



EMPLOYMENT TRIBUNALS

Claimant: Mr B Mistry

Respondent: Ofsted

Heard at: Manchester (by CVP)

On: 6 April 2021
24 June 2021
(in Chambers)

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Mr J Tinston (Solicitor)

Respondent: Ms L Amartey (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The following claims identified in the List of Issues at Annex B to this judgment are dismissed on withdrawal: 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 3.14, 7.1, 7.3, 7.4, 15.8, 15.9, 15.10, 15.11, 15.12, 15.13, 15.14., 22.1 and 22.2.
2. The respondent's application to strike out the claimant's other claims is refused.
3. The respondent's application to dismiss the claimant's other claims as being out of time are refused.
4. The claims set out in Annex C to the case management order of today's date will proceed to final hearing.

REASONS

Introduction

1. By a claim form (in case number 2402758/2020) filed by the claimant on 17 March 2020, he brought claims of disability discrimination against the respondent. By a second claim form (in case number 2408596/2020) filed on 28 June 2020 the claimant brought further claims of disability discrimination against the respondent. At the preliminary hearing on 5 October 2020 the claimant was given permission by consent to add a claim of unfair dismissal and disability discrimination claims relating to that dismissal. The particulars of those claims were sent to the Tribunal on the 15 January 2021. In this document I have referred to those as the “the Dismissal Particulars”.
2. At two case management preliminary hearings on 16 September 2020 and 5 October 2020, Employment Judge Porter sought to clarify the claimant's claims. At those hearings the claimant acted in person. He has been represented by Mr Tinston's firm since 15 January 2021.
3. At the preliminary hearing on 5 October 2020 Employment Judge Porter directed that there should be a public preliminary hearing which “shall determine”:
 - (1) Whether the parts of the claims were presented out of time and, if so, whether it is just and equitable to extend time to allow the claimant to pursue those parts of the claims;
 - (2) Whether the claimant should be granted leave to amend the claims to include each of the complaints set out in the Case Management Orders made on 16 September 2020 and 5 October 2020;
 - (3) The respondent's application for a strike out and/or deposit order; and
 - (4) Any further Case Management Orders for the final hearing.
4. The Case Management Order of 5 October 2020 (“the October CMO”) set out an amended “preliminary List of Issues” setting out the claimant's complaints as identified at the two preliminary hearings. I have included that List of Issues as Annex B to this judgment. It included a number of incidents relied on as being acts of harassment related to disability, of direct discrimination because of disability, discrimination arising from disability, a failure to make reasonable adjustments and victimisation (in breach of sections 26, 13, 15, 21 and 27 of the Equality Act 2010 respectively).
5. On 27 April 2021 Mr Tinston wrote to the Tribunal to withdraw a number of claims. He did so by reference to the October CMO List of Issues. This judgment dismissed those claims on withdrawal.
6. I reviewed the claims withdrawn and compared them with the claims in the Schedule which Mr Tinston confirmed were (along with the Dismissal Particulars claims) the only claims now being pursued I identified claims 3.7 and 3.8 in the October CMO List of Issues as also not being included in the Schedule and have therefore also dismissed those on withdrawal. The result of that (with my decisions on the amendments) is that the claimant is no longer

pursuing any claims of harassment. Since no claims of harassment are being pursued, those claims which referred back to incidents of harassment set out in section 3 of the October CMO List of Issues are also withdrawn, namely 7.4 and those s.15 claims at para 10 which referred back to para 3. The claimant's victimisation claim is now only in relation to those acts set out in the Dismissal Particulars and on that basis I have also dismissed as withdrawn those claims set out at 22.1 and 22.2. They are replaced by the unfavourable treatment set out in the Dismissal Particulars.

The amendment applications

7. On 29 March 2021, Mr Tinston wrote to the respondent and the Tribunal sending the claimant's skeleton argument for the preliminary hearing and a Schedule of Incidents ("the Schedule") detailing the acts of discrimination that the claimant was proceeding with. For convenience I have attached that Schedule as Annex A to this judgment
8. The respondent's position was that permission to amend was required for allegations 1, 4, 5, 7, 8 and 10. I granted permission for amendments 4, 5 (as a reasonable adjustment claim) and 7 (as a reasonable adjustment claim only). In relation to Allegation 1, I allowed that to proceed as set out in paras 15.5 and 15.6 of the October CMO but refused the amendment to expand its scope and re-draft the PCPs relied on as set out in the Schedule.
9. The claimant also sought permission to amend to add a claim of wrongful dismissal. That was not objected to by the respondent and I granted that application.
10. I have set out the reasons for my decisions on the amendment applications in my case management order of today's date. Annexed to that case management order (As Annex C) is a revised list of issues. That is based on the October CMO List of Issues but amended to reflect the claims withdrawn and my decisions on the amendments and strike out applications. Annex C represents the claims which will go forward to the final hearing based on my decisions today.

