EMPLOYMENT TRIBUNALS

Claimant: Mr J Campbell

Respondent: Pennine Acute NHS Foundation Trust

Heard at: Liverpool (by CVP) **On:** 12–19 July, 26 August and 28 September 2021

Before: Employment Judge Benson
Mr D Wilson
Mr J Murdie

REPRESENTATION:

Claimant: Mrs J Campbell (Claimant's wife)
Respondent: Ms R Kight, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of:

    a. Chronic central serous retinopathy at all material times;
    b. Back injury from 23 April 2017.
    c. Anxiety and depression from January 2017.

2. The respondent has not discriminated against the claimant contrary to section 13 Equality Act 2010 because of any disability;

3. The respondent has not discriminated against the claimant contrary to section 15 Equality Act 2010 because of something arising as a consequence of any disability;

4. The respondent has not failed in its duty to make reasonable adjustments for the claimant contrary to sections 20 and 21 Equality Act 2010;

5. The respondent has not subjected the claimant to harassment related to any disability contrary to section 28 Equality Act 2010;

6. The respondent has not subjected the claimant to victimisation contrary to section 27 Equality Act;

7. The claimant was not subjected to any detriment contrary to section 47B Employment Rights Act 1996 because he has made a protected disclosure;

8. The claimant was not dismissed pursuant to section 95(1)(c) Employment Rights Act 1996;

9. The claimant was not unfairly dismissed contrary to section 94 or section 100 Employment Rights Act 1996.

10. All claims fail and are dismissed.

REASONS

Claims

1. By a claim form dated 19 April 2018, the claimant brought claims against the respondent. Those claims were claims of disability discrimination (direct discrimination), discrimination arising from disability, a failure to make reasonable adjustments, harassment and victimisation. In addition, the claimant contends that he was subjected to detriments having made protected disclosures, and further, that he was constructively unfairly dismissed under Section 100 (health and safety) and/or Section 98 of the Employment Rights Act 1996. The respondent defends all claims, and case management hearings took place on 18 July 2018 and 4 March 2019. The claimant provided further particulars of his claim in the form of a Scott Schedule, and at the outset of this hearing a draft List of Issues, prepared by Ms Kight, was discussed and agreed between the parties and the Tribunal. That list as agreed is set out below. There were some amendments made by Mrs Campbell and these were incorporated into the list, after discussions with her.

Agreed List of Issues

Disability discrimination

Disability

2. The claimant pleads 3 different disabilities:

    a. Chronic central serous retinopathy;

    b. Back injury since December 2016;

    c. Anxiety and depression since January 2017.

    The respondent concedes that each of these impairments are disabilities but disputes the date on which the claimant became disabled by virtue of impairment (b).

Therefore, when did impairment (b) start to have a long term substantial adverse effect on the claimant's ability to carry out normal day to day activities?

3. At the time of each alleged act of discrimination, did the respondent know or ought reasonably to have known that the claimant was disabled by virtue of the relevant disability?

The respondent concedes that it was aware that the claimant was disabled by virtue of impairment (a) at all material times.

The respondent concedes that it was aware that claimant was disabled by virtue of impairment (b) from 31st May 2017 when OH confirmed that claimant's back injury was a recurrence of his sciatica.

The respondent denies that it was aware or ought reasonably to have been aware that the claimant was disabled by virtue of impairment (c) prior to his resignation.

Direct discrimination/section 15 discrimination/Harassment/Victimisation

4. Did the respondent do any of the following acts:

   a. Between 11.10.16 and 24.11.16: (**ACT A**)

      i. Wayne Hobson told the claimant's colleagues that he was going to lose his job;

      ii. Wayne Hobson told the claimant's colleagues that Paul Corr was gunning for him, and he needs to be careful;

      iii. Wayne Hobson told the claimant's colleagues that the claimant was not doing himself any favours

   b. On 14.12.16, Paul Corr did not act on concerns the claimant raised and denied that he had raised them with him; (**ACT B**)

   c. Between 20.12.16 and 23.04.17 Wayne Hobson calling the claimant "glass back" and "hop-a-long" whenever he entered a room, shouting it down corridors, laughing and inciting other porters to do the same; (**ACT C**)

   d. Between 10.01.17 and 14.03.17 the claimant was made by Wayne Hobson and Paul Corr to work ad-hoc shifts on random days of the week; (**ACT D**)

   e. Following OH recommendations on 10.01.17 and 08.02.17 Paul Corr did not complete a risk assessment for claimant meaning that his manual handling difficulties and job risks were never identified or addressed. (**ACT E**)

The respondent accepts that a specific risk assessment was not carried out by PC, but this was because the claimant was not undertaking the duties in question at the relevant time.

