 2nd March 2023, and the Claimant was then dismissed on 14th March 2023.

107. It was not because the Claimant was disabled that he was not permitted to work from home, but because it was not compatible with his role.

Discrimination arising from disability (Equality Act 2010 section 15)

Did the respondent treat the claimant unfavourably by refusing to hear his grievance dated 22 February 2023 which he sent to Simon Nearney?
Did the claimant's dismissal arise in consequence of the claimant's disability?
Did the respondent refuse to hear the grievance because he had been dismissed?

108. This is a repeat of the allegations already dealt with at paragraphs 53 to 55.

109. The principal reason for dismissal was that after 10th January 2023 the Claimant did not comply with a clear management request and, in breach of his own assurance that he would not do so, continued to contact his ex partner in circumstances where he knew full well that that was, to her, unwanted conduct. There is no proper evidential basis upon which we could conclude that the Claimant committed that misconduct because he had ADHD, so that the ensuing dismissal for that reason was because of something which arose in consequence of disability.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

110. It is admitted that the Respondent knew that the claimant had the disability from March 2021.

111. The only provision, criterion or practice (PCP) now relied upon is "requiring staff in C's role to work in an open plan environment."

112. The background is set out in paragraphs 76 to 83 and 105 to 107 above.

113. From 10th January 2023 the Claimant was not working in the open plan environment at Castle Hill.

114. Prior to that date, when he had been based at Castle Hill, he had not raised any issue about his working environment. On the two referrals to OH in this time frame no issue was raised about open plan office working. The first time home working was mentioned in the context of it being a possible reasonable adjustment was in the last referral to OH (where it was not specifically addressed in the report of 2nd

March 2023), but this was when the Claimant was now at HRI. The Claimant's principal complaint was that he believed he should have simply been allowed to return to his old office when the dismissal was overturned, as if nothing had happened in the meantime: that was how he interpreted "reinstatement" on appeal.

115. Even if the working out of Castle Hill between July 202 and January 2023 did in fact place the Claimant at a substantial disadvantage, absent any issue being raise the Respondent could not reasonably known of that disadvantage.

Harassment related to disability (Equality Act 2010 section 26)

On 15 September 2021 Steve Roberts referring to the Claimant's disability as AC/DC.

116. This is a repeat of the allegations already dealt with at paragraphs 30 to 32.

117. This may have been purposed to violate the Claimant's dignity or to have had that effect. Alternatively, even though this was a single act it may also have been sufficient to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

118. Without having been able to hear all the evidence in the absence of Steve Roberts, it is not possible to make a final conclusion.

119. The claim is, however, significantly out of time and given the substantial delay and the prejudice to the Respondent time will not be extended.

On 7 July 2022, Ron Gregory retracting an apology made to the claimant.

120. The apology was never in fact retracted. Ron Gregory expressed privately his disagreement with the issuing of that apology in his name. because he had concluded on the evidence he had obtained that it was merely a slip of the tongue on the part of Steve Roberts.

121. The Claimant disagrees with that conclusion, in our view rightly, but its private expression is not , objectively, harassment.

On 30 August 2022, Gary Usher attempting to force the Claimant to sign a long list of NHS Policies to keep his job.

122. This is a repeat of the allegations already dealt with at paragraphs 40 and 41.

123. This was not conduct which was in any way related to the Claimant's disability.

On 2 December 2022, following a training session delivered by the Claimant about his ADHD, in a meeting with Gary Usher he saw negative comments written in the notes of Karen Alexander about his ADHD.

124. This is a repeat of the allegations already dealt with at paragraphs 42 to 52.

125. Although the entries in Karen Alexander's notebook do relate to ADHD, the fact that she did not tear out that page and left the notebook on her desk is not conduct related to disability.

126. Though the Claimant's perception was that "I'm not having this, this is discrimination" which we find that the did indeed say to Gary Usher as he stormed out of the office it was not reasonable for Karen Alexander's actual conduct which was of course unrelated to disability – to have had that effect.

On 10 January 2023 Gary Usher making verbal threats against the claimant.

127. This is a repeat of the allegations already dealt with at paragraph 79.

128. Gary Usher did not make verbal threats against the Claimant and what he did say was not related to his disability.

On 22 February 2023, David May's question to Occupational Health 'What disadvantage does Gavin's disability cause in the workplace?'.