Summary of the Case

11. Before turning to the strike out applications I will briefly summarise the case as set out in the pleadings to date. I make no findings of fact but provide this outline by way of context for the decisions on the specific amendment allegations.
12. The claimant was employed by the respondent from 1 October 2009. He was summarily dismissed on 16 September 2020 for gross misconduct. At the time of his dismissal he was employed as an Advisor in the respondent's Applications, Regulatory and Contact ("ARC") Contact and Administration Team ("the ARC A & C Team").
13. The respondent accepts that the claimant was a disabled person for the purposes of the 2010 Act at the time the incidents complained of happened by

reason of the effect on his mental health of PTSD arising from abuse in his childhood.

14. During his employment the claimant attended a number of Occupational Health ("OH") appointments linked to absences from work for reasons relating to anxiety and depression. The respondent says it put in place reasonable adjustments in line with recommendations made in the resulting OH reports.
15. Prior to 2018 the ARC A & C Team had consisted of three distinct teams. The claimant was employed as an Advisor in the Application Team which processed new applications to register on the Early Years and Social Care registers and maintained existing registrations. In 2018 that team, the Contact Centre team and the Administration Team were unified, creating the ARC A & C Team. That change meant that those carrying out the Advisor role which the claimant did were from 2018 expected to deal with tasks previously carried out by those in other teams, e.g. dealing with direct contacts from the public, applicants or stakeholders which would previously have been dealt with by the Contact Centre team.
16. The claimant had in July 2018 requested that feedback he had been receiving be provided in a more supportive manner. The respondent says that after a meeting, measures were put in place to ensure that feedback was provided in a way that the claimant was comfortable with. From on or around March 2019, Matthew Ritson was the claimant's line manager. The respondent says that Mr Ritson worked closely with the claimant to ensure any feedback was given in the manner that had been agreed with the claimant, but recognising it was necessary for a manager to provide feedback connected with work and work performance to employees they are managing.
17. On 4 October 2019 Mr Ritson met with the claimant to discuss putting together a Workplace Adjustment Passport ("WPA"). This is a voluntary, employee-led process whereby a document is created which records workplace adjustments agreed with the employee's line manager. The intention is that the WPA is portable so that when the employee moves to a new role they can share the adjustments with their new management team to ensure the support put in place continues. On 11 October 2019 the claimant and Mr Ritson met to finalise the WPA. The final version of the WPA in November 2019 confirmed that all feedback would be delivered by and via Mr Ritson.
18. On 12 December 2019 Mr Ritson held a Skype call with the claimant to discuss anomalies had had found between the flexi-time records submitted by the claimant and the time he was recorded as working on the respondent's computer systems. On 16 December 2019 the claimant started a period of sickness absence due to depression. He says that the trigger for this was the call on 12 December 2019.
19. The claimant was off sick until 14 April 2020. During that time Mr Ritson held absence review meetings with him. The claimant also raised a formal grievance during his absence alleging failures to make reasonable adjustments going back 4 years despite recommendations for adjustments made in OH Reports

and including Mr Ritson's conduct of the 12 December 2019 Skype call. The grievance was investigated but not upheld. An appeal against that decision was not upheld.

20. On 14 April 2020 during a meeting about the claimant's return to work, Mr Ritson informed the claimant that he needed to progress discussions with him in relation to concerns about his time recording and asked how the claimant wanted to do this. The claimant asked for all the information to be sent to him in writing. He started a further period of sickness absence after that meeting.
21. The claimant raised a further grievance on 22 April 2020 (the respondent says 25 April 2020) complaining of failures to make reasonable adjustments over the course of his absence, that Mr Ritson had harassed him including contacting him every week during his absence and on his return to work on 14 April 2020 and about the way Mr Ritson had raised performance issues with him. Lauren Hill, ARC Senior Team Manager was appointed to investigate the second grievance. The claimant said he wanted a new manager, managers to have mental health training, an OH referral, a phased return and a new WPA. That second grievance was not upheld but it was confirmed that the claimant would be allocated a new line manager.
22. On 12 June 2020 the claimant was invited to a disciplinary investigation meeting relating to allegations that he had recorded time as working time when there was no work accounted for or undertaken. The 7 and 8 December were weekend days so in relation to those days the allegation was that the claimant had claimed overtime in excess of time actually worked. The claimant was warned that the allegations may amount to gross misconduct and may result in the claimant's dismissal. The investigation led to a disciplinary hearing on 4 September 2020 which concluded that the claimant's behaviour amounted to fraud and that the appropriate sanction was summary dismissal. The decision to dismiss was confirmed by letter dated 16 September 2020. The claimant's appeal against the dismissal was considered at an appeal hearing on 22 October 2020 but not upheld.

Relevant Law

Striking out

16. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim on the grounds it has no reasonable prospect of success.
17. Rule 37(2) says that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
18. Caselaw provides guidance on the exercise of this power:
 - a. It will only be in an exceptional case that a complaint will be struck out as having no reasonable prospect of success when the central facts are in

dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation (**Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1122, Court of Appeal**).

b. A Tribunal should not be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person (**Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA EAT**).

c. The Tribunal should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents (**Mbuisa**).

d. Discrimination issues should, as a general rule, be decided only after hearing the evidence. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence (**Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**).

e. Whether the necessary test is met in a particular case depends on an exercise of judgment. It may not be assisted by attempting to gloss the language of the rule by reference to other phrases found in the authorities such as 'exceptional' and 'most exceptional'. However, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. (**Ahir v British Airways Plc [2017] EWCA Civ 1392**)

Time Limits for claims under the 2010 Act

23. The time limit for bringing a claim appears in section 123 as follows:-

"(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 three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

(2) ...

