



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Peter McCalam

v

Royal Mail Group Limited

Heard at: Cambridge

On: 27, 28, 29, 30 and 31 March 2023;
18 & 19 April 2023 (no parties in attendance)

Before: Employment Judge M Ord

Members: Ms A Brown and Mr C Grant

Appearances

For the Claimant: In person

For the Respondent: Mr P Chaudhry, Solicitor

RESERVED JUDGMENT

It is the unanimous decision of the employment tribunal that;

1. The Claimant suffered a single act of harassment on 24 August 2020, when Mr Robert Gould called him by telephone to ask him what was preventing him from working and what activities he was currently completing at home while absent through sickness. This is an act of harassment related to disability.
2. The remainder of the Claimant's complaints are not well founded and are dismissed.

REASONS

1. The Claimant was employed from 7 October 2019 until 7 October 2020 as a Postman. His employment ended by way of resignation.
2. Following a period of Early Conciliation which began on 19 October 2020, the Claimant received an ACAS Certificate dated 20 October 2020 and presented his claim form to the Tribunal on 19 November 2020.

3. In that claim form the Claimant brought complaints of:
 - 3.1 sex discrimination;
 - 3.2 disability discrimination; and
 - 3.3 race discrimination.
4. The Claimant stated that he was disabled by virtue of:
 - 4.1 a condition of the bowel (since approximately 2018);
 - 4.2 anxiety / depression (since approximately 2007); and
 - 4.3 a condition of the ankles (since March 2020).
5. On 5 May 2021, the Respondent conceded the Claimant was a disabled person by virtue of those conditions.

The Issues for Determination

6. A List of Issues was provided by the parties following a Preliminary Hearing before Employment Judge Laidler on 5 August 2021. There were 11 items on the Draft List of which Items 10 and 11 were referred to as “*not agreed*” as on the face of them they had not appeared in the Claimant’s claim form.
7. The Claimant was advised that if he wished to add those matters to the List of Issues for determination, he could apply to amend his claim but that if the Application was granted it might well be the case that the Respondent would require time to collate its evidence in relation to those two new matters which might require adjournment of the Hearing. The Claimant, on the first day of the Hearing, considered the matter and said that he did not wish to proceed with Items 10 and 11. Accordingly, the issues for determination by the Tribunal were as follows:
 - 7.1 Did the Claimant suffer race discrimination in early May 2020 when Alan Wiggs screwed up his face and said several times, “*I can’t understand you*”?
 - 7.2 Was it an act of direct sex discrimination when the Claimant was removed from driving duties from 21 May 2020 until the end of his employment on 5 October 2020? The Claimant relied on the comparator being “*Donna*” who also had had accidents but was permitted to resume her driving duties a few days later.
 - 7.3 Did the Claimant suffer unfavourable treatment for something arising in consequence of his disability, namely the Claimant’s bowel condition, on 22 July 2020 when he was prevented from accessing a toilet because he was refused access to the Respondent’s van?
 - 7.4 Did the Claimant suffer harassment related to his disability (bowel condition) contrary to s.26 of the Equality Act 2010 when Mattina Gough

allegedly made the comment "*I thought you had a bag*" (confusing the Claimant's colostomy bag with the incident in question)?

- 7.5 Did the Claimant suffer harassment related to his disability (mental health) contrary to s.26 of the Equality Act 2010 when he arrived for work on 23 July 2020 and was sent home for a "24 hour cooling off period"?
 - 7.6 Did the Claimant suffer harassment related to his disability (mental health) contrary to s.26 of the Equality Act 2010 when he was contacted by telephone and instructed not to attend work on 24 July 2020?
 - 7.7 Did the Claimant suffer harassment related to his disabilities (bowel condition and mental health) when he was contacted by Mattina Gough and asked to attend a (formal) behaviour / conduct meeting to discuss behaviour and standards?
 - 7.8 Did the Claimant suffer harassment related to his disabilities (bowel condition and mental health) when a (formal) behaviour / conduct meeting was held on 27 July 2020 for his alleged actions on 22 July 2020?
 - 7.9 Did the Claimant suffer harassment on 24 August 2020 related to his disability (mental health) when Mr Robert Gould called the Claimant asking him what he was doing whilst he was off work, and asking him what was preventing him from attending work?
8. In relation to Item (7) above, the parties did not agree whether the meeting was a formal or an informal meeting and the same issue arose in relation to Item (8). The Respondent said that it was an informal behaviours meeting, the Claimant said it was a formal conduct meeting.

The Hearing

9. The Claimant gave evidence. On behalf of the Respondent evidence was heard from four witnesses, namely:
 - Robert Gould (Customer Operations Manager);
 - Alan Wiggs (Relief Manager);
 - Rakesh Shah (Delivery Office Manager); and
 - Ian Lawton (Customer Operations Manager).
10. Mr Gould was said to be the person involved in Allegations (3), (8) and (9), Mr Wiggs in Allegation (1). Mr Shah conducted the Claimant's Grievance (which was dealt with after the Claimant's resignation) and Mr Lawton dealt with the Grievance Appeal.
11. Reference was made to a substantial Bundle of documents, including a separate Bundle of agreed transcripts of recordings of discussions between the Claimant and various individuals within the Respondent's undertaking, including Mr Gould, Mr Shah, Mr Lawton and Mattina Gough.
12. Ms Gough did not give evidence although she was the individual identified as being involved in Allegations (2), (3), (4), (5), (6) and (7).

