EMPLOYMENT TRIBUNALS

Claimant: Mr Warburton

Respondent: Openreach Limited

Heard at:	Manchester Employment Tribunal	**On: 18-27 September 2023 inclusive and 29 and 30 January 2024 (29 January 2024 in chambers)**
Before:	Employment Judge Childe	
	Mr Dodd	
	Ms Gilchrist	

JUDGMENT

REPRESENTATION:

Claimant: In person

Respondent: Mr Sheehan (Counsel)

1. The claimant's complaint that the respondent subjected him to harassment, as defined in section 26 Equality Act 2010, is not well founded and is dismissed.
2. The claimant's complaint that the respondent subjected him to direct disability discrimination, as defined in section 13 Equality Act 2010 is not well founded and is dismissed.
3. The claimant's complaint that the respondent subjected him to discrimination arising from disability, as defined in section 15 Equality Act 2010, is not well founded and is dismissed.
4. The claimant's complaint that the respondent failed to make reasonable adjustments, as defined in sections 20 and 21 Equality Act 2010 is dismissed on withdrawal.
5. The claimant's complaint that he was subjected to victimisation by the respondent, as defined in section 27 Equality Act 2010, is not well founded and is dismissed.
6. The claimant's complaint that the respondent made unauthorised deductions from his wages is not well founded and is dismissed.
7. The claimant's complaint that the respondent subjected him to a detriment, with the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union, as defined in section 146 Trade Union and Labour Relations (Consolidation) Act 1992, is not well founded and is dismissed.
8. The claimant's complaint that the respondent subjected him to a detriment done on the ground that the claimant was a representative of workers on matters of health and safety at work or a member of a safety committee, as defined in

section 44 (a) (b) (ii) Employment Rights Act 1996, is not well founded and is dismissed.

9. The claimant's complaints brought under sections 47, 61 and 62 Employment Rights Act 1996, are dismissed on withdrawal.
10. The claimant's complaints brought under sections 168, 169 Trade Union and Labour Relations (Consolidation) act 1992 are dismissed on withdrawal.
11. The claimant's complaints brought under the Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500) and Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)) are dismissed on withdrawal.

REASONS

Summary of case

13. The claimant brings complaints of disability discrimination, detriment arising from trade union activities and unlawful deduction from wages. These arise from the decision of the respondent to restructure its organisation, which commenced in January 2020. As a result of this restructure the role of operations manager was removed from the respondent's structure. The claimant held the role of operations manager prior to the restructure.
14. The claimant's case in summary is that he should have been moved into a grade E or D role within the respondent's new structure, without the need for interview. The respondent's position is that the claimant was unable to demonstrate at interview that he had the skills and experience to carry out a role grade D role and he was offered a grade E role, the patch lead role, without the need for an interview. The respondent's position is that the claimant rejected this role.
15. The claimant accepted a role within another part of the respondent's business, following a period of redeployment and remains in employment. He also continues to carry out facilities time in connection with his trade union activities in this new role.
16. The above is a short summary only of the claimant's complaints.
17. The tribunal spent the first two days of the final hearing clarifying and confirming the claims and issues in dispute.

18. For the reasons the tribunal gave orally at the time, the tribunal decided that the document entitled “appendix A the claimant’s complaints” which formed part of the record of the third and final preliminary hearing before Employment Judge Shotter on 23 August 2021 set out, in complete form, the claimant’s complaints. We shall refer to this document as Appendix A in this judgment.
19. This case had already been case managed in three separate preliminary hearings, prior to the final hearing. Unfortunately, it had not been possible to determine a final list of issues prior to the final hearing. As the tribunal went through the list of issues, the claimant provided further details about his complaints (such as providing relevant dates about when alleged matters had occurred) and he also withdrew some of his allegations.
20. The claimant had the opportunity overnight on the first day of the hearing to consider how he wished to advance his reasonable adjustments claim. On day two of the hearing the claimant withdrew his reasonable adjustment claim and his complaints brought under the Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500) and Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)). He agreed that these complaints would be dismissed on withdrawal.
21. A list of issues was produced and agreed by the parties, based on Appendix A.
22. On day two of the final hearing the claimant made an application to amend his claim, to reintroduce claims and issues that were not in Appendix A, including the reasonable adjustments claims that he had withdrawn earlier that day, and to add additional claims and issues. For the reasons given orally at the time this application was refused.

23. The tribunal explained to the parties that it would only determine those claims set out in the agreed list of issues. A short document containing the agreed list of issues was sent to the parties at the end of day two of the final hearing. We refer to the list of issues below when determining this case.

Agreed issued to be determined.

24. The agreed issues to be determined are as follows:

Time limits

1. *Given the date the claim form was presented and the effect of early conciliation any complaint about something that happened before 19 May 2020 (in respect of the First Claim) or before 8 November 2020 (in respect of the Second Claim) may not have been brought in time.*

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

    a. *Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?*
    b. *If not, was there conduct extending over a period?*
    c. *If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?*

3. *If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:*
    a. *Why were the complaints not made to the Tribunal in time?*
    b. *In any event, is it just and equitable in all the circumstances to extend time?*

Disability

4. *The respondent accepts the claimant had the disability of dyslexia, anxiety and depression at the material time.*

Harassment (s.26 Equality Act 2010 (EqA))

5. *Did the respondent do the following alleged things:*
    a. *Theresa Hyde not moving the Claimant's line management in January 2021.*
    b. *If so, was that unwanted conduct?*
6. *Was it related to disability?*
7. *Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*
8. *If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable to have that effect.*

Direct disability discrimination (s.13 EqA)

9. *Did the respondent do the following things:*

a. *Deliver a grievance outcome on 3.11.2020 was evasive and the grievance was not dealt with in a manner that resolved the issues.*

b. *The grievance outcome on 3.11.2020 did not take into consideration the effect of the claimant's disability and mental state (in particular, the STREAM Assessment).*

c. *Rehabilitation following long term sickness absence, occupational health support and a structured return to work were not provided between April and May 2020.*

d. *The outcome to the grievance appeal on 10 May 2021 was evasive, vague and did not answer the Claimant's questions.*

e. *In the Claimant's appeal, his request for a sabbatical and to move away from his working environment was ignored on or around January 2021.*

f. *Not "lifting and shifting" the claimant into a D grade or an E grade position between January 2020 and October and November 2020.*

10. *If so has the claimant proven facts from which the tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances – i.e. someone without the Claimant's impairment of dyslexia, depression and anxiety.*

11. *Was that less favourable treatment?*

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

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

c. *The claimant says he was treated worse than Peter Pearson in respect of allegation 9.f. In respect of the other allegations, the claimant has not named anyone in particular who he says was treated better than he was.*

12. *If so, has the respondent shown that the less favourable treatment was not because of the Claimant's disability?*

Discrimination arising from disability (s.15 EqA)

13. *Did the respondent treat the claimant unfavourably in the following alleged respects:*
    a. *In March 2021and April 2021 a performance related bonus was due which was not paid.*
14. *Did the following things arise in consequence of the claimant's disability?*
    a. *The Claimant's sickness absence from work between November 2020 and March 2021.*
15. *Did the respondent not pay the March and April 2021 bonus because of that sickness absence?*
16. *If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says its aims were:*
    a. *maintaining a bonus and performance incentive scheme which incentivises employee performance in role.*
17. *The Tribunal will decide in particular:*
    a. *Was the treatment an appropriate and reasonably necessary way to achieve those aims;*
    b. *Could something less discriminatory have been done instead;*
    c. *How should the needs of the claimant and the respondent be balanced?*

Victimisation (s.27 EqA)

18. *Did the claimant do a protected act as follows:*
    a. *Making the grievance on 22 June 2020.*
    b. *Making the grievance appeal on 10 November 2020.*
19. *Did the respondent do the following things:*
    a. *Theresa Hyde withdrawing the patch leader position on or around January 2021.*
    b. *Not being offered suitable alternative employment on 12 October 2020 and 12 November 2020 and throughout 2021 by Theresa Hyde and Ian Welsby.*
20. *By doing so, did it subject the claimant to detriment?*
21. *If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act?*
22. *If so, has the respondent shown that there was no contravention of section 27?*

Unauthorised deductions from wages

23. *Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?*
24. *This relates to the claimant not being paid a performance bonus in June 2021, which the claimant says would have been around £5,000.*

Detriment (Employment Rights Act 1996 section 44, TULRCA sections 146)