(3) for the purposes of this section -

(a) conduct extending over a period is to be treated as done at the end of the period;

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

Continuing Acts

24. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding this question:

'The focus should be on the substance of the complaints ... was there an ongoing situation or a continuing state of affairs in which officers ... were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

25. 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' (**Aziz v FDA 2010 EWCA Civ 304, CA**).
26. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

The respondent's strike out/dismissal applications

27. I considered the respondent's application to strike out allegations 1, 4, 5, 7, 8, and 10 as part of deciding whether to allow the amendments relating to those allegations. For those claims where I granted leave to amend, I have already decided that a strike out is not appropriate. I have set out my reasons in the case management order of today's date and do not repeat them here.
28. This judgment sets out my decisions on the respondent's applications to strike out Allegations 2, 3, 9 and the claims in the Dismissal Particulars.
29. The respondent does not seek a strike out order or deposit order in relation to allegation 6.
30. Employment Judge Porter's order was not specific as to the approach to be taken at the preliminary hearing to those incidents which the claimant said were in time because they formed part of a continuing act under s.123(3)(a) of the 2010 Act. As I explain in the CMO of today's date, my approach to the time limit issue was:
- a. To decide whether a claim is out of time, in the sense that it was made outside the time limit even if the conduct complained of formed part of a continuing act. If the claim is out of time in that sense, I must dismiss it given that the claimant is not now advancing any "just and equitable extension" arguments.
 - b. Where the claimant says an otherwise out of time claim is in time because it is about conduct forming part of a continuing act the definitive decision on that argument will be one for the final hearing.
 - c. However, I can strike out an otherwise out of time claim even if the claimant says it is about conduct forming part of a continuing act where

I find that the “continuing act” argument has no reasonable prospects of success.

- d. I can make a deposit order in relation to an otherwise out of time claim even if the claimant says it is about conduct forming part of a continuing act where I find that the “continuing act” argument has little reasonable prospects of success.

31. As I also explain in the CMO of today’s date, where I decided that an amendment related to a claim which was out of time (i.e. para a. above) and/or there was no reasonable prospect of the claimant establishing it was in time because it was part of a continuing act (para c above), I refused the amendment, rather than allowing it and then immediately dismissing or striking out that allegation.

Allegation 2 – refusing to change his line manager from Mr Ritson (Failure to make reasonable adjustments - s.21 of the 2010 Act)

32. On 11 January 2020 the claimant lodged his first grievance. While the first grievance investigation was underway, the claimant formally requested a change of line manager from Mr Ritson to Charlotte Wolfencroft because he felt she had a better understanding of his mental health issues. On 4 February 2020 this request was refused by the respondent. The respondent says the refusal was by Mr Jones (who carried out the grievance investigation). The claimant says it was by Ms Exon. In any event, it is clear that it was on 4 February 2020.
33. The claimant says that having Mr Ritson as his line manager was a PCP which placed the claimant at a substantial disadvantage and that it would have been a reasonable adjustment under s.21 of the 2010 Act to change his line manager to Ms Wolfencroft.
34. Although the respondent did not object to the addition of this allegation it is not clear to me which PCP in the October CMO List of Issues applies to it. The PCP is not simply of having a male line manager (15.17 on that list) but of having Mr Ritson as manager. I have therefore added a PCP to that effect at 15.12 of the revised List of Issues at Annex C to the case management order.
35. Miss Amartey submitted that this claim was out of time and there was no reasonable prospect of the claimant showing that it was part of a continuing act. She submitted that on the claimant’s own case, the refusal to change Mr Ritson as the claimant’s line manager took place on 4 February 2020 so the time limit would expire on 3 May 2020. She submitted that early conciliation relating to the relevant claim form (the claimant’s second) was not begun until 27 May 2020, more than three months later and there was no extension of time deriving from that process. The claim form was not filed until 28 June 2020 and was out of time. She further submitted that the time limit may well have been earlier than 3 May 2020. Mr Ritson had been the claimant’s manager since around March 2019. The time limit for a reasonable adjustment claim ran from the point where the respondent did an act inconsistent with making a reasonable adjustment which was arguably far earlier than 4 February 2020.

36. I accept Miss Amarety's submission that as a stand-alone act and in the absence of any just and equitable extension application, the claimant's claim is out of time. However, I do not find that there is no reasonable prospect of the claimant showing that it was part of a continuing act so as to bring it in time. It seems to me that is a decision that can only be made by a Tribunal hearing the evidence and putting the specific failure to change Mr Ritson as Line Manager in February 2020 in context. In reaching that decision I take into account the accepted fact that there were ongoing grievance procedures which included consideration of who the claimant's line manager should be after that date which eventually resulted in a change of line manager to Mr Davis in June 2020.
37. I do not find there are grounds on which I can say that there is no reasonable prospect of the claimant being to establish a continuing act, justifying striking out this claim.
38. Because the question of whether the making of a deposit order is one which seems to me to turn on the facts of the case, I find that on the limited evidence before me I cannot say there is little reasonable prospect of that argument succeeding. I therefore also refuse the application for a deposit order in relation to this claim.