The Facts

13. Based on the evidence presented to us, we have made the following findings of fact.
14. In his written statement, the Claimant referred to matters which pre-dated the issues before the Tribunal which began in early May 2020.
15. These included allegations of: harassment (relating to overtime hours being worked and timekeeping); what was stated to be “*complete disregard for duty of care or the law*” relating to the driving of a colleague; an allegation of “*ignoring abuse by colleague*” regarding the alleged behaviour of a colleague; being “*actively encouraged... to commit fraud*” relating to the delivery of a Special Delivery item; alleged failure to follow appropriate procedures regarding the Claimant’s van being struck by a Council vehicle from Daventry; and a “*total failure of duty of care*” when the Claimant slipped on a step whilst out on delivery causing a break of the fibula and left ankle.
16. None of these matters touched and concerned the issues that were before the Employment Tribunal. We have considered the information provided by the Claimant in his Witness Statement on these matters as background information, but they do not appear to the Tribunal to be relevant to any of the issues before it, nor has the Claimant explained their relevance.
17. The matters which concern the Tribunal began in early May 2020.
18. On 20 May 2020, the Claimant was driving a van in the course of his duties when he collided with the wall of a garden at premises to which he was making a delivery. The vehicle required repair, in particular a new wheel to enable the Claimant to continue his work.
19. Mr Wiggs attended the scene. He felt that whilst there was in his view “*substantial*” damage to the vehicle and “*slight damage*” to the customer’s wall, there was no harm to any person and no immediate reason, in Mr Wiggs view, to take the Claimant off driving that day. He was allowed to continue his work.
20. The Respondent has a national agreement reached with the Communications Workers Union on the Road Traffic Accident Procedure which is signed and dated July 2012.
21. Under that Policy the following points are relevant:
 - 21.1 The Manager should commence the Report being an investigation process in a prompt manner and with completion normally within 7 days;
 - 21.2 The Investigating Manager should meet the driver within 24 hours of any road traffic accident and ask for a preliminary verbal account of the

circumstances relating to the accident to enable the basis assessment and to establish the facts;

- 21.3 In the event of an accident involving serious or fatal injury to a third party, or initial evidence that suggests the Royal Mail Driver was driving in a grossly reckless or negligent manner, the Line Manager may consider a precautionary removal from driving pending the completion of the investigation. Such action should only be taken in appropriate circumstances in order to protect the safety of employees, other road users and the general public;
 - 21.4 When a driver has been removed from driving on a precautionary basis and has not been found blameworthy, they will normally be reinstated to driving duties at the conclusion of the investigation. Where the outcome of the investigation has recommended one or more Training Interventions, reinstatement will be enacted once the action plans / interventions have been successfully completed and performance restored;
 - 21.5 A precautionary removal from driving for a prolonged period should be avoided and Managers should prioritise the allocation of Training Interventions ensuring timely deployment;
 - 21.6 After the initial Investigation there is a formal Investigation Process which begins with a formal fact finding interview (normally within two days) after which there are two possible outcomes, either the driver was not blameworthy or the driver was blameworthy;
 - 21.7 After the Investigation, Training Interventions are to be discussed and a meeting with the Investigating Manager; and
 - 21.8 Where there is a single blameworthy accident, the most effective intervention is to be selected and agreed as an Action Plan to be signed by the Driver and Manager and to be completed within 42 days of the accident occurring.
22. Mr Wiggs completed the Road Traffic Accident Form on the day of the accident. He reported the incident accurately and stated that the incident occurred when the Claimant,
- “drove onto a customer drive instead of parking the van in the road and walking to the house”.*
23. On the following day, 21 May 2020, the Claimant was suspended from driving by his direct Line Manager Ms Gough.
24. Ms Gough has not given evidence before us and there is no statement of evidence from her. Why she reached the decision that, notwithstanding Mr Wiggs’ view, the Claimant should be suspended from driving we cannot say. Mr Wiggs’ evidence was that the removal from driving was likely to have been done *“pending Driver Re-Training”* but there is no evidence of any Re-Training plan before us.

25. The Claimant attended a Fact Finding Meeting with Mr Alan Wiggs on 2 June 2020. During that discussion which was described by the Claimant as an informal discussion to establish what had happened on the day of the accident, the Claimant raised an allegation of racism against Mr Wiggs. In the agreed transcript of that discussion, which the Claimant had covertly recorded he said this,

“You know when you [slipped] in the office last week and all that stuff and you know, you making a joke about oh I can’t understand you, I can’t understand you and I says oh a little bit racist, you don’t mean any of that do you?”

26. Mr Wiggs replied,

“Do I fuck”

The Claimant replied,

“Right”

And Mr Wiggs said,

“Mate look, I give as good as I get”

The Claimant said,

“Right well I don’t give but maybe I should ay”

Mr Wiggs replied,

“There’s em... there’s a... there’s a few Scots I don’t, I don’t understand and Kevin Bridges is one of them”

To which the Claimant replied,

“There’s a few Scots that I don’t understand”

27. Mr Wiggs said that he had recently been to see Kevin Bridges and said,

“I love him he’s brilliant but by the time he’s said the joke and I’ve got it he’s onto the next one”

He further said,

“I get on well with everyone mate I really do. I give as good as I get you know me”

28. When the Claimant expressed concern about “all this” because he was new, Mr Wiggs said,

“Don’t be concerned, you know, you’ll be all right”