f. At a staff meeting between 09.02.17 and 07.03.17 Paul Corr: (**ACT F**)

    i. did not invite the claimant to the meeting,

The respondent accepts that the claimant was not invited to the meeting, but this was because he was not working on "waste" at the time (it being a "waste" staff meeting)

    ii. did not acknowledge the claimant's concerns when he attended anyway and raised them;

    iii. made a comment that there were now "no excuses for injuries on the job".

g. Prior to an OH appointment between 07.03.17 and 13.03.17 the claimant was told by: (**ACT G**)

    i. Wayne Hobson and Paul Corr that if he was not fit to return to his waste duties following his review on 14.03.17 he would be removed from them and put on relief;

    ii. Paul Corr that the claimant's job would be given to someone else.

h. Between 22.06.17 and 29.06.17 Wayne Hobson made the following derogatory comments about the claimant: (**ACT H**)

    i. "let's see how he pays his bills now he's only getting sick pay he'll be out on the streets" and laughed and joked about it;

    ii. there was no place for the claimant in portering;

    iii. The claimant was just sat at home taking tablets, he'll be lucky to get a job in laundry.

i. Between 02.10.17 and 05.11.17 the claimant was moved to Fairfield Hospital for his phased return to work meaning that he had to travel for 2 hours per day instead of 20 mins per day and was unable to return to Oldham because his grievance was ongoing, and health and safety concerns had not been addressed. (**ACT I**)

The respondent accepts that the claimant was moved to Fairfield Hospital, but with his express agreement and without objection.

j. Between 06.10.17 and 09.11.17: (**ACT J**)

i. The claimant was relocated to Rochdale.

The respondent accepts that the claimant was relocated to Rochdale, but in response to his raising concerns about travel time to Fairfield Hospital

ii. Pam Miller called claimant "bizarre"
iii. Pam Miller shared claimant's relocation with Paul Corr in breach of confidentiality

k. The claimant's DSAR took 7 months to be actioned (**ACT K**)

l. Between 01.01.18 and 13.03.18 Rob Jepson and Alison Brophy provided Paul Corr with updates about C. (**ACT L**)

The respondent accepts that Paul Corr discussed his position in relation to the claimant's grievance with Mr Jepson and Ms Brophy because they were his line manager and HR support respectively.

5. If yes, what was the reason or principal reason for such treatment? Was it:

a. less favourable treatment because the claimant is disabled in respect of any of his 3 disabilities? (Direct discrimination)

The claimant relies on a hypothetical comparator

The claimant relies upon his back impairment in respect of allegations 4(a)-(l)

The claimant relies upon his eye impairment in respect of allegations 4(a), (e), (f) and (l)

The claimant relies upon his mental health impairment in respect of allegations 4(k) and (l)

b. Unfavourable treatment because of something arising in consequence of the claimant's disabilities (Discrimination arising from disability)

The claimant relies upon the following disabilities and "somethings"

4(a) back and eye condition: absence from work

4(b) back: absence from work

4(c) back: manner in which the claimant walked

4(d) back: the claimant was on a phased return and light duties

4(e) eye and back: requirement for an individual RA

4(f) back and eye: because the claimant was put on light duties

4(g) back: because the claimant was on light duties

4(h) back: absence from work

4(i) back: the claimant was on a phased return

4(j) back: the claimant was on a phased return

4(k) back and mental health: absence from work and the request for risk assessments and because he brought a grievance

4(l) back, eye, mental health: absence from work and the request for risk assessments and because he brought a grievance

c. Unwanted conduct related to disability (Harassment)

The claimant relies upon the same disabilities as listed in 5(a) above in respect of each alleged act

d. A detriment because on 3 July 2017 the claimant raised a grievance? (Victimisation)

The claimant relies upon allegations 4(j)-(l)

6. If the answer to 5b is yes, was the respondent's treatment of the claimant a proportionate means of achieving the legitimate aim.

7. If the answer to 5c is yes, did that conduct have the purpose or (reasonably have the) effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Failure to make reasonable adjustments

8. Did the respondent apply any of the following PCP's?

a. A requirement to manually handle certain goods throughout his employment with the respondent. (**PCP A**)

b. A requirement to work ad-hoc shifts between December 2016-12 March 2018. (**PCP B**)

c. A requirement to work shifts on one week's notice between December 2016-October 2017. (**PCP C**)

d. A requirement to perform heavy lifting, for example lifting heavy bags above shoulder height/manoeuvring large metal cages/bins by hand over roads and uneven surfaces throughout his employment with the respondent. (**PCP D**)

e. A requirement to complete full duties between March 2017-April 2017. (**PCP E**)

f. A requirement to work with managers after raising a grievance of bullying and harassment against them between July 2017-March 2018. (**PCP F**)

The respondent accepts that it applies these PCP's generally, but disputes that they were necessarily applied to the claimant at the relevant times.