Allegation 3 – failure to make reasonable adjustment to a PCP of line managers contacting employees every week during their sickness absence (s.21 of the 2010 Act)

39. The claimant alleges that during his sickness absence from 12 December 2020 Mr Ritson contacted him on a weekly basis. He alleges that the respondent applied a PCP of requiring line managers to contact employees on long term sick leave every week and that this put him at a substantial disadvantage compared to those not sharing his disability. He suggests that a reasonable adjustment would have been for him to be contacted every two weeks.
40. The claimant in the Schedule of Incidents says this failure lasted until "Early April 2020". Taking the date of 14 April 2020 as the latest date, a claim about this unlawful act would (unless it formed part of a continuing act with other incidents) have to be initiated by 13 July 2020. The second claim from The second claim form was filed on the 28 June 2020 so the claim was in time. Miss Amarety, however, suggested that as a claim for a failure to make a reasonable adjustment, time would run from the date when the respondent did an act inconsistent with making the relevant adjustment. She submitted that would be from around 16 December 2019, i.e. the first time when Mr Ritson contacted the claimant on sick leave. That meant, she said that the claim should have been filed by 15 March 2020 and was some 3-4 months out of time.
41. I can see some force in that argument. The claimant, however, says that the failure continued until his return to work on 14 April 2020. As with Allegation 2, it seems to me that that is something that can only be decided by the Tribunal at the final hearing based on evidence which places the failure in context. I do not find on the evidence before me I can say the claimant has no (or little) reasonable prospect of satisfying the Tribunal either that the reasonable adjustment claim "crystallised" in April 2020 or that it was part of a continuing

act until then bringing it in time. I therefore refuse the strike out and deposit order applications in relation to this allegation.

Allegation 9 – The PCP of working within the ARC department (failure to make a reasonable adjustment – s.21 of the 2010 Act)

42. The claimant says that the PCP of working within the ARC department placed him at a substantial disadvantage because working in that department triggered his mental health issues. The claimant says a reasonable adjustment would have been to move him to another department, a suggestion refused by Lauren Hill in the grievance outcome dated 26 June 2020.
43. Miss Amartey's submission was that the merits of this claim were not strong. she referred to the relevant extract of Ms Hill's grievance outcome letter (p.188). She submitted that it supported the respondent's case that the claimant was not subjected to a requirement to work in the ARC department. In her letter, Ms Hill records the fact that the claimant was able to apply for roles outside of ARC but had not done so. It does not seem to me that that one sentence is enough for me to say that there is no (or even little) reasonable prospect of the claimant establishing that a PCP was applied to him. That is particularly given that the second submission made by Miss Amartey appears to suggest that a PCP of staying in the ARC department was applied. That submission was that p.188 also supported the respondent's case that the impact of COVID meant that a number of teams were operating with a skeleton staff so it was "Not feasible for you to complete another team's work".
44. Miss Amartey submitted that explained why it was not a reasonable adjustment for the respondent to move the claimant-the impact of COVID meant it was simply not feasible. It does not seem to me that that one sentence is enough for me to say that there is no (or even little) reasonable prospect of the claimant showing that a move to another department would have been a reasonable adjustment.
45. I therefore refuse the strike out and deposit order applications in relation to this allegation

The Dismissal Particulars

46. In the Dismissal Particulars the claimant made claims of unfair dismissal and wrongful dismissal. I do not understand there to be any application for a strike out or deposit order in relation to those claims. They were filed in time. However, there were challenges to the disability discrimination (s.15 and reasonable adjustment claims) and victimisation claims which the claimant made arising from his dismissal, the refusal of his appeal against dismissal and the disciplinary proceedings which led up to his dismissal.

Time limits

47. Miss Amartey made submissions that the victimisation and reasonable adjustment claims were out of time. The claimant accepts in his Dismissal Particulars that the failure to make the reasonable adjustment of providing questions in advance of the disciplinary hearing occurred on 2 July 2020.

However, he says that the disciplinary procedure was a continuing act up to the dismissal on 16 September 2020. He also says that the unfavourable treatment forming the basis of his victimisation claim (the decision to “elevate” as he put it, his misconduct to gross misconduct and subsequently to dismiss and refuse his appeal) was a continuing act to the date of dismissal. If they are, the claims would be in time. Miss Amartey submitted that it is not enough for a claimant to merely assert there is a continuing act. I accept that is so. However, it does seem to me that there is nothing obviously unsustainable about the claim that decisions made in conducting a disciplinary process (including the decision to dismiss and refuse an appeal) are on the face of it a continuing act. I do not find on the evidence before me (which is limited in terms of who decided how the disciplinary process should be conducted) that there are grounds for a finding that there is no (or little) reasonable prospects of the claimant being able to show that there was such a continuing act.