29. In his evidence before us, Mr Wiggs said that the Claimant could become irate (he described him as volatile) and in those circumstances his speech increased in pace and he could be difficult to understand.
30. Mr Wiggs' unchallenged evidence was that he had previously had to ask the Claimant to slow his speech down because he was talking too fast. Mr Wiggs had suffered a stroke in 2016 which he said continued to impact on his memory and how he processes and filters information, including understanding language particularly when people talk too quickly. Mr Wiggs denied discriminating against the Claimant, or harassing him on the grounds of his race as a Scot.
31. Mr Wiggs stated that he may not have been able to clearly make out what the Claimant was saying on occasion, but when he had done this he had not appeared to be offended or raised any issue with Mr Wiggs.
32. We find as a fact that the reason why Mr Wiggs told the Claimant that he could not understand him was because the Claimant was speaking rapidly which created a problem for Mr Wiggs based on his medical condition. We find as a fact that this had happened on previous occasions and the Claimant had been asked to slow down his speech, without any problem.
33. We note that the conversation with Mr Wiggs is one of the few about which the Claimant complains which he does not have a recording / transcript of.
34. The Claimant had previously suffered an accident at work on 29 February 2020, causing him to break his left leg and ankle. He claims that he was not put on light duties and also complains in his evidence that when suspended from driving initially, he was put on difficult delivery "walks".
35. Those matters are not part of the issues about which the Claimant complains in these proceedings. In May to July 2020 the Claimant suffered absences from work, referencing a "fracture" but it was not made clear to us precisely what that related to.
36. By 22 July 2020, the Claimant was back at work.
37. At this time the country was in the throws of the Coronavirus pandemic. Social distancing rules were in place and the Respondent says this had impacted on its ability to arrange and carry out Driver Re-Training so that the Claimant was still suspended from driving.
38. The Claimant could not challenge that evidence (other than to point to alleged disparity and treatment between himself and Donna). We are therefore bound to accept the Respondent's position that Driver Re-Training which involved being "on the road" with the driver under Re-Training could not take place. Mr Shah subsequently referred to on-line Training which could be used in certain circumstances, but the matter remained in the discretion of the Line Manager (Ms Gould). We deal with the issue of direct sex discrimination using the comparator Donna below.

39. On 22 July 2020, the Claimant was carrying out his duties delivering mail when he had an urgent need to use a toilet. The Claimant says this was due to his proctalgia (which is he says a consequence of his bowel surgery) which he stated can cause severe pain when he has a full bladder and makes it difficult for him to control his bladder.
40. The Claimant rang a colleague whose van was nearby (Kevin) to ask where there was an available toilet. Kevin suggested a garage which the Claimant felt was too far away, but he did not make, insofar as we were told, any further enquiry or request of Kevin.
41. The Claimant then rang the office to speak to Ms Gough who did not take his call, but Mr Gould rang the Claimant back promptly. Mr Gould suggested walking to the office which the Claimant said would have been too far away and the Claimant asked if he could not drive the van back to the office. Mr Gould suggested the Claimant go to Tesco which was nearby, but the Claimant said that was also too far away.
42. According to the Claimant, Mr Gould then asked,
- “What do you want us to do?”*
- and the Claimant replied,
- “I am asking you what I can do”*
- and said,
- “I am by the van, can I come back in the van?”*
43. The Claimant’s request to use the van was refused because the Claimant was still suspended from driving, as he well knew.
44. Mr Gould then suggested walking into the Town Centre which was nearby, or alternatively, he would collect the Claimant and bring him back to the office. The Claimant refused this offer because he said it would be contrary to social distancing rules. Mr Gould said,
- “Okay, how do you want to do it then?”*
- At which point the Claimant hung up.
45. On the Claimant’s evidence he began to walk to the nearest toilet (the garage), but did not get there in time and wet his trousers.
46. The Claimant says he continued to walk to the garage to clean up and then walked back to the office. He says that he told Ms Gough that he needed to go home because he had had an accident. He allegedly

showed Ms Gough his wet trousers and according to the Claimant Ms Gough replied,

"I thought you had a bag".

47. The Claimant explained that he had a colostomy bag (but not an ileostomy) whilst showing Ms Gough his trousers.
48. According to the Claimant's evidence he contact his GP who signed him off work with stress. However, the medical records do not show any consultation with his General Practitioner on 22 or 23 July 2020.
49. Rather, the Claimant contacted the GP by telephone on 30 July 2020 complaining of stress relating to feeling bullied and because he was carrying out a long walking route and referred to his having crashed a Royal Mail van. He did not mention, according to the GP's note, the issue on 22 July 2020.
50. The General Practitioner issued the Claimant with a fit note saying that he was unfit for work from 29 July 2020 to 8 August 2020 on the stated ground of, *"stress at work"*.
51. We found as a fact that the Claimant did not contact his General Practitioner on 22 July 2020 and that when he did, on 30 July 2020, he made no mention at all of the incident of 22 July 2020 or any of the subsequent events of that day about which he complains.
52. The Claimant also complains that when he attended work on 23 July 2020, the day after the accident, he was told by Ms Gough to take the day off as a *"cooling off period"*. The Claimant says he was then contacted early on 24 July 2020 and told he could also take that day off from work. The following day, 25 July 2020 which was one of the Claimant's days off, he was contacted and told to attend a meeting with Ms Gough on his next working day, 27 July 2020.
53. The Claimant complains of the following matters:
 - 53.1 The refusal to allow him to drive a van back to the office on 22 July 2020, which the Respondent says did occur because the Claimant was suspended from driving and further that the Respondent offered the Claimant an alternative of a lift from Mr Gould;
 - 53.2 That the comment by Ms Gough to the Claimant that, *"I thought you had a bag"* was an act of harassment relating to the Claimant's disability (bowel condition);
 - 53.3 That being told that he did not need to attend work on 23 and 24 July 2020, were acts of harassment relating to his mental health disability; and