25. *Did the respondent do the following alleged acts or deliberate failures?*
    a. *The claimant was denied facility time for the disability and health and safety seats after October 2020.*

b. *The claimant was limited in his ability to take health and safety training and disability training by Theresa Hyde in December 2020 and January 2021which limited his promotional chances for health and safety management roles, which the claimant applied for in July 2020.*

c. *The Claimant was told that the patch lead role he was offered in December 2020/January 2021 was for a busy patch and could not include the additional 1.5 days facility time by Theresa Hyde.*

d. *The claimant was not allowed to remain in the position of project manager with Peter Pearson on the basis that they both worked their roles fifty percent with fifty percent facility time.*

e. *The claimant was unsuccessful in his job applications despite one role being a 90% match. The claimant has to provide information about job applications where 90% match, which occurred prior to serving of second ET1 (8.3.2021). The claimant will provide further details of this role, the relevant dates and people involved who rejected the claimant's application, to the respondent.*

26. Was the sole or main purpose of the respondent's conduct:

f. *Preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time. Appropriate time is a time within working hours where the respondent gave consent for trade union activity to be carried out. s.146(b) TUCLRA.*

g. *The claimant being a representative of workers on matters of health and safety at work or member of a safety committee, as acknowledged by the respondent. S.44 (1)(b)(ii) ERA.*

27. Did the Claimant reasonably see that act or deliberate failure to act as subjecting him/her to a detriment?

Introduction

25. We had access to an agreed tribunal bundle which ran to 1630 pages.
26. Witness evidence was provided by the claimant himself. From the respondent, we were provided with witness statements from Ian Welsby, Senior Area manager, Kate O'Keeffe, Senior HR manager and Theresa Hyde, Senior HR Business Partner.
27. The tribunal made several adjustments to the hearing to enable the claimant and Mr Sheehan, the respondent's representative, to participate effectively. These adjustments were made following discussion with the parties, and following a review of the guidance offered in the equal treatment bench book on making adjustments for individuals who are dyslexic and have autism and were agreed.
28. The tribunal held regular breaks, on at least an hourly basis. The tribunal was held remotely. On days six and eight the tribunal was held on the Microsoft teams' platform, rather than CVP. This was when the claimant was carrying out his cross-examination. A transcript was produced electronically by Microsoft teams' of what was said during the hearing. This was downloaded by the tribunal and sent to the claimant on the same day as it was produced, to assist the claimant by providing a note of the answers to his questions during cross examination. The tribunal confirmed on day five of the final hearing that the tribunal's note of the hearing would take precedence over the transcript produced by Microsoft teams'.

29. Mr Sheehan adjusted his cross-examination style. He introduced the topic that he intended to cross examine on. He did not ask the claimant to read through large parts of a document and comment on it, rather he read the questions himself. The claimant was allowed to use his Dragon software to read out cross examination questions and extracts from key documents. He asked short and straightforward questions. The tribunal gave explanations and instructions slowly, clearly and simply.
30. In reaching our findings of fact below, we have been careful not to treat misunderstandings on the claimant part as evasiveness or inconsistencies in his evidence as indications of untruthfulness.

Findings of fact

31. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point.

Background

32. The claimant commenced employment for the respondent on 5 November 1999. The claimant has held several different roles within the respondent's organisation and at the material time was employed as an operations manager. The operations manager role fell within the respondent's legacy reward structure. We find as a matter of fact that the operations manager role was an E grade role within the respondent's legacy reward structure. We have accepted Theresa Hyde's evidence on this point.

33. The claimant was also a trade union representative for the Prospect trade union and 20% of his working time was allocated to union duties. This was known within the respondent organisation as facilities time.
34. The respondent, Openreach is part of the BT group of companies and operates as the functional division of BT that maintains the telephone cables, ducts, cabinets and exchanges that connect nearly all UK homes and businesses to the national broadband and telephone network.

Restructure

35. In late 2019 the claimant was informed that the service line in which he worked was going to be restructured. Operations manager roles, including the claimant's', would be removed from the existing structure.
36. We find the restructure was a large change across the respondent's organisation. There was the risk of redundancy for people that didn't secure another role. We find that the respondent's selection governance process dated January 2020 did not apply to this restructure. We have decided this because in the introduction it states '*this guide sets out how BT will manage small-scale changes in business units. It should not be used to manage change where it is likely to result in a redundancy situation for our employees.*'
37. We find that the respondent's reorganisation/redundancy policy applied to this reorganisation. We do so because the introduction of the selection governance process states *'anyone involved in the process of consulting with employees who are at risk of redundancy or carrying out a selection process for those in a selection pool must contact ER for advice on the steps that should be taken*

(as the process is different from that which is set out in this document), see the reorganisation/redundancy policy for more information.'

38. We accept the respondent's evidence and find as a fact that the respondent decided to follow a process, as follows, in connection with the restructure.
    a. Existing operational managers would go through a process of interview for a grade D or E role under the new people framework reward structure, between approximately January 2020 and April 2020.
    b. Any operational manager who was not successful for a D or E role would be offered a patch lead role automatically, without the need for competitive interview. There were between 50 and 60 patch lead roles available. This was a team member role within the new people framework at a grade E level under the new people framework.
    c. If an operations manager was not successful in obtaining a grade D or E role and did not accept a patch lead role, they would go through a period of redeployment to find alternative work within the respondent's organisation.
    d. The respondent anticipated offering all patch lead roles on or before June/July 2020.
39. We have accepted the evidence of the respondent and find as a fact that the operations manager role was broadly equivalent to the patch lead role in terms of scope of duty and responsibilities. We have accepted Theresa Hydes evidence that both roles were grade E, under both the legacy reward structure and the new people structure.
40. We find as a fact that the claimant broadly had responsibility for 20 engineers as operations manager. There may have been specific times when he was

responsible for more reports, but overall, that was the usual number of engineers he was responsible for. If the claimant had accepted the role as a patch lead, he would have responsibility for a similar number of engineers. A patch lead would be responsible for the safety and performance of those engineers. This was also the case for an operations manager. If the claimant had accepted a patch lead role, he would have moved to a hybrid job code and would have maintained his pension and sick pay. He would have continued to work under the same terms and conditions. He would have maintained his existing salary and in addition would have had the opportunity to earn overtime.

41. Having said this, we do appreciate that the claimant's perception was that this role was a step down because it didn't have a manager title and was a team member role within the respondent's new people framework. However, the claimant's perception of the role did not change the fact that it was broadly equivalent to the operations manager role.

42. There is a factual dispute about whether the claimant was informed that he would automatically be offered the patch lead role, prior to June 2020. We do not need to resolve this as the claimant accepts that from June 2020, he was aware that he could accept the patch lead role, without interview.

Patch Manager role

43. We accept Theresa Hyde's evidence and find as a matter of fact that the patch manager role was a more senior role to the legacy operations manager role. It was a more strategic role which required more strategic thinking, rather than operational focus. It had greater responsibilities. It had a greater area of responsibility and a wider geographical reach. A patch manager would have a

team of between 35 and 45 team members. This is consistent with what the claimant was told on 18 March 2020 in an email from senior manager Mark Trelfa. It was a D grade role within the respondent's new structure and therefore one grade higher than the legacy operations manager role.

44. The claimant disagreed with this analysis. His perception was that the patch manager role was equivalent to the operations manager role. Whilst this may have been the claimant's perception, as a matter of fact it was incorrect. The respondent was in the best position to assess the similarities and differences between the two roles, not the claimant. We find the patch manager role was responsible for delivery from end to end, rather than just for a small part of the role.

45. Under the redundancy process followed by the respondent, the claimant was classed as an in-scope employee and therefore went through an assessment centre/selection process, to be considered for a patch manager position, along with all other in-scope employees.

46. The claimant, in common with all other in-scope employees, was provided with all the necessary information to enable him to prepare for the assessment centre.

47. We find that prior to the interview itself, the claimant did not inform either Theresa Hyde or his line manager Ian Welsby, that he required any adjustments to the assessment centre process.

48. On 28 January 2020 the claimant attended a competitive interview for the patch manager role.

49. We accept Theresa Hydes evidence (which was not challenged) that on the day of the assessment the claimant requested adjustments to the assessment

centre process. Those adjustments were granted, which included printing the information out on different coloured paper and allowing the claimant additional time to complete the exercise.

50. Unfortunately, the claimant was not successful in his interview for the patch manager role. We find the reason the claimant was not successful in securing this role was because he did not perform well enough in his interview. The claimant accepted this in evidence.