Merits - victimisation

48. Miss Amartey also made submissions on the merits of each of the 2010 Act claims in the Dismissal Particulars.
49. I deal first with the victimisation claim. The claimant’s claim is that he made a series of protected acts (as defined by s.27(2) of the 2010 Act) by making allegations of disability discrimination in his first and second grievances and his two claim forms (which were lodged pre dismissal). He also says that his letter of appeal against dismissal was a s.27(2) protected act because it included an allegation of “systemic racism” within the respondent. The alleged unfavourable treatment is the allegations against him being “elevated” to misconduct then gross misconduct, his dismissal and the failure to uphold his appeal.
50. It is not clear from the respondent’s response to the particulars (para 25 at p.126) whether it accepts the acts were protected acts. It does not expressly deny so and Miss Amartey did not put that forward as the basis for the strike out/deposit order submission. I proceed on the basis there is a reasonable prospect of the claimant showing that he did protected acts.
51. What Miss Amartey did submit was that there was no (or little) reasonable prospect of the claimant’s claim that the “charges” against him were only “elevated” to misconduct then gross misconduct after he had made (at least some) of his protected acts succeeding. The claimant’s case is that when Mr Ritson in December 2019 initially raised the events which led to the disciplinary action against him, he did not mention “Misconduct” and certainly not “gross misconduct”. The claimant’s case is that “gross misconduct” was raised for the first time on 12 June 2020. That was his case at the appeal against dismissal (p.193).
52. Miss Amartey submitted that it was obvious from the start (and before the claimant raised his grievances) that the matter was a serious one which could amount to misconduct. The documents before me, however, tended to support the claimant’s case that Mr Ritson had not initially referred to misconduct or the possibility of disciplinary action (e.g. the description of events in the claimant’s first grievance – p.156 and the email from Mr Ritson to the claimant on 15 April 2020 quoted at p.184). I accept that there may be other evidence not before me

which supports Miss Amartey's submission that it was clear from the start that the respondent was treating the matter as one of misconduct and potentially gross misconduct. That evidence is not before me and in its absence I do not find there is little or no reasonable prospect of the claimant showing that the matters against him were "elevated".

53. Miss Amartey also submitted there was no reasonable prospect of the claimant showing that there was a link between any protected acts and the decisions constituting the alleged unfavourable treatment resulting from them. The difficulty I find with that submission is that central to it is the "reason why" question. That is a question which can only usually be answered by the Tribunal having heard evidence from the relevant decision makers and deciding what inferences it ought to draw based on its findings of fact. I do not find I can say that the evidence before me means there is no (or little) reasonable prospect of the claimant successfully establishing such a link.
54. I therefore refuse the strike out and deposit order applications in relation to the victimisation claim.

Merits – reasonable adjustments

55. The claimant's case is that the respondent should have made two reasonable adjustments. The first was to adjust its PCP of not providing questions in advance of disciplinary hearings by providing questions to the claimant no less than 3 days in advance of the disciplinary hearing. The second was to adjust its PCP of considering "authorised tasks" to only consist of working time and not to count the time the claimant spent engaging in coping mechanisms during his working time as "authorised tasks".
56. In relation to the first adjustment, Miss Amartey's submissions was that it could not be a reasonable adjustment to provide questions in advance in cases of fraud because in such cases the plausibility of the employee's responses was central to deciding their guilt. However, the claimant's argument, as I understand it, is that it is just because the way an employee responds to questions is central in fraud cases that adjustments may need to be made. Otherwise a reaction which is due to a mental impairment may be wrongly perceived as a sign of guilt. That seems to me to be an argument the Tribunal at a final hearing should decide having heard evidence and submissions and not sufficient to justify a strike out or a deposit order.
57. In relation to the second adjustment, Miss Amartey submitted it was a "non-starter" to claim that it was a disadvantage not to allow the claimant to count time spent engaging in coping strategies as "authorised time". There was no disadvantage in undertaking such activities but not recording it as "authorised time". The extent of any disadvantage is a matter for evidence. The limited evidence before me supports the importance of the claimant having short time away from his desk to perform mental health exercises (the OH report at p.137).
58. I do not find grounds for striking out either of the reasonable adjustments claims or making a deposit order in relation to either of the claims.

Merits-the s.15 claim

59. The claimant says that his dismissal was unfavourable treatment because of something arising from him disability. There were as I understand the Dismissal Particulars 3 such “somethings”:
- a. The claimant’s judgment being impaired in the period to which the allegations related
 - b. The claimant’s memory being poor and so his being unable to account for his apparent errors in recording time.
 - c. The claimant’s coping strategies which he engaged in during working time being themselves something arising from his disability.
60. Miss Amartey’s submission was that it was clear the claimant was dismissed for fraud so there was no (or at least little) prospect of this claim succeeding. I accept that “fraud” was the headline reason for dismissal in this case. It seems to me, however that decidig the “reason why” question for this claim (and the extent, if any, to which the alleged “somethings arising” put forward by the claimant influenced the decision maker) is something that is only susceptible of assessment after hearing evidence.
61. I do not find grounds for striking out the s.15 claim or making a deposit order in relation to it.