- 53.4 That when he was asked to attend the meeting on 27 July 2020, this was a further act of harassment relating to the Claimant's disabilities of bowel condition and mental health.
54. According to the Claimant, the meeting on 27 July 2020 was a formal disciplinary meeting. According to the Respondent it was an informal meeting to discuss behaviours. We accept the Respondent's evidence in this regard. There was no suggestion in any of the documents which we have seen, or any of the evidence that was given, to indicate that there was any formal action being taken at the time or that the Claimant was at risk of any disciplinary sanction or punishment.
55. We prefer the Respondent's evidence to that of the Claimant in this area because the Claimant's description of this meeting simply does not accord with the transcript of the meeting which was agreed between the parties based on a covert recording which the Claimant made at the relevant time.
56. According to the Claimant's evidence, at this meeting he was told that showing Ms Gough his wet trousers was unacceptable. However, according to the transcript of the meeting, there is no mention whatsoever of the incident on 22 July 2020 or any aspect of it. The Claimant has not indicated that the recording was partial, or that there was any other meeting with Ms Gould.
57. The meeting begins with a short complaint from the Claimant about his not receiving payment of petrol money and the bulk of the meeting relates to the Claimant's refusal to deliver to a specific address and the claimant's claiming to have been threatened and to have had a vehicle driven at him by a customer.
58. The refusal to deliver to a particular address was the only aspect of the Claimant's conduct which is discussed at the meeting. The remainder of the meeting involved the Claimant complaining about his being suspended from driving and an allegation that Ms Gough refusing to allow the Claimant to drive was an act of discrimination. At that stage the Claimant said that it was an act of discrimination based on his ethnicity, rather than anything to do with his gender.
59. No disciplinary or other action was taken against the Claimant at this time or at all, other than his continued suspension from driving.
60. The Claimant was then absent from work from 29 July 2020, submitting fit notes identifying 'stress at work' as the cause of his absence, until his resignation on 7 October 2020.
61. We find as facts that:
- 61.1 When Ms Gough made the comment (which we accept she made) "*I thought you had a bag*", this was confusion in her mind between a

colostomy and an ileostomy. She was seeking to understand why the Claimant had suffered the problem that he had.

- 61.2 That the instructions to the Claimant not to work on 23 or 24 July 2020, were due to the problems the Claimant had suffered on 22 July 2020. In his own evidence the Claimant describes a substantial level of distress. The alleged harassment on those dates relate to the Claimant's mental health disability. We find as a fact that the issues related in fact to the Claimant's problem with bladder control, which he says are a consequence of his bowel surgery.
 - 61.3 That the meeting on 27 July 2020 was an informal meeting to discuss the issue around the Claimant's unwillingness to deliver to a particular address. There is no mention whatsoever of matters relating to either the Claimant's bowel condition, the incident of 22 July 2020 or anything else which could relate to the Claimant's health condition. He said he felt threatened by a particular customer, alleged that he had had a vehicle driven at him (which was disputed by the Respondent) and the remainder of the meeting revolves around matters related to the Claimant's driving and his petrol expenses.
 - 61.4 At that meeting, there was no discussion whatsoever of the alleged actions on 22 July 2020 (i.e. showing Ms Gough his wet trousers).
62. In relation to the allegation that the Claimant's removal from driving duties (and / or his continued removal from driving duties up to the end of his employment) was an act of direct discrimination when compared to his counterpart "Donna", we have heard no direct evidence regarding Donna's situation, the accident(s) she was apparently involved in, how they compared to the accident involving the Claimant, how long she was suspended from driving for, when and whether she undertook Driver re-Training before resuming Driver duties.
 63. The best evidence in relation to the relevant decision comes from the record of the meeting on 27 July 2020 between Ms Gough and the Claimant. On that day she told the Claimant that the reasons why she was treating the Claimant differently from Donna Cole was because he had less than one year's service. She described the Claimant as a "trialist" and said that whilst Covid remained it was at her discretion as to whether or not to allow the Claimant back to driving. She highlighted that the Claimant had caused damage to a "white vehicle" (i.e. one hired to rather than owned by the Respondent).
 64. During the Covid pandemic Driver Training was, according to Ms Gough, placed on hold. Mr Wiggs, by contrast, told us that there was some online training which could be carried out, but we have seen no evidence relating to that during the course of this Hearing.
 65. The incident in question involved the Claimant driving his vehicle into a wall at the customer's driveway while he was driving onto the driveway. According to the evidence we have heard the Claimant should not have

driven onto a customer's driveway in any event, but should have parked on the side of the road and clearly was at the very least negligent in his driving by colliding with a wall.

66. The Respondent rightly accepted that the reasons given for the continued suspension from driving were not considerations in the agreed Road Traffic Accident Policy which the Respondent had negotiated with the Communication Workers Union. However, the reason given by Ms Gough to the Claimant on 27 July 2020 for his continued suspension from driving (that he was a trialist) clearly does not relate to his gender and we find as a fact that that was the reason (however ill judged, the genuine reason) why the Claimant was continually suspended.
67. We further note that the Claimant was absent from work for a considerable part of the period in question. The incident occurred on 20 May 2020, he was suspended from driving on 21 May 2020, suffered an incident relating to his disabling bowel condition on 22 May 2020, did not work on the 23 or 24 May 2020, thereafter, was absent from work (on the basis of what we have been told) until mid July 2020, suffered the incident relating to his not accessing a toilet on 22 July 2020, did not work 23, 24, 25, 26 July 2020 and attended a meeting on 27 July 2020. He was absent from work from 29 July 2020 until his resignation.
68. Accordingly, the opportunity for the Claimant to undertake Driver Re-Training (and the number of days he was at work between the date he drove his vehicle into a wall and the date of his resignation) was very limited indeed.
69. The final matter about which the Claimant complains in these proceedings was on 24 August 2020 when he was contacted by telephone by Mr Gould. There is also a transcript of this discussion which the Claimant had covertly recorded. Although the transcript is said to be undated, the agreed position is that this discussion took place on 24 August 2020.
70. The reason why Mr Gould rang the Claimant was because of a referral appointment (to Occupational Health to take place by telephone the previous Friday 21 August 2020) where the Claimant had apparently not participated or had not given consent in relation to the Report to be produced after the Consultation.
71. The Claimant advised Mr Gould that he had participated in the call, did not understand what was meant by consent, said that the telephone line had gone dead three times during the call and that he had got a little bit upset at the end of the call and the telephone went dead and the Occupational Health physician did not call back. He denied withdrawing consent to complete the Consultation. There was an agreement that a fresh referral for a Telephone Consultation would be put in place.

72. Thereafter, Mr Gould said,

“Can I ask what is preventing you from working at the minute, please?”

73. The Claimant referred Mr Gould to the Claimant’s sick note and Mr Gould said,

“Stress at work, okay”

and continued,

“what activities are you currently completing at home?”