The claimant's role ceased on 31 March 2020

51. On 31 March 2020 the claimant's role of operations manager ceased to exist.
52. From 31 March 2020 the claimant moved to a 'job search' role. In practical terms this meant that the claimant's only role for the respondent during this period was to carry out job searches and apply for roles, to secure alternative employment with the respondent. The claimant became a priority employee at this time, which in practical terms meant that he had priority for any existing vacancies, over other colleagues within the respondent organisation who were choosing to look for alternative work. For 16 months, the Claimant was able to devote all his working time to searching for an alternative role. During this time, the claimant remained on full pay.

Claimant's illness March 2020

53. On 14 February 2020 the claimant undertook a STREAM assessment. The STREAM assessment is a stress assessment management tool that enables the respondent to assess the level of stress an employee feels at a given time. The answers provided in this assessment indicated the claimant stress rating

was red and was therefore high. A STREAM assessment was sent to Mark Trelfa and was dealt with by him.

54. On 27 March 2020 the claimant was absent from work. The statement of fitness for work, produced by the claimant's GP and provided to the respondent by the claimant, signed the claimant off work for a period of two months (until 27 May 2020). The reason for this was said to be stress at work, anxiety with panic attacks and depression. There was no recommendation made to the respondent that the claimant should have a phased return to work, or any other adjustments should be made during this period to enable the claimant to return to work.

55. We find as a matter of fact that Ian Welsby maintained regular weekly contact with the claimant during his period of sickness absence and that the claimant continued to look for work with the respondent during this period of sickness (from 27 March 2020 to 1 June 2022). We accept Mr Welby's evidence on this point as he was clear and honest in his recollection.

Training request April 2020

56. On 23 April 2020, whilst the claimant was absent due to sickness, he sent Ian Welsby an email in which he made a request for 24 separate types of training. We don't need to go into the detail of those requests, but some of them were very optimistic and some involved him carrying out training in completely different roles to his. For example, the claimant requested the respondent fund a bachelor's University degree in business and engineering and provide him with a professional HR qualification. The claimant did not, in this email, make a request for disability or health and safety training.

Developer relationship manager

57. On 27 May 2020 the claimant interviewed for the role of developer relationship manager. This was also a grade D role, which was one grade more senior to the claimant's operations manager role.
58. The claimant informed Theresa Hyde in advance that he wished to apply for this role and a significant number of reasonable adjustments were put in place, with agreement from the claimant, to enable him to effectively participate in this interview.
59. On 1 June 2020 the claimant was informed he was unsuccessful for the developer relationship manager role. We find the reason the claimant did not get this role was because he did not perform sufficiently well at interview.

Offer of Patch lead role

60. On 16 June 2020 Theresa Hyde emailed the claimant and offered him the patch lead role. The claimant was asked to let Theresa Hyde know that day if he wanted to accept the role or alternatively if he wanted to withdraw, to do so by the end of the week. The claimant was provided with a summary of the role and the relevant job advert, in this email.
61. The claimant responded by email later on that afternoon. The claimant said in his email that he *"[felt] very distressed to be put into a position where there is a variation to my contract of employment notwithstanding the detriment in being placed on me in that position on my mental health and well-being in creating a hostile environment which is degrading humiliating and violates my dignity as I have been a longstanding manager for many years and very*

successful it is not justifiable to place me into such a position as a team member grade to be the laughing stock of the company."

62. The respondent took from this email that the claimant did not want to be offered the patch lead role.

63. The claimant said in evidence to the tribunal that he was not withdrawing from the patch lead role. We heard evidence from Theresa Hyde that she considered the claimant was rejecting the patch lead role. We find as a matter of fact, given the contents of the claimant's email, and accepting the evidence of Theresa Hyde, that the claimant was withdrawing from the patch lead role at this time. Whilst we understood that the claimant's perception was he was not rejecting the role, it was clear to us that anyone reading the claimant's email would draw the reasonable conclusion that he was rejecting the role. The practical impact of this was the claimant did not accept the patch lead role in June 2020. In fact, we find he never accepted the role.

64. On 13 July 2020 Theresa Hyde sent an email to the claimant. In this email Theresa Hyde referred to the patch lead role. The claimant accepted in cross examination that the patch lead role was still available to him at this time.

65. In late December 2020 Ian Welsby still had a patch lead role available within the Blackfriars team, based in central Manchester.

66. On 4 January 2021 Pete Turner, employee relations specialist, wrote to the claimant setting out details of the patch lead role. The claimant had previously asked several questions about this role. These questions were answered by Pete Turner. The claimant was told who his direct manager would be, the salary that he would be paid (which was the same as his previous operations

manager role) and he was provided with various other responses to his questions.

67. One of the specific questions the claimant had asked was whether his 50% facility time with Prospect the union and the BT disability committee and the health and safety committee could be accommodated in the new role. The claimant was informed the respondent could not accommodate 50% facility time within this role. We find as a fact that this did not impact the 20% facility time which the respondent had already agreed to with the claimant. We accept Theresa Hyde's and Ian Welsby's is evidence on this point. They were honest and clear in their explanations on this point.

68. The claimant was asked to confirm whether he wished to accept the patch lead role, on or before 7 January 2021.

69. The claimant responded to Pete Turner by email on 11 January 2021, after the deadline for accepting the role had expired. The claimant said in his email that he did not possess the training or understanding of the technical abilities of the role to carry it out. The claimant maintained that the patch manager role was a similar job to the operations manager role.

70. The Claimant accepted in evidence that he had no interest in carrying out the patch lead role. The claimant accepted that he refused the role at the time. We find as a fact that the claimant refused the patch lead role on 11 January 2021 because he did not want the role. He gave evidence that he felt the role was beneath him.

Support from Theresa Hyde to enable the claimant to find alternative employment

71. We find that Theresa Hyde provided the claimant with a significant level of support in his attempts to find alternative work within the respondent, once he had rejected the patch lead role.
72. Theresa Hyde continued to try and source jobs for the claimant and scheduled regular catch-up calls with him. Theresa Hyde helped the claimant to write a CV.
73. During this time the claimant provided Theresa Hyde with details of the job applications he had made. Theresa Hyde contacted hiring managers responsible for filling the roles to ensure reasonable adjustments were put in place for the claimant. This involved ensuring the claimant was interviewed as a priority candidate, making sure the interviewers had copies of the claimant's disability passport and providing instructions to interviewers to inform them of the adjustments the claimant required. Theresa Hyde made sure the assessment structure for the relevant role was provided in advance and that information about the role was provided in an accessible format, including feedback sessions for any unsuccessful interviews. We have reached this conclusion because we found Theresa Hyde evidence on this point to be clear and honest and consistent with the documentary evidence.
74. From November 2020 the claimant accepted that he stopped telling Theresa Hyde about any job interviews he was applying for. For this reason, Theresa Hyde did not provide further support from this date to enable the claimant to carry out his job searches and attend interviews.

Claimant's search for alternative employment

75. We accept Theresa Hyde's evidence, which was not challenged, that the claimant applied for a high number of roles during his period of redeployment, many of which were unsuited to him. We have reached this conclusion because we found Theresa Hyde's evidence on this point to be clear and honest and consistent with the documentary evidence. For example, the claimant applied for grade B and C roles which were senior management positions. To put this into context, a grade B role was three grades above the claimant's operations manager role and a grade C role would be two grades above it. A grade B role was a director level role, and a grade C role was an area manager level role. We accept the respondent's evidence that the claimant did not have the requisite skills and experience for such roles. In addition, the claimant applied for several other roles, including senior roles, within the respondent HR department. The claimant had no qualifications as HR professional, nor did he have relevant experience. Again, these were more senior roles to his current role, being a grade D or even C role. The claimant accepted he applied for roles across the country, for example in Glasgow and Wales, and was rejected because of where he lived, which was Manchester. It is therefore not surprising that the claimant was not shortlisted for many of the roles he applied for, given he was unqualified for those roles and failed to meet the minimum criteria for many of those roles.

Interview for Project Delivery Professional role

76. On 14 September 2020 the claimant interviewed for the role of project delivery professional, a grade D role. Theresa Hyde had previously arranged for the claimant to undertake a secondment in this role, to give the claimant the opportunity to gain experience of the role and to demonstrate his capabilities before applying for a position that was due to become available in the Fibre City Team. This had taken place from 14 July 2020 for a period of 12 weeks. Several other adjustments were put in place by Theresa Hyde to enable the claimant to effectively participate in the interview. The claimant was not rushed. He was not required to write down questions. He was offered questions before the interview. He was able to have his notes to hand and he was not required to use the STAR technique, which stands for situation, task, action and result and was a method the respondent expected interview candidates to use when demonstrating their competencies for a role they were interviewing for.
77. The claimant was informed on 15 September 2020 that he was unsuccessful in the project delivery professional interview. The claimant accepted in evidence that he did not do well enough in this interview to get the job. We find this is the reason the claimant did not get the role.