9. If yes, did the application of any of these PCP's put the claimant to a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled because:

a. The claimant could not manually handle certain goods without causing back pain/injury to his back. (**SUB A**)

b. The claimant could not work ad hoc shifts as these increased his stress and anxiety. (**SUB B**)

c. The claimant could not work shifts on only one week's notice as this increased his stress and anxiety.(**SUB C**)

d. The claimant could not perform heavy lifting without causing back pain/injury to his back. (**SUB D**)

e. In the period April – July 2017 the claimant could not return to work performing full duties because it would lead to back pain and/or further injury. (**SUB E**)

f. In the period from July 2017 onwards the claimant was unable to work his full duties with his managers because he had raised a grievance against them and working with them would increase his stress and anxiety. (**SUB F**)

10. If yes, did the respondent take reasonable steps to avoid or reduce the disadvantage to the claimant. The claimant says that the respondent should have taken the following steps:

a. In respect of 9(a), (d), (e) provided light duties to the claimant and follow the recommendation of OH including carrying out a risk assessment to identify any further steps. (**STEP A**)

b. In respect of 9(b) and (c) allowed the claimant to continue with his normal 4 days on 4 days off shift pattern. (**STEP B**)

c. In respect of 9(f) provided light duties and move his managers to a different location or suspend the claimant on full pay pending the investigation of his grievance. (**STEP C**)

Time limits

11. Did each of the alleged acts of discrimination amount to conduct extending over a period, the last act of which fell within the period of 3 months prior to the date on which the claimant submitted to ACAS early conciliation?

12. To the extent that any or all of the alleged acts of discrimination are found not to amount to such continuing conduct, would it be just and equitable for the Tribunal to exercise its discretion to extend time?

Whistleblowing detriment

Time limits

13. Did each of the alleged acts of detriment set out at 4(a)-(l) above amount to a series of similar acts or failures, the last act of which fell within the period of 3 months prior to the date on which the claimant submitted to ACAS early conciliation?

14. To the extent that any or all of the alleged detriments are found not to amount to such continuing conduct, was it reasonably practicable for the claimant to bring his claim within the relevant 3-month period? If so, did the claimant present his claim in respect of such acts within such period as was reasonably practicable thereafter?

Protected disclosure

15. Did the claimant make a protected disclosure?

    The claimant asserts that:

    a. Between 10.01.17 and 08.02.17 he spoke to Paul Corr and Wayne Hobson and told them that OH's request for a specific risk assessment had been ignored and porters were raising concerns about the physical "dangers" and injury rate on the waste team. (**PD A**)

    b. During a meeting between 09.02.17 and 07.03.17 he raised concerns with Paul Corr about unsafe jobs on the waste team such as manual handling over-filled, sodden and very heavy laundry bags above shoulder height, manoeuvring large metal cages/bins by hand over roads and uneven surfaces (whilst trying to avoid pedestrians/vehicles), removal of green bins behind the kitchens and issues with safety in/around the cardboard compactor. (**PD B**)

    c. On 03.07.17 he submitted a grievance which detailed health and safety concerns within the portering department, specifically safety concerns within the waste team and omissions of the management team to tackle area of concern and breaches of their own policies and procedures. (**PD C**)

The respondent accepts that the claimant's grievance (15(c)) amounts to a protected disclosure

Detriment

16. Was the claimant subjected to any of the acts referred to at 4(a)-(l) above because he had made a protected disclosure?

17. If so, did such acts amount to detrimental treatment?

Constructive unfair dismissal

18. Was claimant constructively dismissed by the respondent in that he says he resigned in response to allegations 4(e), 4(f) 4(h) 4(i) 4(k)

19. Did the claimant bring to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?

    The claimant relies on 15(a)-(c) above.

20. Is there a health and safety representative or safety committee at the claimant's place of work?

    The respondent asserts that there was a Health and Safety Department at the material time.

21. If so, was it reasonably practicable for the claimant to raise concerns by those means?

22. Did the claimant, in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, leave (or propose to leave) or (while the danger persisted) refuse to return to his place of work or any dangerous part of his place of work?

    The claimant relies upon
    - ***Sickness absence from 23 April 2017***
    - ***His refusal to continue to work at FGH from 31 October 2017***
    - ***Sickness absence from 9 November 2017***
    - ***His resignation on 12 March 2018 – H&S issue.***

23. Did the respondent do any of the following:

    a. Fail to carry out a reasonable investigation into the claimant's grievance.

    b. Fail to uphold the claimant's grievance when it was well-founded – resigned before the end of the grievance process.

c. Breach confidentiality by accessing the claimant's private health records to ascertain the results of the claimant's MRI scan and sharing that information with the claimant's work colleagues.

d. Fail to respond to the claimant's DSAR, including refuse to provide copies of documents.

e. Subject the claimant to detrimental treatment because he had made a protected disclosure/raised genuine health and safety concerns.

f. Subject the claimant to acts of disability discrimination, including failing to make reasonable adjustments to allow him to return to work.

g. Fail in its duty of care for the claimant's health and safety.