74. The Claimant asked why this was being asked when it was on his sick note and whether Mr Gould was questioning the Doctor’s opinion.

75. When Mr Gould said he was not challenging the Doctor’s opinion, the Claimant asked why Mr Gould was asking him saying,

“It’s on the sick note, why have you got to ask me? Why are you asking me what’s preventing me coming to work when it’s on my sick note”

To which Mr Gould replied,

“Okay I am just asking”

76. The Claimant questioned whether this amounted to bullying and harassment which Mr Gould denied and when the Claimant asked,

“well why are you asking me, it’s on my sick note”

Mr Gould replied,

“okay, we’ve got that cleared up then, it’s on your sick note”

The Claimant said,

“You knew it was on my sick note”

And Mr Gould said,

“Err okay”

77. When the Claimant advised that he had handed his sicknote to Mr Gould, he replied,

“Okay so we’ve got it on your sick note then ok. Are you completing any activities at home?”

The Claimant replied,

“I beg your pardon?”

And Mr Gould repeated,

“Are you completing any activities at home?”

The Claimant replied,

“Look I’m off sick at the minute for stress at work and you’re causing me more stress at the minute.”

Mr Gould said,

“Okay”

And the Claimant said,

“If there is a procedure or precedence for this then you’ve got to explain that to me and if there isn’t I have finished talking with you”

Mr Gould replied,

“Okay no problem, what we will do is we will send you in for a referral and get them to ring you back again. Is that okay?”

And the Claimant confirmed that it was.

78. Notwithstanding that this transcript was available to the Respondent (indeed had been prepared by the Respondent’s Solicitors) Mr Gould’s evidence about this call was as follows,

“On 24 August 2020 I telephoned Peter regarding his Occupational Health appointment, as we had a report that he did not participate in the call. It is also usual to keep in touch with staff on sick leave to ensure we can support them.

I asked Peter standard questions such as confirming what was preventing him from working (he had issues with mental health and his ankle) and if he could complete activities at home.”

Mr Gould went on to say,

“In no way was I bullying or harassing Peter. I was simply following a process of calling to firstly establish why he had apparently withdrawn consent for Occupational Health and secondly to check in with him in line with Policy.

In light of the above I strongly deny that I discriminated against Peter as he alleges, or at all.”

79. The evidence from Mr Gould clearly accepts that he was aware that the Claimant had issues with mental health. The Claimant had been absent from work with identifying “*stress at work*” since 29 July 2020 and Mr

Gould accepted that at the time of the telephone call he had sight of the Claimant's fit note.

80. The Claimant raised a Grievance which was dealt with by Mr Shah and thereafter appealed the outcome of the Grievance, the Grievance Appeal was conducted by Mr Lawton.
81. Although during the course of the proceedings the Claimant was critical of the length of time the Grievance had taken to be considered, he had not made any complaint in these proceedings regarding the conduct of the Grievance. The Grievance Investigation did take an inordinate amount of time. The Grievance was raised formally on 24 August 2020 and the outcome was not received until 19 July 2021. Mr Lawton dealt with the Appeal. The Appeal was lodged on 19 July 2021 and the decision was sent on 18 October 2021. The points raised by the Claimant in his Grievance were not upheld. We have said, however, there is no criticism of or reference to the Grievance process or outcome in these proceedings.
82. It is against that factual background that the Claimant brings his complaints.

The Law

83. Under the Equality Act 2010,
 - 83.1 s.6 confirms disability as a protected characteristic;
 - 83.2 s.13 provides, a person discriminates against another if because of a protected characteristic they treat that person less favourably than they treat or would treat others;
 - 83.3 s.26 provides, a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them;
 - 83.4 s.26(4) provides, in deciding whether the conduct has the effect referred to above, each of the following must be taken into account –
 - a. the perception of the person allegedly harassed;
 - b. the other circumstances of the case; and
 - c. whether it is reasonable for the conduct to have that effect.
84. We have been referred by the Respondent to the following Authorities:
 - 84.1 Naiser v NHS England & Anr. [2016] IRLR 170, which set out the test for a complaint of discrimination because of something arising because of disability (the Claimant does not pursue that claim in these proceedings);

- 84.2 Gardener v Chief Constable of West Yorkshire Police & Anr. ET/1807082/13, stating that s.26 of the Equality Act 2010 has two requirements, namely that the Respondent engages in unwanted conduct related to disability and secondly that the conduct has the purpose or effect of violating the dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. That case states that the Tribunal must take into account the Claimant's perception, the circumstances of the case and whether it is reasonable for the conduct to have that affect.
- 84.3 Patel v Lloyds Pharmacy UK EAT08418/12, a case involving direct discrimination where it was stated that the disability itself must be the conscious or subconscious reason for the treatment and there must be some evidence that the employer knew of the disability. In the relevant case the EAT upheld an Employment Tribunal's decision to Strike Out a claim of direct disability discrimination where there was no evidence to suggest that those who interviewed the Claimant had any knowledge (actual or imputed) of the Claimant's condition even though another employee did know of it.

Conclusions

85. Apply the facts found to the relevant Law, we have reached the following conclusions.
86. The Claimant has not satisfied us on the balance of probability that in early May 2020 Mr Wiggs screwed up his face and said several times, "*I can't understand you*" as an act of race discrimination.
87. The Claimant made no complaint or comment about this at the time and did not raise it in any way until 2 June 2020 when he attending a fact finding meeting with Mr Wiggs regarding the Claimant having driven a van into a customer's wall on 20 May 2020.
88. The Claimant said on 2 June 2020 that in May 2020 when Mr Wiggs said, "*oh I can't understand you, I can't understand you*" the claimant alleged this was "*a little bit racist*".
89. On 2 June 2020 the conversation between Mr Wiggs and the Claimant included Mr Wiggs stating that there were "*a few Scots I don't, I don't understand and Kevin Bridges is one of them*" and the Claimant replied, "*there's a few Scots that I don't understand*".
90. Mr Wiggs told us that the Claimant could become irate and in those circumstances his speech increased in pace and could be difficult to understand. Mr Wiggs' unchallenged evidence was that he had, on previous occasions, had to ask the Claimant to slow his speech down because he was talking too quickly. Mr Wiggs had suffered a stroke in 2016 which, on his evidence before us, was said to continue to impact on

his memory and how he processes and filters information including understanding language in particular when people talk too quickly.