129. The only reasonable construction of this question is that David May was seeking advice on how the Claimant's disability disadvantaged him in the workplace. That is what OH would have been competent to address.

130. That is how the OH practitioner, Margaret Mitchell, rightly understood it. We accept that she did indeed explain this at length in the course of the consultation, and that is certainly how she addressed it in her report of 2nd March 2023.

131. Even allowing for the Claimant's own perception that this in fact meant that David May considered that his disability was a disadvantage to the employer, this is not reasonably and objectively to be regarded as harassment.

On 15 March 2023, Lucy Vere (HR Director) approaching the Disability Network chair and OD Manager and warning them not to provide the Claimant with support at work.

132. This is a repeat of the allegations already dealt with at paragraphs 61 to 63.

133. Even though Lucy Vere's advice to her staff, given for their own protection, can be said to be related to the Claimant's disability, it is not objectively conduct which created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, particularly when he was only aware of it after his dismissal.

Victimisation (Equality Act 2010 section 27)

134. The protected acts are imprecisely defined: the dates refer to various stages in the grievance or disciplinary procedures rather than the actual dates on which any allegation of discrimination was made.

135. 20th April 2022 is in fact the date of the second part of the hearing when the Claimant was dismissed prior to being reinstated. 30th May 2022 (not 20th May) was the date of that appeal hearing. 2nd November 2022 is the date when it was acknowledged that the Claimant wished to progress his "unfair dismissal grievance"

to a formal hearing. 24th November 2022 was the date of that hearing. 22nd February 2023 was the date on the final grievance received in fact on 7th March, and which is admitted to amount to a protected act, though it postdates the last alleged act of victimisation within employment.

135. Interspersed within this time frame, though not identified as such, the Claimant did, however, raise grievances dated 3rd July and 30th August 2022 which made allegations of disability discrimination.

136. The alleged acts of detriment (sc. On 7 July 2022, Ron Gregory retracting an apology made to the claimant; Refuse to hear his grievance dated 22 February 2023 which he sent to Simon Nearney; Over the course of C's employment, failing to adhere to R's own WDES Guidelines for Education and Training regarding training staff in the claimant's management team or peer structure about ADHD; On 15 March 2023, Lucy Vere (HR Director) approaching the Disability Network chair and OD Manager and warning them not to provide the Claimant with support at work; On 24 October 2022 Duncan Taylor writing an email to Jenny Jethwa about the Claimant including the words 'Jenny a second grievance !!'; On 9 February 2023 Gary Usher refusing reasonable and pre-agreed training requests; The respondent requesting evidence of the claimant's disability as part of the claimant's Tribunal claim (despite R holding records of C's disability dating back to October 2021, as evidenced by an email Jenny Jethwa wrote on 8 September 2022 to Duncan Taylor); On 8 September 2022, Duncan Taylor commenting that the Claimant rambled and that Duncan is not clear what his grievance was) have all already been addressed.

137. In particular we have already addressed, where applicable, the reasons why the Respondent in fact did these things.

137. There is no evidence from which we could conclude that any of these acts, even if it properly could in fact constitutes detrimental unfavourable treatment, was done because the Claimant had made any allegation of discrimination.

EMPLOYMENT JUDGE LANCASTER

DATE 28th March 2024

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CASE SUMMARY

1. The claimant was employed by the respondent, an NHS Trust, as a Waste Support Officer from 10 August 2017 until 14 March 2023. Early conciliation started on 27 March 2023 and ended on 2 May 2023. The claim form was presented on 3 May 2023.

2. The claim is about the claimant's ADHD, concerns he raised and his dismissal.

3. The claimant raised a previous claim on 15 November 2021 under e-submission reference 182024047300 which the parties believe was dismissed upon withdrawal.

The Complaints

4. The claimant is making the following complaints:

   4.1 Unfair dismissal;

   4.2 Discrimination because of disability, as follows:

      4.2.1 Direct discrimination;
      4.2.2 Indirect discrimination;
      4.2.3 Failure to make reasonable adjustments;
      4.2.4 Harassment;
      4.2.5 Victimisation.