Interview for Patch Manager role in Service Delivery Line

78. On 16 September 2020 the claimant interviewed for the patch manager role in service delivery line, a grade D role. Several adjustments were put in place to support the claimant in the interview for this role. These were agreed with the claimant prior to implementation. The claimant was provided with a

personalised selection pack with his own personal timetable for the day, with breaks built in. Rather than a normal interview process, the claimant was given a period of time to deliver a presentation and then a dedicated period of uninterrupted time to speak to set out his achievements and competencies for the role. The claimant was offered additional time to complete the interview. Whilst the interview process was initially scheduled to take place over two days, following the claimant's comments this was reduced to one day.

79. The claimant was informed that he was unsuccessful for the patch manager role in service delivery line role. We find the reason the claimant did not get this role was because he did not do well enough at interview. The claimant's scores were low for this interview.

Interview for open reach area manager role

80. The claimant applied for the role of open reach area manager on 17 September 2020, a grade D role. On 7 October 2020 the claimant was informed he was unsuccessful in this application. We find the reason the claimant did not get this role was because he did not do well enough at interview.

Union duties from 1 April 2020

81. We find as a matter of fact that from 1 April 2020 when the operations manager role ceased, there was an informal agreement between Ian Welsby and the claimant that he could carry out both union duties and his duties as a health and safety representative, whilst he was without a substantive role. The respondent's expectation was still that the claimant should spend this time looking for alternative work. The claimant accepted in evidence that he was

doing more union and health and safety work during this period. Ian Welsby gave evidence, which the tribunal accepted, that he had no issue with the claimant carrying out's union and health and safety work if he could fit this in and around his job searching duties. We found Mr Welsby's evidence on this point to be straightforward and honest. It was also common sense that the claimant would be able to carry out his union duties at this time, given he was only required to carry out job searches during this time.

82. On 13 October 2020 the claimant emailed Ian Welsby to explain that he had been elected as a disabled representative for Prospect the union. In this email the claimant requested his facility time be increased to 50%, from the 20% that was agreed by the respondent.

83. On 21 October 2020 Ian Welsby sent an email to the claimant in which he responded specifically to the request for increased facility time to 50%. Ian Welsby said to the claimant '*it was also raised that your union facility time may increase to around 40 to 50% of your working week. Your priority at this time should be to secure a permanent role- should this happen we can discuss the union role.*'

84. The claimant's evidence was he interpreted this as him been told by the respondent not to do **any** union work from the date of this email.

85. We find that the claimant misinterpreted what he was been told here. He was being told to focus his time on finding alternative work. He was not being told that he should not carry out the 20% facility time which had previously been agreed by the respondent. Indeed, given the informal arrangement in place with Mr Welsby, the claimant could have continued to carry out union duties alongside his job searches, whilst at the same time ensuring he prioritised his

job searches. The claimant was also being informed that the issue of facility time would be looked at again as and when the claimant found alternative work.

Job Share with Peter Pearson

86. On 12 November 2020 the claimant attended a second consultation meeting in connection with his redundancy, known as an IC2 meeting. The claimant was accompanied by Peter Pearson, project manager and trade union official from Prospect.
87. We find as a matter of fact that Peter Pearson was employed in a grade D project manager role. This is the type of role that the claimant had previously unsuccessfully interviewed for on more than one occasion.
88. Peter Pearson and the claimant suggested that the respondent allow the claimant to enter a job share role with Peter Pearson. The claimant accepted in evidence at this would involve creating a vacancy, which did not exist at the time.
89. We find that the claimant's proposal was for the respondent to create a role that didn't exist and then promote the claimant into a D grade role, which the respondent had previously found the claimant did not have the skills and experience to carry out.
90. The respondent considered the claimant's proposal and rejected it because no vacancy existed. We accept that the reason the respondent rejected this proposal was because no vacancy existed. We would add that we accept it would not have been appropriate for the respondent to promote the claimant into a D grade role which he had unsuccessfully interviewed for on several occasions previously.

91. On 17 November 2020 the claimant was absent from work due to sickness. The statement of fitness for work produced by the claimant's GP on that date signed the claimant off work due to sickness until 16 February 2021.
92. On 3 December 2020 Ricky Jones took over as duty of care manager for the claimant.
93. On 28 January 2021 Theresa Hyde refused the claimant's request for a sabbatical in HR because there were no vacancies available at the time.

Claimant's bonus March 2020 – April 2021

94. On 17 June 2021 Jenny Tingle, Prospect representative, raised the issue of the Claimant's bonus for March 2020 to April 2021. Jenny Tingle said Ian Welsby had not paid this due to the claimant's sickness absence and this was unfair because the sickness absence was connected to the claimant's disability.
95. On 18 June 2021 Ms O'Keefe, Senior HR Manager, responded to say the bonus could be nil if person not in substantive role for a year.
96. We find as a matter of fact that the reason the claimant was not offered a bonus during the period March 2020 to April 2021 was because the claimant did not have a substantive role. We accept Mr Welsby's evidence that he was not the one that decided the claimant should not be paid a bonus. We accept the position set out by Ms O'Keefe that an individual would not qualify for a bonus if they did not have a substantive role. Ms O'Keefe was not challenged by the claimant on this point. It seems to us a matter of common sense that if an individual's only role is to search for work within an organisation, in addition to

duties on behalf of the union, an employer could elect not to pay a bonus and this is exactly what happened in this case.

Grievance process

Grievance June 2020

97. On 22 June 2020 the claimant raised a grievance with the respondent. The grievance was a nine-page document, covering 57 numbered paragraphs. It had an appendix attached which ran to 105 documents in total.
98. On 8 July 2020 the claimant was absent from work due to sickness. A statement of fitness for work was completed by the claimant's GP and provided to the respondent which signed the claimant off work due to sickness until 8 September 2020.

Clarifying claimant's Grievance

99. On 28 July 2020 the claimant attended a grievance meeting with Andrew Hammerton, grievance officer. We find as a fact that this grievance meeting lasted two hours and 15 minutes and was designed to clarify the claimant's grievance. We find that most of the time was spent discussing the claimant's unsuccessful interview for the patch manager role in January 2020. The claimant accepted this in evidence.
100. Andrew Hammerton sent the claimant a note of the grievance discussion they had had, by email, on 30 July 2020. The claimant annotated those notes and sent them back the same day. We will refer to this as the 30 July 2020 Email

in this judgment. There was no reference in the notes to a STREAM assessment.

101. We find that the claimant made no reference to a STREAM assessment when discussing his grievance with Andrew Hammerton on 28 July 2020 or subsequently on 30 July 2020 when clarifying the nature of his grievance. We find that if this had been said, it would have been in the notes, or the claimant would have subsequently clarified it in the 30 July 2020 email.

102. Andrew Hammerton interviewed all of the key individuals the claimant complained about in his grievance (Mr Trelfa, Mr Welsby, Mr Knight and Ms Hyde), as set out in the 30 July 2020 email, in August and September 2020. The claimant accepted this in evidence.

Grievance outcome

103. On 3 November 2020 the respondent sent the claimant an outcome to his grievance

104. We have accepted the respondent's submission that Mr Hammerton, identified three complaint headlines, which were:

    a. appropriate provisions were not made in advance or during the interview process to allow for the claimant's disability;

    b. unfair treatment and insufficient support for the claimant provided during and after the interview process; and

    c. redeployment options and next steps were not properly available to the claimant as required, after the unsuccessful patch manager interview process.

105. We find that within each of the three complaint areas, Mr Hammerton drew out a number of specifics raised by the claimant.

106. We find that this was a reasonable summary of the claimant's key complaints at the relevant time.

107. We also accept the respondent's submission that Mr Hammerton reached a clear conclusion to each of these complaint areas. He concluded that:

    a. Information about the assessment centre was shared well ahead of time.

    b. Adjustments were in fact made during the assessment to provide the claimant with an adjusted view on different sized paper. Additional time was also allowed to give the claimant time to review and complete the data exercise and also during the competency questions.

    c. There was no evidence that the claimant was treated unfairly.

    d. Based on the various communications, meetings and calls prior to the assessment a consistent level of support was made available to all candidates in order to help with reasonable preparation.

    e. The claimant was offered the opportunity to take a patch lead role without interview and Theresa Hyde took time to organise for the claimant to have a temporary project role whilst he searched for an alternative permanent position.

    f. Mr Hammerton was satisfied that the decisions about whether or not the claimant passed the assessment for the patch manager role and the subsequent interview the claimant completed for the developer relationship manager role were objective and consistent.

    g. There was no evidence that the claimant had not been afforded access to opportunities following his unsuccessful application for the patch

manager role. Mr Hammerton was satisfied that the claimant had been treated as a preferred candidate where he has been a viable candidate for a role.

h. The claimant has received enhanced support from Theresa Hyde, supporting him during any applications, ensuring that all adjustments the claimant may want from potential interview processes happen and also in helping the claimant into a temporary project role while he searched for a separate permanent position.