Employment Judge McDonald
Date: 23 September 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 24 SEPTEMBER 2021

FOR THE TRIBUNAL OFFICE

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

ANNEX A

Schedule of Incidents

No.	Incident	Section of Equality Act 2010	Last act of discrimination
1	<p>The respondent's PCPs of providing feedback through various managers, its conflict resolution process, its disciplinary and grievance procedures, its methods of employee support and its method of communicating feedback including performance issues placed the claimant at a substantial disadvantage. A reasonable adjustments passport was prepared on 4 October 2019 stating:</p> <p>a. Any feedback concerning the claimant's performance was to come from the claimant's line manager and be delivered only by the claimant's line manager, to provide certainty to the claimant.</p> <p>b. Conflicts were to be resolved quickly and in a timely manner and not left for several days. If this is not possible a timescale to be put in place as to when and how the conflict will be resolved, hence reducing the claimant's anxiety.</p> <p>c. Disciplinary actions or other formal investigations should take into account the provisions of the Equality Act e.g. whether the disciplinary offence arose from the claimant's disability or whether certain formal investigation processes could be adapted to suit the claimant's needs and reduce his anxiety.</p>	Section 21	The reasonable adjustments passport was refused on 2 December 2019 on the basis of it being "too long". Mr Ritson then failed to implement the passport in his discussion with the claimant on 12 December 2019.

	<p>d. When colleagues offer support, they should clarify when expressing an opinion and only ask open questions. They should not use statements or words such as “you should” or “you need”.</p> <p>e. Punitive language should be avoided when giving feedback or communicating an issue. Language should be supportive.</p> <p>The proposed steps were to remove the substantial disadvantage i.e. the exacerbation of the claimant's anxiety.</p>		
2	<p>In January 2020 the claimant requested that his line manager was changed from Matthew Ritson, because of “broken trust” and anxiety caused by Mr Ritson's actions. He suggested Charlotte Wolfencroft.</p> <p>The PCP of having Mr Ritson as his line manager placed the claimant at a substantial disadvantage and reasonable steps to remove that disadvantage would include changing the claimant's line manager to Ms Wolfencroft, given her understanding of the claimant's mental health.</p>	Section 21	Refused by Emma Exton on 4 February 2020
3	<p>The PCP of line managers contacting employees every week during their sickness absence placed the claimant at a substantial disadvantage owing to the anxiety it created for the claimant. The claimant requested contact every two weeks but the weekly contact continued into April 2020.</p>	Section 21	Early April 2020
4	<p>On 31 January 2020 the respondent's Occupational Health provider (“OH”) stated that the claimant's Key Performance Indicators (“KPIs”) should be amended (i.e. reduced) on his return to work. The KPI, a PCP, causing the claimant the most difficulty was the requirement for ARC Advisors to send 50 to 60 emails to customers each day, as this exacerbated his anxiety and placed him at a substantial disadvantage. On the claimant's return to work however this KPI had not been reduced.</p>	Section 21	14 April 2020
5	<p>The respondent's PCP of requiring employees to spend time in the office (usually at least two days each week) during the working week placed the claimant at a</p>	Section 21 Section	Initial refusal November 2019. The claimant returned to the office on 14 April 2020.

	<p>substantial disadvantage owing to the anxiety experienced whilst working from the office. On 31 January 2020 OH recommended that the claimant undertake permanent homeworking to allow him to manage his mood optimally. On his return to work in April, however, the claimant continued to work from the office.</p> <p>In addition or in the alternative this amounted to less favourable treatment compared to Karen Harris. The claimant only discovered Ms Harris was working from home entirely in around June 2020.</p>	13	
6	<p>The PCP of discussing performance concerns with employees immediately on their return from sick leave placed the claimant at a substantial disadvantage owing to the anxiety this caused him. Reasonable steps to remove this disadvantage would be to allow the claimant to complete his phased return before raising such performance concerns.</p>	Section 21	14 April 2020
7	<p>It was agreed as part of the grievance appeal outcome in April 2020 that the claimant would therefore be provided with a female team leader because of his history of abuse at the hands of a man – the root cause of his disability.</p> <p>On 13 June the claimant was provided with a male team leader – Morgan Davis. This amounted to unfavourable treatment arising from the claimant's disability and was not a proportionate means of achieving a legitimate aim as female team leaders were available.</p> <p>In addition or in the alternative this was unwanted conduct related to the claimant's disability, the purpose or effect of which violated his dignity or created an intimidating, hostile, or degrading environment for him.</p> <p>In addition or in the alternative the PCP of providing team leaders to employees irrespective of sex placed the claimant at a substantial disadvantage and a reasonable step to remove the disadvantage would be to provide a female team leader.</p>	<p>Section 15</p> <p>Section 26</p> <p>Section 21</p>	13 June 2020
8	<p>In the claimant's grievance outcome of 26</p>	Section	26 June 2020

RESERVED JUDGMENT

**Case Nos. 2402758/2020
2408596/2020**

	June 2020, Lauren Hill of the respondent wrote that the claimant had shown an “unwillingness to engage in conversation”. Ms Hill was aware that any unwillingness to engage in conversation arose from the claimant’s disability.	15 Section 26	
9	The PCP of working within the ARC Department placed the claimant at a substantial disadvantage as working in this department was triggering his mental health. Reasonable steps to remove this disadvantage would be to move the claimant to another department.	Section 21	Refused by Lauren Hill in the grievance outcome of 26 June.
10	On 10 September 2020 the claimant received documents following a subject access request showing that Elizabeth Pendlebury, who was fully aware of the effects of the claimant's disability, had made the following comment about the claimant during the course of the investigation of his grievance: “As soon as Bhav is question on anything he will turn his back on management, there is no understanding from Bhav as to why questions need to be asked. He does not appear to take on board feedback very well”. The claimant submits that any lack of understanding or difficulties taking feedback arose from his disability.	Section 15 Section 26	10 September 2020