91. Mr Wiggs accepted that he may not have been able to clearly make out what the Claimant was saying on occasion, but when he had done this the Claimant had not appeared to be offended or raised any issue with Mr Wiggs.
92. We have found as a fact that the reason why Mr Wiggs told the Claimant could not understand him was because he was speaking rapidly which created a problem for Mr Wiggs based on his medical condition. This had happened on previous occasions and the Claimant had been asked to slow down his speech without any problem.
93. Many of the conversations which the Claimant complains about were (covertly) recorded by him, but this one was not. We are satisfied on the balance of probabilities on the information before us that Mr Wiggs was having difficulty in understanding the Claimant because of the speed at which he was talking and because Mr Wiggs had difficulty processing information / speech at that speed. In those circumstances, we accept Mr Wiggs' statement that he was not discriminating against or harassing the Claimant on the grounds of his race as a Scot, but rather because due to the speed of the Claimant's delivery Mr Wiggs was having difficulty understanding him, reasonably so based on his medical situation.
94. The Claimant was involved in an incident whilst driving on 20 May 2020.
95. There were no other vehicles involved, the Claimant was driving onto the driveway of a customer's house to deliver an item of post when he collided with the customer's garden wall. This caused damage to the vehicle (and some apparently superficial but inconsequential damage to the customer's wall).
96. Mr Wiggs completed the Road Traffic Act Accident form on the day of the accident, reporting the incident accurately and said that the incident had occurred when the Claimant,

"drove onto a customer drive instead of parking the van in the road and walking to the house."
97. The Respondent has a national agreement with the Communication Workers Union on the Road Traffic Accident Procedure. The important points are that an investigation should be complete normally within seven days, the investigating Manager should meet the driver within 24 hours of any road traffic accident (which Mr Wiggs did in this case); in the event that the initial evidence suggests the Royal Mail Driver was driving in a grossly reckless or negligent manner, the Line Manager may consider a precautionary removal from driving pending completion of the investigation and that when a driver has been removed from driving on a precautionary basis and has not been found blameworthy, they will normally be

reinstated to driving duties at the conclusion of the investigation. If the outcome recommends one or more training interventions, reinstatement will be enacted once the action plan / interventions have been successfully completed.

98. It is also said that where there is a single blameworthy accident the most effective intervention is to be selected and agreed as an action plan to be signed by the driver and Manager and completed within 42 days of the accident occurring.
99. The Claimant was suspended from driving on 21 May 2020 by his direct Line Manager Ms Gough. She has not given evidence before us, but Mr Wiggs' evidence was the removal from driving was likely to have been done "*pending driver re-training*".
100. We have not seen any re-training plan.
101. The Claimant was then absent from work in May and June 2020, returning to work on 22 July 2020.
102. By this time the country was suffering in the face of the height of the Coronavirus pandemic. Social distancing rules were in place.
103. We are satisfied by the Respondent's evidence that Driver re-Training was at this stage out of the question because of social distancing rules. Driver re-Training would involve being "*on the road*" with the driver so that it could not take place.
104. Mr Shah, on his evidence, referred to online training which could be used, but that remained in the discretion of the Line Manager. There is no complaint in these proceedings that the on-line training should have been used.
105. The Claimant's allegation is that his continued suspension from duty until his employment ended in October 2020, was an act of sex discrimination relying on a comparator ("Donna") who also had accidents but was permitted to resume her driving duties a few days later, according to the Claimant.
106. Ms Gough confirmed during a meeting with the Claimant on 27 July 2020, that she was treating the Claimant differently from Donna Cole (when the Claimant raised this point) because first of all he did not have a year's service and she considered him as a "*trialist*" and that as Covid was going on the matter remained in her discretion. Further, she highlighted that the Claimant had damaged a vehicle which was hired to (rather than belonging to) the Respondent.
107. Whilst the Respondent, in closing submissions, frankly accepted (as they had to) that the stated reasons for not allowing the Claimant to return to driving were not relevant considerations in line with the Road Traffic

Accident Procedure, they disclose Ms Gough's rationale or reasons for continuing the claimant's suspension from driving and they did not relate to gender.

108. Further, during the investigation into the Claimant's Grievance, Ms Gough confirmed that due to the Covid pandemic Driver Training / re-Training was placed on hold until May 2021.
109. Accordingly, whilst the reasons given for not allowing the Claimant to resume driving were outside of the Road Traffic Accident Procedure, we do not find that it was due to gender and thus not discriminatory as alleged. Whilst Ms Gough had made references to the Claimant's behaviour and attitude which she considered not in line with the Respondent's expectations, including incidents when she advised Mr Shah who was conducting the Claimant's Grievance that the Claimant was inappropriate in his behaviour and often rude and oppressive towards her, there is no evidence that this is a gender based decision. This complaint therefore fails. The claimant has not established on the balance of probabilities that his continued suspension from driving was an act of sex discrimination. The reasons were, primarily, because he had been employed for less than one year and was thus, in Ms Gough's mind "a trialist" and because driver re-training could not be carried out during the pandemic..
110. The Claimant complained that he suffered unfavourable treatment contrary to s.15 of the Equality Act 2010 because of something arising in consequence of his disability (his bowel condition) on 22 July 2020, when he was prevented from accessing a toilet because he was refused access to the Respondent's van also fails.
111. On that day the Claimant was carrying out his duties delivering mail when he had an urgent need to use a toilet which he says was due to his proctalgia (said to be a consequence of his bowel surgery), which he said can cause severe pain when he has a full bladder and makes it difficult for him to control his bladder.
112. A colleague advised the Claimant where the nearest toilet was when he made enquiry by mobile telephone, but the Claimant felt this was too far away. When the Claimant rang the office, Mr Gould returned his call to suggest that the Claimant walked back to the office or alternatively, to go to a nearby Tesco. The Claimant said that both of those were too far away.
113. According to the Claimant, Mr Gould asked what the Claimant wanted the Respondent to do, to which his reply was, "*I am asking you what I can do*" and asked if he could use the van to return to the Depot. That was refused because the Claimant, as he well knew, was still suspended from driving.