108. The grievance outcome did not make specific reference to the claimant's STREAM assessment, but it did take into consideration the effect of the claimant's disability and mental state. The grievance outcome made specific reference to the reasonable adjustments implemented by the respondent, due to the claimant's disability and mental state, as set out in paragraphs 107.b and 107.h above.

109. On 10 November 2020 the claimant appealed against the grievance outcome. The grievance appeal was 20 pages long and consisted of 150 separate bullet points. Within the grievance appeal there was substantial reference to case law and primary legislation. We find, having reviewed this document, it was not clear which were new allegations requiring a separate grievance and which were points of appeal, arising from the original grievance outcome.

110. In this appeal the claimant did request a sabbatical to work within the respondent's HR team.

111. On 12 November 2020 Dawn Wardle, employee relations manager, replied to the claimant by email in connection with his grievance appeal. Ms Wardle asked the claimant to clarify which were his specific points of appeal, arising

from the original grievance outcome and which were new points that should be investigated. We find that this was a reasonable and sensible approach for the respondent to take to enable it to properly investigate the claimant's grievance appeal.

112. The claimant replied on 13 November 2020 and said '*what I would like to happen is for my employer to carry out another investigation and all the points on the original grievance to be rechecked and investigated with any supporting evidence*.'

113. We find that what the claimant was asking here was for the respondent to completely reinvestigate the original grievance.

114. The claimant never provided the clarity about his grievance requested by Ms Wardle.

115. By email dated 2 December 2020, Mr Melvin, the then-appeal manager, invited the claimant to a meeting to clarify his grievance, but the claimant declined, and asked not to attend any meeting, by telephone, video-link or in person, by reason of his mental health.

116. On 3 December 2020 Ms Wardle again sent an email to the claimant asking for him to clarify his appeal. The claimant did not provide the clarification requested. In evidence the claimant accepted that what he wanted was for the respondent to go through his appeal line by line and provide a response.

Grievance appeal outcome

117. On 10 May 2021 the appeal outcome was sent to the claimant by Allan Lane.

118. We find that Allan Lane conducted the grievance appeal in a thorough and careful way. We find that the appeal manager (first Mr Melvin and later Mr

Lane) had no opportunity to clarify the Claimant's appeal with him. The appeal manager, Mr Lane, never met the Claimant whilst dealing with his grievance appeal.

119. Although the claimant did not clarify those points in his grievance appeal which related to the grievance outcome and those which required a new grievance, Mr Lane decided it was appropriate to review the original complaint and consider additional points which he believed summarised the essence of the claimant's appeal. Mr Lane established seven key points of appeal. This included the claimant's original grievance complaint that he had been unhappy about the project manager and developer manager interview process. It also identified four additional points which were:

    a. whether inappropriate comments were made during the original project manager interview assessment;
    b. whether the claimant had been disadvantaged during the grievance process;
    c. whether there was a data protection breach in regard to a STREAM assessment; and
    d. whether the claimant have been given adequate support to help in finding alternative role.

120. We accept the respondent's submissions that Mr Lane reached a conclusion in relation to each of those categories as follows:

    a. The grievance had gone into detail explaining the process in place ahead of the assessment centre and the claimant had the opportunity to say he might struggle with some aspect of the assessment.

b. The grievance was carried out to a good standard highlighting the support the claimant received at the assessment centre.

c. The claimant was not disadvantaged during the interview process, he was offered support before the interview as well as on the day.

d. The original grievance was not conclusive about whether any inappropriate comments had been made, but Mr Lane had followed up with Mr Binks and concluded that no inappropriate comments were made.

e. The Claimant was not disadvantaged during the grievance process and it had not been a sham investigation.

f. Mr Trelfa informing Mr Welsby of the STREAM assessment was not a data breach, and he would have been negligent had he not shared his concerns about the claimant's health, but he should have explained to the claimant that he was going to do so.

g. the claimant had been given sufficient support to find an alternative role.

121. We find that this was an appropriate approach to take, in all of the circumstances.

122. Having established the scope of the grievance appeal, Mr Lane interviewed witnesses relevant to these allegations, including Sean Binks and Mark Trelfa.

123. We find that Mr Lane was in a difficult position, faced with a lengthy and convoluted grievance appeal which the claimant did not clarify either in writing or in a conversation, whether by telephone, video link or in person.

124. We accept the respondent's submission that that Mr Lane did his best to identify the key points of the claimant's appeal, and that he reached clear conclusions in relation to each of those points.

125. The grievance appeal was a direct and clear response to the claimant.

Claimant's new employment

126. On 13 August 2021the claimant was successful in applying for a technical professional role in BT Enterprise role.
127. The claimant commenced this role on 1 January 2022 with an agreed 20% facility time for his union work.

Relevant Law

Direct disability discrimination

128. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of disability than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.
129. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was. (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285)

130. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*)

131. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

132. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board* [2012] IRLR 870, SC.)

133. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

134. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

135. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

'*The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

Discrimination arising from disability

136. This claim is brought under section 15 of the Equality Act 2010.

137. In order for the claimant to succeed in his claims under section 15, the following must be made out:

a. there must be unfavourable treatment;

b. there must be something that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

Harassment

138. Section 26 of the Equality Act 2010 says,

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

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

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

(i) violating B's dignity, or

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

139. Where for the purpose of s.26(1)(b) the claim relies upon the 'purpose' of the alleged harassment this requires an analysis of the alleged harasser's motive or intention. Where the claim relies upon the 'effect' of the alleged harassment the test is both subjective and objective. The Tribunal should consider both the effect of the conduct from the Claimant's point of view and also whether it was reasonable of the Claimant to consider that the conduct had the required effect per *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336. See also s.26(4) Equality Act 2010.

140. It is not sufficient for the Claimant simply to prove facts from which the Tribunal could conclude that the Respondent could have committed an act of discrimination. The bare fact of a difference in treatment is not sufficient. The Claimant must also adduce evidence of the reason for the differential treatment (per *Madarassy v Nomura International Pld* [2007] IRLR 246 at paragraph 57).

Victimisation

141. Section 27 Equality Act 2010 says,

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

(a) B does a protected act, or

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

142. A detriment exists where a reasonable worker would take the view that treatment was to his detriment (*Ministry of Defence v Jeremiah* [1980] ICR 13), but detriment must be capable of being objectively regarded as such (*St Helens Metropolitan Borough Council v Derbyshire* [2007] ICR 841) and an 'unjustified sense of grievance' cannot amount to a detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).

143. The EAT has recently confirmed that the Shamoon principles apply equally to victimisations claims (*Warburton v Chief Constable of Northamptonshire Police* [2022] ICR 925).

144. The requirement that the detriment must be 'because of' the protected act applies the same test as under s.13 for direct discrimination (*Greater Manchester Police v Bailey* [2017] EWCA Civ 425). It requires a finding about the employer's motivation.

Trade Union Detriment

145. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA') says,

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so…

h. Section 44 of the Employment Rights Act 1996 ('ERA') says,

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) …

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) …

(ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

146. The Tribunal must consider whether the detriment was for a 'prescribed reason' under TULRCA or 'on the ground' prescribed by the ERA, both of which require consideration of the mental process of the Respondent (see *Harrow London Borough v Knight* [2003] IRLR 140). It is not sufficient to apply a 'but for' test to the facts.

147. Both section 44 ERA and section 146 the ERA claim, the prescribed reason must materially influence the Respondent's treatment of the Claimant (*Fecitt v NHS Manchester* [2012] ICR 372). For the TULRCA claim, it must be the "sole or main purpose".

148. Both section 44 ERA and section 146 TULRCA require at least a 'deliberate failure to act' and so cannot encompass an accident, oversight, or administrative error on the part of the Respondent.