Annex B

October CMO List of Issues

Disability

1. The respondent concedes that the claimant was at the relevant time a disabled person within the meaning of the Act, in relation to a mental impairment, which it describes in its Response as some form of Post-Traumatic Stress Disorder ("PTSD"). It is noted that the respondent refers to absences by the claimant by reason of anxiety and depression. Clarification will be required at the next hearing as to whether this is a separate and distinct mental impairment upon which the claimant relies in pursuit of this claim, or whether it is conceded that anxiety and depression form part of the claimant's PTSD.

Time limits / limitation issues

2. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred.

EQA, section 26: harassment related to disability

3. Did the respondent engage in conduct as follows:
 - 3.1. Did Claire Binks in a telephone call on or around 12 July 2018 talk to the claimant in a demeaning tone, demanding answers to many questions, knowing the claimant's mental health condition and knowing that he did not respond well to allegations of poor judgment and/or misconduct;
 - 3.2. Did Helen Barrow, when the claimant complained about the conduct of Claire Binks, minimise the claimant's complaint, tell him that he was overreacting and that he was the one with the issue, not them;
 - 3.3. Did Claire Binks between May and July 2018 continually criticise the claimant and give him her opinion on his mental health;"
 - 3.4. In January 2020 did the respondent tell the claimant that they knew nothing about the sensitive medical information he had given the respondent in December 2016, did they say that they knew nothing about it;
 - 3.5. Did Elizabeth Pendlebury on a telephone call on or around 24 September 2019 talk to the claimant in a humiliating and demeaning manner for about 2 hours about one comment made by the claimant which had triggered a complaint;

- 3.6. Did Matthew Ritson, the claimant's line manager, on or around 12 December 2019 deliver criticisms to the claimant about his performance in an intimidating manner;
- 3.7. Did Matthew Ritson on the claimant's return to work from sickness absence on or around 14 April 2020 tell the claimant that the agreed reasonable adjustments had not been put in place and raise performance issues;
- 3.8. Did the respondent accuse the claimant of not working the hours he should have done in December 2019?
- 3.9. *In or around January 2020 did Matthew Ritson repeatedly, in face to face meetings and by e-mail, tell the claimant to email to Matthew Ritson details of the confidential medical matters the claimant intended to discuss with OH;*
- 3.10. *On 15 January 2020 did Steven Dunn from HR share the claimant's grievance with a Senior Manager, Caroline Purcell, in breach of policies and in breach of the duty of confidentiality?*
- 3.11. *On 6 February 2020 did Hinna Salam ask leading questions and provide misinformation to Matthew Ritson, seeking to influence the grievance manager's response to the claimant's grievance;*
- 3.12. *On 3 February 2020 did Emma Exton breach policy by appointing an Appeal manager for the claimant's grievance at the same level as the grievance officer, thereby attempting to ensure that the claimant's appeal would be unsuccessful;*
- 3.13. *On 9 April 2020 did Hinna Salam share confidential sensitive information relating to the claimant's disability with Andrew Cowler, against whom the claimant had raised a grievance;*
- 3.14. *On 18 May 2020 did Lauren Hill fail to conduct the grievance hearing in an impartial manner, asking leading questions, asking little questions about the grievance but concentrating on the claimant's sickness absence;*
- 3.15. *On 26 June 2020 did Lauren Hill write in the claimant's grievance outcome that the claimant had shown an "unwillingness to engage in conversation";*
- 3.16. *On 10 September 2020 did the claimant receive documents following a subject access request showing that Elizabeth Pendlebury had made the following comment about the claimant during the course of the investigation of his grievance – "As soon as Bav is question on anything he will turn his back on management , there is no understanding from Bhav as to why questions need to be asked. He does not appear to take on board feedback very well."*

4. If so was that conduct unwanted?

5. If so, did it relate to the protected characteristic of disability?
6. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

EQA, section 13: direct discrimination because of disability

7. Has the respondent subjected the claimant to the following treatment:
- 7.1. the investigation of a complaint by Elizabeth Pendlebury;
- 7.2. in or around November 2019 the refusal of the claimant's request for permanent home working;
- 7.3. *The conduct of the grievance hearings contrary to the respondent's own procedures and failing to address the grievance in a fair unbiased and proper manner;*
- 7.4. each of the allegations of unwanted conduct set out at paragraph 3 above
8. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators for most of these complaints. For the claimant re his request for home working he relies also on an actual comparator, Karen Harris;
9. If so, was this because of the claimant's disability?