The Issues

5. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 28 December 2022 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    1.2.4.1 Why were the complaints not made to the Tribunal in time?
    1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

2.1 The parties agree the claimant was dismissed.

2.2 What was the reason or principal reason for dismissal? – *R says the reason was conduct due to a stalking incident with another employee*. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.3 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

2.3.1 there were reasonable grounds for that belief;
2.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
2.3.3 the respondent otherwise acted in a procedurally fair manner – *C says they did not because they took into account a previous written warning*;
2.3.4 dismissal was within the range of reasonable responses.

3. **Remedy for unfair dismissal**

3.1 Does the claimant wish to be reinstated to their previous employment? – *C says not currently, having got another job*.

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment? – *C says not currently, having got another job.*

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?
3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.6.3 If not, for what period of loss should the claimant be compensated?
3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.6.5 If so, should the claimant's compensation be reduced? By how much?
3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.6.7 Did the respondent or the claimant unreasonably fail to comply with it? *R doesn't allege any but C alleges a breach by way of a decision having been made without hearing from C.*
3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
3.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.6.11 Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Direct disability discrimination (Equality Act 2010 section 13)

4.1 Did the respondent do the following things:

4.1.1 On 15 September 2021 Steve Roberts referred to the Claimant's disability as AC/DC – *no specific comparator given*.

4.1.2 over the period July 2022 to February 2023, isolated C from team meetings and restricted him from carrying out his normal duties of his job role – *comparator given as rest of C's team*.

4.1.3 Over the period July 2022 to February 2023, not allow C to *re*commence his job role and not provide him with correct equipment for auditing duties – *comparator given as rest of C's team*.

4.1.4 On 6 January 2022, not include C in a team project announced on the intranet – *comparator given as rest of C's team*.

4.1.5 On 30 August 2022, Gary Usher attempting to force the Claimant to sign a long list of NHS Policies to keep his job – *comparator given as all staff members in wider Trust (including those in his team)*.

4.1.6 On 2 December 2022, following a training session delivered by the Claimant about his ADHD, in a meeting with Gary Usher he saw negative comments written in the notes of Karen Alexander about his ADHD - *no specific comparator given*.

4.1.7 (no longer applicable).

4.1.8 On 22 March 2023, Laura Jardine saying the respondent would not hear the Claimant's grievance submitted on 22 February 2023 on the basis that he was no longer an employee – *comparator given as any other employee or ex-employee of the Trust.*

4.1.9 Over the course of C's employment, failing to adhere to R's own WDES Guidelines for Education and Training regarding training staff in the claimant's management team or peer structure about ADHD - *no specific comparator given.*

4.1.10 On 15 March 2023, Lucy Vere (HR Director) approaching the Disability Network chair and OD Manager and warning them not to provide the Claimant with support at work – *comparator given as all other Trust staff members*

4.1.11 Confidential emails relating to the Claimant's health and disability being stored by Steven Roberts (from March 2020 until July 2022) on a multi-user accessible central folder – *comparator given as all other staff members managed by Steven Roberts*.

4.1.12 On 15 July 2022, Duncan Taylor making comments about the Claimant via email to Zara Ridge – *comparator given as other peer staff members in C's team*.

4.1.13 On 17 October 2022, Gary Usher using the acronym ADHA when referring to the Claimant's disability and stating it was 'overtaking the Claimant's thought processes' within the risk assessment – *comparator given as other staff members in C's team*.

4.1.14 Following the claimant's return to work in July 2023, requiring him to hot desk and to work different hours, affecting his mental health (as raised in an email of 12 January 2023 to Helen Penn) – *comparator given as other staff members in C's team.*

4.1.15 On 9 February 2023 Gary Usher refusing reasonable and pre-agreed training requests – *comparator given as other staff members across the Trust*.

4.1.16 The respondent requesting evidence of the claimant's disability as part of the claimant's Tribunal claim (despite R holding records of C's disability dating back to October 2021, as evidenced by an email Jenny Jethwa wrote on 8 September 2022 to Duncan Taylor) – *comparator given as other staff members with disabilities e.g. Elaine Hilladie who has a physical disability*.

4.1.17 On 8 September 2022, Duncan Taylor commenting that the Claimant rambled and that Duncan is not clear what his grievance was – *comparator given as other staff across the Trust bringing a grievance*.