149. Section 148 TULRCA provides that it is for the employer to show the sole or main purpose for which he acted or failed to act and s.48(2) ERA provides that it is for the employer to show the ground on which any act or deliberate omission was done. The burden is nevertheless on the Claimant to raise a prima facie case before there is any burden on the employer. Only once the prima facie case is made out, is it for the employer to show the purpose or his act or the reason for the dismissal. The burden of proof operates in the same way as under anti-discrimination legislation.

Analysis and conclusion

Issue 4: Disability

150. The respondent accepts the claimant had the disability of dyslexia, anxiety and depression at the material time.

Issue 5: Harassment (s.26 Equality Act 2010 (EqA))

Issue 5 (a) Did the respondent do the following alleged things: Theresa Hyde not moving the Claimant's line management in January 2021.

151. We find that Theresa Hyde did move the claimant's line management in January 2021.

152. The Claimant's evidence in his witness statement is that his union representative requested a change of duty of care manager in December 2020, from Mr Welsby.
153. We have found (at paragraph 92) that Ricky Jones took over as the claimant's duty of care manager before that, on 3 December 2020.
154. The claimant did not challenge Theresa Hyde's evidence on whether she refused to move his line manager in January 2021.
155. The claimant did not hold a substantive role in December 2020 or January 2021. We find that the claimant's effective management was changed from Mr Welsby to Mr Jones in December 2020. The 'duty of care' management Mr Jones provided was the only management that was relevant to the claimant.
156. Our overall conclusion is that there was a change in duty of care manager from Mr Welsby in December 2020 to Mr Jones.
157. As a result, we conclude it is factually incorrect to say *"there was no failure to move the claimant's line management at this time"*. We have found at paragraph 153 that this is exactly what did happen.
158. Having reached the conclusion that this allegation is factually incorrect, we therefore do need to consider whether the conduct was unwanted, whether it related to disability or whether it had the purpose or effect of violating the claimant's dignity as set out in issues 6, 7 and 8. This allegation fails.

Issue 9: Direct disability discrimination (s.13 EqA)

159. We turn to consider each of the direct disability discrimination allegations set out in the list of issues, in turn.

Issue 9 (a) Did the respondent deliver a grievance outcome on 3.11.2020 which was evasive and was the grievance not dealt with in a manner that resolved the issues?

160. The claimant has not established that the grievance outcome was evasive or that the grievance was not dealt with in a manner that resolved the issues. This allegation fails.

161. As we have found at paragraphs 99 to 106, Mr Hammerton took the time to identify the issues in dispute with the claimant and to clarify the nature of the claimant's grievance. He then set out to investigate that grievance, focusing on the core components of the grievance which were the interview and assessment process for the project manager role. Mr Hammerton interviewed the relevant witnesses to those issues and arrived at a conclusion.

162. The outcome was not evasive. Instead, as we have found at paragraph 107, it addressed the issues in dispute. The issues were resolved. Mr Hammerton didn't uphold the claimant's grievance. We accept that the claimant did not like the outcome of the grievance, but that is a very different matter to an allegation that the grievance did not resolve the dispute.

Issue 10: If so, has the claimant proven facts from which the tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances – i.e. someone without the Claimant's impairment of dyslexia, depression and anxiety

163. Whilst we don't need to answer this question, if we are wrong on our answer to issue 9 (a) above, we nonetheless conclude that the claimant has not shown that he was treated less favourably than someone without the claimant's

impairment of dyslexia, depression and anxiety, in this regard. We accept the respondent's submission that the claimant has advanced no explanation about why the grievance outcome was 'because of' his disability. The claimant only ever met Mr Hammerton once. There was no reason advanced by the claimant to suggest Mr Hammerton was motivated to subject the claimant to discrimination due to his disablity.

164. We find that an individual without the claimant's disability would have received a similar grievance outcome. In other words, an employee without the claimant's disability would have received a grievance outcome that was not evasive and answered the issues in question, following a full grievance investigation.

Issue 11: Was there less favourable treatment

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

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

165. No, there was not for the reasons we have set out in paragraph 163 above.

Issue 9 (b): Did the grievance outcome on 3.11.2020 not take into consideration the effect of the claimant's disability and mental state (in particular, the STREAM Assessment)?

166. We have found, in paragraph 108, that the grievance outcome did consider the claimant's disability and mental state. However, it did not consider the STREAM assessment. This first part of the allegation (that the grievance

outcome did consider the claimant's disability and mental state) therefore fails. We go on to consider there remaining issues in respect of the second part of the allegation (that the grievance outcome did not consider the STREAM assessment).

Issue 10: If so, has the claimant proven facts from which the tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances – i.e. someone without the Claimant's impairment of dyslexia, depression and anxiety

167. Not in connection with the claimant's disability and mental state. Yes, in connection with the STREAM assessment. The claimant had asked for the STREAM assessment to be dealt with in his written grievance and this had not been dealt with.

Issue 11: Was there less favourable treatment

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

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

168. Not in connection with the claimant's disability and mental state. Yes, in connection with the STREAM assessment.

Issue 12: If so, has the respondent shown that the less favourable treatment was not because of the Claimant's disability?

169. Yes, the respondent has shown that the less favourable treatment was not because of the claimant's disability. We find that the grievance outcome on 3 November 2020 did not consider the claimant's STREAM assessment because, whilst the claimant did raise the STREAM assessment in his written grievance, he did not raise it in the subsequent discussions he had with Mr Hammerton to clarify his grievance, in the 30 July 2020 email. The reason the grievance outcome did not take into account the claimant's STREAM assessment was because the claimant did not identify it as one of the key matters to be considered as part of his grievance and not because of his disability.
170. In conclusion, the respondent has shown that the reason for the treatment, under this allegation, was not in any way because of the Claimant's disability. The second part of this allegation (that the grievance did not consider the STREAM assessment) therefore fails.

Issue 9 (c) Did the respondent not provide rehabilitation following long term sickness absence, occupational health support and a structured return to work between April and May 2020?

171. Yes, the respondent did not provide rehabilitation following long term sickness absence, occupational health support and a structured return to work between April and May 2020.

Issue 10: If so, has the claimant proven facts from which the tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances – i.e. someone without the Claimant's impairment of dyslexia, depression and anxiety

172. No, the claimant has not.

173. The reason the claimant was not offered occupational health support and a structured return to work between April and May 2020 was because the claimant was signed off sick from work from 27 March 2020 and 27 May 2020. Neither he nor his GP suggested a structured return to work was necessary.

174. There is no evidence to suggest that Mr Welsby, or any other employee, was motivated by the Claimant's disability to not provide him with this support during the period April and May 2020. The claimant did not put this allegation to Mr Welsby. This allegation therefore fails.

Issue 11: Was that less favourable treatment?

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

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

175. Whilst we don't need to answer this question, if we are wrong on our answer to issue 10 above, we nonetheless conclude that the claimant has not shown that there was less favourable treatment.

176. The claimant did not hold a substantive role during the period April and May 2020. We have already found his substantive role came to an end in March 2020. His only role at this stage was to find alternative employment. There was therefore no substantive role to rehabilitate the claimant back into. We have found at paragraph 55 that the claimant continued to search for alternative work during April and May 2020. We conclude that the claimant did not need any rehabilitation from the respondent, following his period of long-term sickness, to carry out his only role at this time, which was to search for alternative work. He was able to do so, despite being on long term sickness absence.

177. If we are wrong on that point, we find any other employee in the circumstances would have been treated the same. The claimant's disability was not a factor in not providing occupational health support or a return to work during this period. The reason the claimant was not offered the support was because the information available to the respondent was the claimant was not well enough to return to work during this period. Any other employee would have been treated the same in these circumstances.

Issue 9 (d): Was the outcome to the grievance appeal on 10 May 2021 evasive, vague and did not answer the Claimant's questions?

178. No, the grievance appeal outcome was not evasive or vague as we have already found in paragraphs 124 and 125 above. This part of the allegation is therefore factually incorrect and fails.

179. However, we find that the grievance appeal outcome did not answer all the claimant's questions, as set out in his grievance appeal.

Issue 10: If so, has the claimant proven facts from which the tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances – i.e. someone without the Claimant's impairment of dyslexia, depression and anxiety

180. Turning to deal specifically with the failure to answer the claimant's questions.

181. Whilst the grievance appeal did not answer all of the claimant's questions, as set out in his grievance appeal, the reason was because the claimant never clarified, despite being invited to do so on numerous occasions (as set out in paragraphs 111 to 116 above), which points related to the grievance outcome and which were new allegations which should be raised as a new grievance.