114. When Mr Gould suggested the Claimant either walked into the nearby Town Centre, or alternatively offered to collect the Claimant and bring him back to the office, this was refused because the Claimant said accepting a lift from Mr Gould would be contrary to social distancing rules. When Mr Gould asked how the Claimant therefore wanted to deal with the issue, the Claimant hung up.
115. The Claimant's complaint is that he was prevented from accessing a toilet. In truth his complaint is that he was not allowed to drive the van. There were toilets nearby. We have not been given any information as to the distance involved, nor why the Claimant was able to in his view access the van and drive to the Depot and there use the lavatory more quickly than he could return to a nearby shop, find a lavatory in the Town Centre or otherwise find a public lavatory.
116. The Claimant was not prevented from accessing a toilet. He was prevented from driving the van which was the only solution to the situation that he was willing to consider.
117. Further and in any event, Mr Gould did not know of the Claimant's bladder condition at the time. The Claimant made no reference to it on that day or at any time before the incident and the first time the Respondent and Mr Gould in particular became aware of the condition, was on 24 August 2020 when the Claimant disclosed it during a discussion on the telephone that day.
118. Further, when the claimant disclosed his medical condition prior to commencing employment with the Respondent on 25 September 2019, he did not indicate that there could be incidences where he required access to a toilet urgently and confirmed that his medical condition did not require any reasonable adjustments and stated that it did "*not affect [his] ability to work*" and that he did not need any special requirements.
119. Denying the Claimant access to the van was not because of his bowel condition or because of anything arising because of it. It was because he was suspended from driving.
120. The Respondent did not know and could not reasonably have been expected to know, that the Claimant had an urgent need to use the lavatory because of any disabling condition and further and in any event, the reason why he was unable to access the van (all other proposed solutions being rejected by the Claimant) to access a lavatory was because he was suspended from driving and for no other reason.
121. Accordingly the complaint that the claimant suffered discrimination because of something arising from disability when he was denied access to a toilet fails.
122. Later that day when the Claimant returned to the Depot (on his evidence he had begun to walk to the nearest toilet but did not get there in time and

wet his trousers, whereafter he cleaned himself up and walked back to the office), the Claimant advised Ms Gough as his Line Manager that he needed to go home because he had had an accident. When showing Ms Gough his wet trousers, Ms Gough allegedly replied, "*I thought you had a bag*" and the Claimant explained that he had a colostomy bag but not an ileostomy whilst showing Ms Gough his trousers.

123. The Claimant's complaint is that the phrase, "*I thought you had a bag*" was an act of harassment relating to his disability (a bowel condition).
124. In the same way as Mr Gould could not have known about the Claimant's proctalgia bladder condition, nor ought he reasonably to have known about it, the same applies to Ms Gough.
125. On the balance of probabilities we are satisfied that the reason why Ms Gough raised the question of a bag was because she did not understand how the Claimant had come to suffer his accident as she mistakenly believed that the colostomy bag would prevent the type of situation from which the Claimant had suffered.
126. We do not find that the comment, "*I thought you had a bag*" had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Nor do we believe that it reasonably could be considered to have the effect of creating such an atmosphere or violating the Claimant's dignity. The comment was a reasonable and innocent one as we are satisfied that Ms Gough did not understand, nor could she reasonably understand on the basis of the information she had at the time, how the Claimant had suffered the incident in question as she reasonably believed that the colostomy bag which the Claimant wore was designed to prevent such an incident. In that she was mistaken, but we do not find that the statement / question could reasonably have caused the effect required by s.26 of the Equality Act 2010. For those reasons this claim fails.
127. The next complaint brought by the Claimant was that on the following day, 23 July 2020, he was sent home for a 24 hour "*cooling off period*", which he says was an act of harassment related to a mental health disability.
128. At this time the Respondent did not know, nor could it reasonably have been expected to know, that the Claimant suffered a mental health disability.
129. The first time that the Respondent could have been aware that the Claimant suffered from a mental health condition that could amount to a disability was when he submitted fit notes from his GP referring to stress at work. The first time the respondent was aware that the Claimant suffered from depression was when the Occupational Health Report of 7 September 2020 was provided.

130. Although the Claimant had previously raised issues regarding his interactions with other colleagues at work, there is nothing in these issues which pointed towards the Claimant suffering a mental health disability.
131. In any event, we conclude on the balance of the evidence before us, that the reason why the Claimant was told not to work on 23 July 2020 was because of the incident on 22 July 2020 and the difficult interaction which had taken place between himself and Ms Gough that day. The Claimant had not explained to us how it had either violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.
132. The Respondent, in its submissions, suggested that it would in fact have the opposite effect and avoid the Claimant attending work in circumstances which might be offensive for him. We are satisfied on the information that has been provided to us that the conduct did not relate to the protected characteristic of mental health and did not have the purpose or effect referred to in s.26(1)(b) of the Equality Act 2010, and for those reasons the complaint fails.
133. The Claimant says that he suffered harassment related to his mental health disability, when he was contacted by telephone and told not to attend work on 24 July 2020. The same comments apply and relate to the decision to send the Claimant home on 23 July 2020. This did not relate to any mental health disability, such disability was not and could not reasonably have been known to the Respondent at the time and they could not reasonably have known about it and in the circumstances of the case it was not reasonable for the conduct to have the effect complained of in any event.
134. The Claimant complains that he suffered harassment relating to disability (bowel condition and mental health) when he was asked to attend a formal conduct meeting to discuss behaviour and standards on 27 July 2020.
135. We have found as a fact this was not a formal disciplinary meeting or a formal conduct meeting under any process within the Respondent's undertaking. There was no suggestion in any of the documents we have seen or any of the evidence that was presented to us, to suggest that there was any formal action being taken or that the Claimant was at risk of any formal action being taken against him.
136. Further, the Claimant complains that he suffered harassment related to his disabilities by the meeting on 27 July 2020 due to his alleged actions on 22 July 2020.
137. The Claimant made a covert recording of this meeting. It simply does not accord with the Claimant's evidence in relation to this meeting.
138. The Claimant says that at the meeting he was told that when he showed Ms Gough his wet trousers on 22 July 2020, that was unacceptable.