4.1.18 Dismissing the Claimant with effect from 14 March 2023 – *comparator given as someone without a disability.*

4.1.19 Over the course of C's employment, not permitting C to work from home – *comparator given as other members of C's team.*

4.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who s/he says was treated better than s/he was.

4.3 If so, was it because of disability?

4.4 Did the respondent's treatment amount to a detriment?

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the respondent treat the claimant unfavourably by refusing to hear his grievance dated 22 February 2023 which he sent to Simon Nearney? *R says it did in fact hear his grievance and send him a letter with a detailed outcome*.

5.2 Did the claimant's dismissal arise in consequence of the claimant's disability?

5.3 Did the respondent refuse to hear the grievance because he had been dismissed?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? *R says it did hear the grievance, so does not specify any such aims*.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

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

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

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

6.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1 requiring staff in C's role to work independently;
6.2.2 requiring staff in C's role to work in an open plan environment;

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that:

6.3.1 the C's ADHD means he struggles to prioritise and gets distracted;
6.3.2 the C's ADHD means he struggles to concentrate in noisy environments;

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

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

6.5.1 supervision to assist with time management and prioritising tasks, setting out clear daily plans, providing clear instructions;

6.5.2 allowing C to work from home or giving C a fixed base of work.

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

6.7 Did the respondent fail to take those steps?

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

7.1 Did the respondent do the following things:

7.1.1 On 15 September 2021 Steve Roberts referring to the Claimant's disability as AC/DC;

7.1.2 On 7 July 2022, Ron Gregory retracting an apology made to the claimant;

7.1.3 On 30 August 2022, Gary Usher attempting to force the Claimant to sign a long list of NHS Policies to keep his job;

7.1.4 On 2 December 2022, following a training session delivered by the Claimant about his ADHD, in a meeting with Gary Usher he saw negative comments written in the notes of Karen Alexander about his ADHD;

7.1.5 On 10 January 2023 Gary Usher making verbal threats against the claimant;

7.1.6 On 22 February 2023, David May's question to Occupational Health 'What disadvantage does Gavin's disability cause in the workplace?';

7.1.7 On 15 March 2023, Lucy Vere (HR Director) approaching the Disability Network chair and OD Manager and warning them not to provide the Claimant with support at work.

7.2 If so, was that unwanted conduct?

7.3 Did it relate to disability?

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

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

8. Victimisation (Equality Act 2010 section 27)

8.1 Did the claimant do a protected act in raising grievances on the following dates:

8.1.1 2 November 2022;
8.1.2 24 November 2022;
8.1.3 20 April 2022;
8.1.4 30 May 2022;
8.1.5 22 February 2023.

8.2 Did the respondent do the following things:

8.2.1 On 7 July 2022, Ron Gregory retracting an apology made to the claimant;

8.2.2 Refuse to hear his grievance dated 22 February 2023 which he sent to Simon Nearney?

8.2.3 Over the course of C's employment, failing to adhere to R's own WDES Guidelines for Education and Training regarding training staff in the claimant's management team or peer structure about ADHD;

8.2.4 On 15 March 2023, Lucy Vere (HR Director) approaching the Disability Network chair and OD Manager and warning them not to provide the Claimant with support at work;

8.2.5 On 24 October 2022 Duncan Taylor writing an email to Jenny Jethwa about the Claimant including the words 'Jenny a second grievance !!';

8.2.6 On 9 February 2023 Gary Usher refusing reasonable and pre-agreed training requests

8.2.7 The respondent requesting evidence of the claimant's disability as part of the claimant's Tribunal claim (despite R holding records of C's disability dating back to October 2021, as evidenced by an email Jenny Jethwa wrote on 8 September 2022 to Duncan Taylor);

8.2.8 On 8 September 2022, Duncan Taylor commenting that the Claimant rambled and that Duncan is not clear what his grievance was.

8.3 By doing so, did it subject the claimant to detriment?

8.4 If so, was it because the claimant did a protected act? The claimant does not allege that it was because the respondent believed the claimant might do a protected act.

9. Remedy for discrimination or victimisation

9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the claimant?

9.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

9.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

9.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

9.6 Is there a chance that the claimant’s employment would have ended in any event? Should their compensation be reduced as a result?

9.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it – *R doesn't allege any but C alleges a breach by way of a decision having been made without hearing from C*. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

9.8 Should interest be awarded? How much?