182. We have found in paragraph 124 that the respondent did its best, in the absence of any clarification from the claimant, to identify the relevant part of the grievance appeal and investigate it. Indeed, the respondent identified four additional points which it considered to be relevant to the grievance appeal.

183. We find that an employee without the claimant's disability who had raised a similarly wide-ranging appeal, which contained new allegations that ought to be raised as a separate grievance and who did not clarify the nature of the grievance, would have been treated the same as the claimant. This allegation therefore fails.

184. Given our answer to issue 10, we do not need to go on and address issues 11 and 12. However, if we are wrong about whether the claimant was subjected to less favourable treatment in connection with the grievance appeal outcome, we conclude that there is no evidence to suggest that Mr Lane did so because of the claimant's disability. We have found that Mr Lane, the appeal officer,

never met the claimant. No explanation is given by the claimant as to why Mr Lane is said to have acted 'because of' his disability.

Issue 9 (e): Did the respondent, in the Claimant's appeal, ignore his request for a sabbatical and to move away from his working environment on or around January 2021?

185. This allegation is factually incorrect and therefore fails. Rather than ignore the claimant's request for a sabbatical in January 2021, Theresa Hyde considered the request for a sabbatical in HR and refused it because there were no vacancies in the HR Department at that time as we have found at paragraph 93 above.

Issue 10: If so, has the claimant proven facts from which the tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances – i.e. someone without the Claimant's impairment of dyslexia, depression and anxiety?

186. No the claimant has not. We find that anyone else requesting a sabbatical in HR would have had a sabbatical refused if there were no vacancies in the HR Department at that time.

Issue 11: Was that less favourable treatment?

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

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

187. If we are wrong on that issue 10, we would add that the claimant was already on a form of sabbatical in January 2021. As we have found, his only role at this time was to find alternative employment. He did not hold a substantive role with the respondent. It therefore cannot be said, in our judgment, to be less favourable treatment to not offer the claimant a sabbatical in circumstances where to all intents and purposes he was already on a sabbatical at that time.

Issue 12: If so, has the respondent shown that the less favourable treatment was not because of the Claimant's disability?

188. If we are wrong on point 11, we conclude that the respondent has shown that treatment of the claimant was not because of his disability. We accept the respondent's submission that the reason the Claimant was not transferred into HR was because there was no vacancy in HR.

189. There is no evidence to suggest that that a hypothetical comparator who was also on redeployment and was similarly unqualified but did not have the claimant's disability would have been treated differently to the claimant.

Issue 9 (f): Did the respondent not "lift and shift" the claimant into a D grade or an E grade position between January 2020 and October and November 2020?

190. The respondent did offer to lift and shift the claimant into a grade E role. We have found at paragraphs 60 and 66 that the claimant was offered the grade E patch lead role without an interview. By offering the claimant the grade E patch lead role this had the effect of placing him into a grade E role under the respondent's new structure. This had the effect of "lifting and shifting" the claimant into a grade E role under the new structure. This part of the allegation therefore fails as it is factually incorrect.
191. The claimant refused that role which is why he did not move into this role, but we find that he was offered this role without interview.
192. The claimant was not lifted and shifted into a D grade position.

Issue 10: If so, has the claimant proven facts from which the tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances – i.e. someone without the Claimant's impairment of dyslexia, depression and anxiety

193. It was not less favourable treatment to offer the claimant the grade E role of patch lead, given we have found that this is an equivalent role to the role he was previously carrying out. As we have found in our factual findings, the role was the closest match in the respondent's new structure to the claimant's operational manager role.
194. The claimant has also failed to establish how it was less favourable treatment to lift and shift him into a grade D role. We have accepted that the respondent

formed the reasonable view, based on an objective and fair interview process, that the claimant did not have the necessary skills and experience to carry out a grade D role. We have found that the grade D role was one grade higher than the role the claimant did. It cannot, in our view have been less favourable treatment to put the claimant into a role that he was assessed as incapable of performing. This would only serve to add to any stress or anxiety he was suffering. This allegation therefore fails.

Issue 11: Was that less favourable treatment?

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

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

c. The claimant says he was treated worse than Peter Pearson in respect of allegation 9.f In respect of the other allegations, the claimant has not named anyone in particular who he says was treated better than he was.

195. If we are wrong on point 10 above, we find that the claimant was not treated worse than Peter Pearson, his named comparator in connections with this allegation, by not being offered a grade D role.
196. The reason the claimant wasn't offered a grade D role was because he did not perform well enough at interview to be appointed to this role as set out in paragraphs 50, 59, 77, 79 and 80 above.
197. We find that Peter Pearson was not a relevant comparator because:

a. he was in a different role within a different team and not subject to the same restructuring as the operations managers; and
b. he was a part-time employee with BT. He worked a full 50% of his working time with the union.
c. The claimant advanced no evidence to suggest that Peter Pearson was in a similar situation to him i.e. was similarly assessed as not being appointable to a grade D role, but was nevertheless offered such a role.

Issue 12: If so, has the respondent shown that the less favourable treatment was not because of the Claimant's disability?

198. If we are wrong on point 11, we conclude that the respondent has shown that treatment of the claimant was not because of his disability. We have accepted the respondent's evidence that the reason the claimant was not offered a grade D role without interview was because they genuinely believed the claimant was not capable of performing such a role.
199. The respondent had established that the claimant was previously working in a grade E role. This was one grade below grade D role. In the circumstances, we are satisfied that it is logical respondent not to offer the claimant a grade D role under the new structure without interview.
200. As we have said at paragraph 196, the claimant was not offered a grade D role due to his performance at interview. The claimant had the opportunity but failed to demonstrate the necessary capabilities to perform in the role.
201. We therefore conclude that the respondent has established disability played no part in the claimant's treatment in connection with this allegation.

Issue 13: Discrimination arising from disability (s.15 EqA)

Issue 13 (a): Did the respondent treat the claimant unfavourably in the following alleged respects: In March 2021and April 2021 a performance related bonus was due which was not paid.

202. We find that the claimant was not paid a performance related bonus in March 2020, for the period March 2020 April 2021. This is capable of being less favourable treatment.

Issue 14 (a): 14. Did the following things arise in consequence of the claimant's disability? The Claimant's sickness absence from work between November 2020 and March 2021.

203. We also find that the claimant's absence from work between November 2020 and March 2021 was due to his disability.

Issue 15: Did the respondent not pay the March and April 2021 bonus because of that sickness absence?

204. No, the respondent did not. We find at paragraph 96 that the reason the respondent did not pay the March and April 2021 bonus was because the claimant was without a substantive role and therefore did not have any performance objectives to be measured against, rather than because of his sickness absence. We have accepted the contemporaneous documentary evidence of Kate O'Keeffe about the reason why the bonus was not paid to the claimant. This evidence was not challenged in cross examination.

205. We would add that this explanation is consistent with the bonus plan guidelines, which contain a specific process for calculating a personal bonus

by reference to an assessment of an employee's personal achievement of their pre-determined goals. The claimant was without a substantive role for the entirety of the bonus and therefore it was logical that he did not receive a performance related bonus during this process.

206. Having reached this finding, this allegation fails and we do not need to consider whether the respondent's treatment of the claimant was a proportionate means of achieving a legitimate aim.

Victimisation (s.27 EqA)

Issue 18 Did the claimant do a protected act?

207. We find that the claimant did do the following protected acts:

    a. Making the grievance on 22 June 2020.

    b. Making the grievance appeal on 10 November 2020.

Issue 19 (a) Did Theresa Hyde withdraw the patch leader position on or around January 2021?

208. Yes, she did.

Issue 20: By doing so, did it subject the claimant to detriment?

209. No, it did not. We have found at paragraph 70 that the claimant didn't want the patch lead role. The withdrawing of a role the claimant never had any intention of accepting cannot be a detriment in our judgment. This allegation therefore fails.

210. We therefore do not need to go on and consider issues 21 and 22. However, if we are wrong on issue 20, we nonetheless conclude that the Theresa Hyde withdrew the patch lead job offer in January 2021 because the claimant refused to accept it and the respondent needed to fill the vacancy, and not because the claimant had done a protected act.

Issue 19 (b): Did Theresa Hyde and Ian Welsby not offer the claimant suitable alternative employment on 12 October 2020 and 12 November 2020 and throughout 2021?