139. The transcript of the meeting, however, makes no mention at all of the incident on 22 July 2020 or any aspect of it. In fact, the meeting begins with a complaint from the Claimant himself about not receiving payment of petrol money and the remainder of the meeting is about the Claimant's refusal to deliver to a specific address and his claiming to have been threatened by a customer and having had a vehicle driven at him.
140. Accordingly, the meeting was neither a formal conduct meeting, nor was it related to the Claimant's alleged actions on 22 July 2020.
141. For those reasons the Claimant did not suffer harassment either when being asked to attend the meeting, nor during the meeting, nor by virtue of the fact of it being held.
142. The Claimant's final complaint is that he suffered harassment related to his disability (mental health) when Mr Gould called the Claimant asking him what he was doing whilst he was off work and what was he doing that was preventing him from attending work.
143. By this time the Respondent was in possession of the Claimant's fit notes. He had been absent from work since 29 July 2020, identifying "*stress at work*" as the cause of his absence.
144. By this stage, therefore, the Respondents were in possession of knowledge that the Claimant was suffering some form of mental health problem.
145. Given that the Claimant had been absent from work for four weeks with a condition which related to mental health and had complained on previous occasions about interactions at work, we are satisfied that Mr Gould ought to have been aware of the likelihood of the Claimant suffering a mental health disability,
146. We are conscious that the conduct in question, for the purposes of s.26 of the Equality Act must *relate to* a relevant protected characteristic (which need not be possessed by the complainant) and adding to that the knowledge which Mr Gould had of the nature of the cause of the Claimant's absence, we find that Mr Gould's comments when he asked the Claimant "*can I ask what is preventing you from working at the minute please?*" when he knew because he had sight of the Claimant's fit note that he was absent due to stress at work and secondly when he asked him, "*what activities are you currently completing at home?*", which we find was a statement redolent of distrust and implied that the Claimant was fit to carry out activities notwithstanding his absence from work through illness, was an act of harassment. It related to a relevant protected characteristic (mental health disability), violated the Claimant's dignity and created a hostile, humiliating or offensive environment for him.

147. We are reinforced in this view by the fact that notwithstanding that the transcript of the telephone call between Mr Gould and the Claimant (which had in fact been prepared by the Respondent's Solicitors) was available Mr Gould's evidence was in contradiction to the agreed transcript of the call. Mr Gould claimed that he had asked the Claimant,

"standard questions such as confirming what was preventing him from working (he had issues with mental health and his ankle) and if he could complete activities at home",

saying that he was,

"following a process of calling firstly to establish why he had apparently withdrawn consent for Occupational Health and secondly, to check in with him in line with Policy".

148. In fact, Mr Gould asked, *"what is preventing you from working at the minute please"* and when the Claimant referred Mr Gould to his sick note Mr Gould said, *"stress at work, okay"* demonstrating that he knew what was the cause.

149. Mr Gould had not asked the Claimant whether he was capable of carrying out any (presumably work related) activities at home, although we are bound to say that nothing has been put before us to suggest that there were any work related activities which the Claimant could carry out at home. He asked, *"what activities are you currently completing at home?"*

150. When the question about the reason for absence was challenged by the Claimant, Mr Gould replied, *"okay I am just asking"* and later, *"okay we've got that cleared up then, it was on your sick note"* and when the Claimant said that Mr Gould knew this Mr Gould replied, *"err, okay"*.

151. When Mr Gould asked if the Claimant was completing any activities at home, the Claimant, after the question was repeated, said that he was off with stress and was being caused more stress by the line of questioning.

152. All of this was subsequent to the apparent initial reason for the call, which was a misunderstanding regarding consent to attend an Occupational Health referral.

153. However, in his evidence before us, Mr Gould confirmed that he knew that the Claimant had *"issues with mental health and his ankle"* which lent support to our conclusion that this time Mr Gould knew that there was a mental health issue.

154. In submissions, the Respondent claimed that Mr Gould was seeking to offer support to the Claimant by understanding what types of activities he was able to perform at home and that his choice of words was, *"clumsy"*. We do not accept the suggestion that an act of harassment needs to be deliberate. It is sufficient that the harassing conduct is, to use the

Respondent's Representatives own word, "*clumsy*". However it cannot, on any reasonable understanding of the language used, be considered that Mr Gould was making an enquiry of the nature suggested by him in evidence and by the respondent in submissions.

155. Accordingly, we find that the Claimant suffered harassment relating to his mental health disability on 24 August 2020 when he was asked what he was doing whilst he was off work and what was preventing him from attending work.

Summary

156. The Claimant suffered harassment relating to his mental health disability on 4 August 2020, when Mr Robert Gould called him by telephone to ask him what was preventing him from working and what activities he was currently completing at home whilst absent through sickness.

157. The remainder of the Claimant's complaints are not well founded and are dismissed.

Employment Judge M Ord

Date: 25 May 2023

Sent to the parties on: 31 May 2023

For the Tribunal Office.