EQA section 15: EQA, section 15: discrimination arising from disability

10. Did the respondent treat the claimant unfavourably as set out at paragraphs 3 and 7 above?
11. If so, did the treatment arise from the claimant's disability?
12. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
13. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

14. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?
15. A "PCP" is a provision, criterion or practice. Did the respondent have the

following PCP(s):

- 15.1. The requirement to work in the office;
- 15.2. The practice of changing the way in which the office was organised and operated and the nature and method of working of all employees;
- 15.3. The practice of frequent change in line manager;
- 15.4. The policy of holding 1-1 meetings every 3 months to discuss performance;
- 15.5. The practice of discussing performance issues by use of negative and constructive criticism;
- 15.6. The practice of talking to all employees as if they do not have mental health issues;
- 15.7. The policy under the sickness absence policy of the line manager contacting the absent employee on a weekly basis;
- 15.8. The Sickness Policy uses the concept of sustainable sickness whereby absent employees are told of the risk of termination of employment if they do not return to work;
- 15.9. The requirement to attend sickness absence meetings;
- 15.10. The requirement to stay throughout working hours at a desk or other specified location;
- 15.11. The use of trigger points under the Sickness Policy to take action against absent employees;
- 15.12. The requirement to undertake telephone calls;
- 15.13. The requirement to attend medical appointments outside working hours ;
- 15.14. The requirement for employees to answer questions about health issues at any time;
- 15.15. The practice of discussing performance issues on a return to work from sickness absence;
- 15.16. The requirement for employees to meet allocated Key Performance Indicators (KPI's);
- 15.17. *The requirement to work for a male team leader;*
- 15.18. *The requirement to work in the ARC Contact Admin Team*

16. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:
- 16.1. Each of these PCPs increased the claimant's anxiety and could act as trigger points, making the claimant unable to attend work; or complete work satisfactorily;
 - 16.2. By reason of his medical condition the claimant reacted badly to criticisms of his performance, either negative or constructive, it would lower his self esteem and make it difficult for him to believe that he was capable of the demands made of him;
 - 16.3. The claimant found it very difficult to deal with changes in the workplace including changes in management;
 - 16.4. The claimant finds socialising with others very difficult ;
 - 16.5. The claimant finds it difficult to trust people and it takes him a long time to be able to talk and relate to managers and work colleagues;
 - 16.6. The claimant is unable to talk about his mental health issues at any time as required by a manager or work colleagues;
 - 16.7. *The claimant was unable to work with a male team leader because of a history of sexual abuse by a male;*
 - 16.8. *The claimant was unable to return to work in the same department because of his complaints about the conduct of managers in that department which triggered his anxiety;*
17. Did the physical feature, namely the nature of the light in the building during winter months, put the claimant at a substantial disadvantage in comparison with persons who are not disabled, in that the winter light adversely affected his mood and ability to work effectively;
18. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
19. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
- 19.1. Following each of the recommendations made in the numerous OH reports including those of 15 August 2016, 23 March 2017, 24 July 2017, 30 January 2018 including:
 - 19.1.1. Allowing the claimant to bring into work a Seasonal Disorder Therapy lamp. This was recommended in the OH report dated 30

January 2018 but was not allowed until November 2019;

- 19.1.2. Allow the claimant to work at home. It was recommended by OH reports in 2017 and 2018 that the claimant should be allowed to work from home other than one day a week. This was not followed;
- 19.1.3. In times of change to provide the claimant with regular support/feedback/routine;
- 19.1.4. To give feedback on performance with the claimant in a positive way, avoid criticism;
- 19.1.5. Give the claimant regular 1-1 meetings as recommended in OH report 24/7/17;
- 19.1.6. Provide the claimant with a point of contact for support as recommended by OH report 23 March 2017;
- 19.1.7. Carry out a stress risk assessment and act on its conclusions as recommended by OH report of 23 March 2017;
- 19.1.8. Allow the claimant time away from his desk/duties in work time to practice meditation and/or make calls to helplines such as "Survivors" as recommended in OH report of 15/8/16 and January 2020;
- 19.2. Change the claimant's line manager, Matthew Ritson, as requested;
- 19.3. Stop Matthew Ritson calling the claimant while he was on sickness absence;
- 19.4. Provide managers and work colleagues with training/guidance as to how to talk to people with mental health issues;
- 19.5. Prevent managers and work colleagues from asking the claimant questions about his mental health at any time they chose;
- 19.6. Increase the absence trigger points for the claimant;
- 19.7. Amend the sickness policy to avoid threatening dismissal;
- 19.8. Do not hold sickness absence meetings during sickness absence;
- 19.9. Allow permanent home working;
- 19.10. Remove KPIs from the claimant;
- 19.11. Allow the claimant time out of work to attend medical appointments;
- 19.12. Stop call work for the claimant;

19.13. Give the claimant time to prepare answers to questions by emailing them to him before discussing them on the telephone or in the office.

19.14. *Appoint a female team leader for the claimant's team;*

19.15. *Redeploy the claimant to a different department*

20. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Victimisation under s27 Equality Act 2010

21. Did the claimant do a protected act .The claimant relies upon the following:

21.1. Formal grievance 11 January 2020;

21.2. *Formal Grievance April 2020*

22. Did the respondent subject the claimant to any detriments as follows:

22.1. *The conduct of the grievance hearings contrary to the respondent's own procedures and failing to address the grievance in a fair unbiased and proper manner;*

22.2. *each of the allegations of unwanted conduct set out at paragraph 3 above arising after 4 January 2020*

23. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?