211. The respondent offered the claimant suitable alternative employment, in the form of the patch lead role, repeatedly from June 2020. As we have found in our factual findings, the role was the closest match in the respondent's new structure to the claimant's operational manager role. All the claimant's terms and conditions would be preserved, including pay and pension. In our view, on an objective analysis, the claimant was offered suitable alternative employment by Ian Welby and Theresa Hyde during this time. Whilst subjectively the claimant took the view that the role was a demotion, we find that this was incorrect due to the similarities of the role to is operational manager role and the preservation of all his terms and conditions and benefits.

Issue 20: By doing so, did it subject the claimant to detriment?

212. No, it did not. It is self-evident that offering the claimant suitable alternative employment, as we have found, did not subject him to a detriment. This allegation therefore fails.

213. We therefore do not need to go on and consider issues 21 and 22. If we are wrong on this point, we find the respondent has presented clear non-

discriminatory evidence to explain why the claimant was not offered suitable alternative employment: because he was unsuccessful at interview for the roles he applied for (see paragraphs 50, 59, 77, 79 and 80 above) and because he applied for a significant number of roles that were completely unsuited to his skill set and experience (see paragraph 75 above). As we have found at paragraph 74, Theresa Hyde could not provide the claimant with further support after November 2020 to find alternative work, because the claimant did not inform her of the vacancies he was applying for.

Issue 23: Unauthorised deductions from wages

Issue 23: Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

214. The respondent did not make unauthorised deductions from the claimant's wages. The claimant had no contractual entitlement to be paid a performance bonus in June 2021, for the reasons we have set out in paragraph 96 above. We find the respondent had a contractual right to not pay a bonus to the claimant, during the time he did not hold a substantive post with the respondent. This allegation therefore fails.

Issue 25: Detriment (Employment Rights Act 1996 section 44, TULRCA sections 146)

215. We turn to consider each of the detriment allegations set out in the list of issues, in turn.

Issue 25 (a) Was the claimant was denied facility time for the disability and health and safety role after October 2020?

216. No, we find that the claimant was never denied facility time by the respondent for the disability and health and safety role after October 2020. The reason for this is as follows:

a. The claimant misinterpreted the respondent's email on 13 October 2020 in which he was told by Ian Welsby to focus on finding alternative work as an instruction not to carry out facility time for the respondent, as we have set out in paragraph 85.

b. The claimant had a specific right to carry out 20% of his time as facility time. The claimant accepted this.

c. The claimant was told that once he found a permanent position the respondent would look at any additional facility time that could be offered to him. The claimant accepted this.

d. There was an informal understanding between the claimant and Mr Welsby that he could spend any time not looking for alternative work, carrying out's union duties, from April 2020. This equally applied after October 2020. The claimant accepted he was carrying out more union work during this time.

217. Having reached this finding, this allegation fails and we do not need to go on to decide what the purpose of such conduct was.

Issue 25 (b): Was the claimant limited in his ability to take health and safety training and disability training by Theresa Hyde in December 2020 and January 2021which limited his promotional chances for health and safety management roles, which the claimant applied for in July 2020?

218. No. We do not find that the claimant was limited in his ability to take health and safety training and disability training by Theresa Hyde December 2020 January 2021. The reason for this is as follows:

    a. We found the claimant's evidence on this point confused. He was unable to point to a specific request he had made for training or identify who that request had been made to.

    b. The claimant did not challenge Theresa Hyde's evidence on this point.

    c. There was no written record of any such request for health and safety training and disability training. We have found at paragraph 56 that the claimant was able to request training. Had the claimant made such a request for health and safety and disability training there would have been a written record of it.

    d. The facilities agreement between the respondent and Prospect the union makes it clear that any health and safety and disability training will be delivered to union officials by prospect and not by the respondent. There would therefore be no reason for the claimant to make such a request to Theresa Hyde in December 2020 January 2021.

219. Having reached this finding this allegation fails and we do not need to go on to decide what the purpose of such conduct was.

Issue 25 (c): Was the Claimant told that the patch lead role he was offered in December 2020/January 2021 was for a busy patch and could not include the additional 1.5 days facility time by Theresa Hyde?

220. We find that the claimant was told that the patch lead role he was offered in December 2020/January 2021 was for a busy patch and would not include the additional 1 ½ days facility time, by Theresa Hyde.

221. The claimant was already carrying out 20% facility time. This equated to one day in each five-day week carrying out union activities. The claimant was asking for an additional 1 ½ days in the five-day working week to carry out union activities. This would equate to 50% of the claimant's working week spent on union or health and safety duties a week.

Issue 26: Was the sole or main purpose of the respondent's conduct: (a) Preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time. Appropriate time is a time within working hours where the respondent gave consent for trade union activity to be carried out. s.146(b) TUCLRA. (b) The claimant being a representative of workers on matters of health and safety at work or member of a safety committee, as acknowledged by the respondent. S.44 (1)(b)(ii) ERA?

222. We find that the sole or main purpose of the respondent's conduct was not to prevent or deter the claimant from taking part in trade union activities or because the claimant was a representative of workers on matters of health and safety, but rather simply because the patch lead role in Blackfriars Manchester was busy and the amount of facilities time the claimant was requesting in this role simply could not be accommodated. This allegation therefore fails.

Issue 27: Did the Claimant reasonably see that act or deliberate failure to act as subjecting him to a detriment?

223. Given our finding at paragraph 222 above, we do not need to consider whether the claimant reasonably saw this as subjecting him to a detriment. Nonetheless, if we are wrong on point 222 above, we accept the respondent's submission that this allegation does not amount to a detriment. It was a discussion about a potential role, the patch lead role, that the claimant did not want and did not accept. The details of how much union time the Claimant may have been able to agree with his manager in a role that he declined are entirely academic and do amount to a detriment.

Issue 25 (d): Was the claimant not allowed to remain in the position of project manager with Peter Pearson on the basis that they both worked their roles fifty percent with fifty percent facility time.

224. This allegation is misconceived and therefore fails. We have found that the claimant was not a project manager. The respondent therefore did not allow the claimant to remain in the position of project manager as the claimant was not carrying out this role in the first place.

Issue 26: Was the sole or main purpose of the respondent's conduct: (a) Preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time. Appropriate time is a time within working hours where the respondent gave consent for trade union activity to be carried out. s.146(b) TUCLRA. (b) The claimant being a representative of workers on matters of health and safety at work or member of a safety committee, as acknowledged by the respondent. S.44 (1)(b)(ii) ERA?

225. If we are wrong on point 224 above, we find that the claimant was not offered a 50% job share with Peter Pearson because no vacancy existed and because the claimant could not demonstrate at interview that he had the skills and experience necessary to carry out a project manager role. It was not to prevent or deter prevent or deter the claimant taken part in trade union activities or because the claimant was a representative of workers on matters of health and safety.
226. Having reached this finding, we do not need to consider whether the claimant reasonably saw this as subjecting him to a detriment.

Issue 25 (e): Was the claimant unsuccessful in his job applications despite one role being a 90% match?

227. The claimant was unsuccessful in several job applications, but none were a 90% match as alleged. This allegation fails.
228. The claimant has presented no credible evidence that he was unsuccessful in his job applications despite being a 90% match for the role. The claimant produced a series of spreadsheets in which he self-declared that he was a 90% match for roles advertised. We were taken to some of these roles during

cross examination and it was clear that the claimant's method for producing a job match where he used electronic CV matching software was flawed. Roles that he suggested were 90% match were in reality not such a match. We do not accept that the claimant's self-determination of his suitability for roles he applied for was accurate.

229. As we have found at paragraph 213, the claimant applied for many roles which he was unqualified for, which were significantly more senior to his role and for which he did not possess the necessary skills or experience. This is why the claimant was unsuccessful in those job applications.

Issue 26: Was the sole or main purpose of the respondent's conduct: (a) Preventing or deterring the claimant from taking part in the activities of an independent trade union at an appropriate time. Appropriate time is a time within working hours where the respondent gave consent for trade union activity to be carried out. s.146(b) TUCLRA. (b) The claimant being a representative of workers on matters of health and safety at work or member of a safety committee, as acknowledged by the respondent. S.44 (1)(b)(ii) ERA.

230. If we are wrong in our findings at paragraphs 227, 228 and 229 above, we find the fact the claimant did not secure an alternative role until December 2022 was not because the respondent prevented or deterred the claimant from taking part in trade union activities or because the claimant was a representative of workers on matters of health and safety. It was because the claimant was not successful in interview for the roles he applied for.

Issues 1, 2 and 3: Time limits

231. Given we have found that all the claimant's claims are not well founded, and fail do not address the issue of whether the claims were presented out of time.

Employment Judge Childe

28 February 2024

JUDGMENT SENT TO THE PARTIES ON

12 March 2024

FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

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)