24. If so, did they either individually or cumulatively amount to a fundamental breach of the claimant's contract?

25. If so, did the claimant resign in response to such breach?

26. Did the claimant affirm such breach either by his conduct or by delay in respect of the timing of his resignation?

Admissions

27. Ms Kight confirmed that the claimant's three disabilities, being Chronic Central Seruse Retinopathy, a back injury, and anxiety and depression since January 2017 were admitted as disabilities but disputed the date upon which the claimant became disabled by virtue of his back injury. Further, the respondent accepted that the grievance submitted by the claimant on 3 July 2017 amounted to a protected disclosure for the purpose of the public interest disclosure claim but did not accept that the other pleaded disclosures were protected. Ms Kight also confirmed and provided details of the objective justification defence in respect of the claim of discrimination arising from disability and further, confirmed that the respondent was not arguing a potentially fair reason under Section 98, should the Tribunal find that the claimant had been constructively dismissed and that the reason was not automatically unfair.

Evidence and Submissions

28. The Tribunal heard evidence from the claimant, and on behalf of the respondent, from Mr Wayne Hobson, Mr Paul Corr, Mr Ian Coop, Mr Rob Jepson and Mr Nigel Wiley. It was referred to an agreed bundle of documents which had additional pages provided separately, together with an agreed bundle of witness statements. The Tribunal had regard to the witness statements which were the witnesses' evidence in chief, together with the documents to which they were referred. They further heard cross examination of the witnesses from Ms Campbell and Ms Kight and considered such evidence in coming to their decision.

29. Mr Campbell, who is visually impaired, had the assistance of Mrs Campbell when being referred to documents, and where appropriate, the Tribunal or Ms Kight also read out parts of any documents to which he was referred. There were some IT issues which arose during the hearing which caused it to be delayed, but these were overcome. Further, it was necessary to adjourn the hearing on the afternoon of 15 July in order to accommodate some personal issues of the claimant and his representative.

30. We were also provided with a chronology and cast list for which we were grateful.

Reliability of the evidence

31. In this case there were areas of dispute between the claimant and the respondent's witnesses. We make some general comments at this stage about the reliability of the evidence provided by the witnesses, but in our findings below deal with relevant areas where there was dispute.

32. Mr Campbell: It is clear that Mr Campbell has had considerable health issues to contend with since 2017. This includes his deteriorating sight and serious mental health issues. As is often the case with evidence of events some time ago, the claimant's versions of many of the events which he says occurred have been reinforced and changed by his view of the respondent and the impact which he considers that the respondent's conduct has had upon him and his health. We consider that many of the claimant's perceptions and in parts his recollection of events, were often not born out by the oral evidence of other witnesses and the documents to which we were referred.

33. Mr Hobson: Mr Hobson's evidence was generally reliable and credible. We were impressed with him as a witness. He was visibly very upset at the allegations which had been made against him but also that they have been made by someone who he considered was a close friend. The claimant suggested in evidence that they were not close friends but that he felt sorry for Mr Hobson after he had marital difficulties and that is why he went out drinking with him after work on a number of occasions. We note however that the claimant does refer to Mr Hobson as a friend at page 253 of the bundle when referring to money issues. We consider that Mr Hobson and Mr Campbell were friends.

34. Mr Corr: Mr Corr was a manager and he had management responsibilities when he re-joined Royal Oldham which he sought to progress. This included looking at attendance within the portering team. We did not find that Mr Corr was targeting Mr Campbell. His approach was in accordance with the Trust's policies and he was doing his job.

35. Mr Wylie and Mr Jepson: We found both witnesses to be reliable and credible in their evidence to the Tribunal. It was clear that they were seeking to resolve the claimant's grievances and do what they could to bring him back into the workplace. At both the grievance and appeal stage, they offered options to the claimant. Mr Wylie recognised that the original investigation was not up to scratch and offered a reinvestigation. Mr Jepson also sought to give choices

to the claimant, recognising that a reinvestigation would take time and that might not be in the claimant's best interests.

Findings of Fact

36. The claimant commenced employment with the respondent on 9 November 2015, having previously worked as a "bank" porter. His employment ended on 12 March 2018 when he resigned from his employment in circumstances which he says amounted to constructive unfair dismissal.

37. The respondent is a hospital trust consisting of four hospitals in the Greater Manchester area. These are the Royal Oldham Hospital, Fairfield General Hospital, North Manchester General Hospital and Rochdale Infirmary. They employ some 19,000 staff over the four sites. The claimant was a Porter based at the Royal Oldham Hospital.

38. The claimant's role involved him carrying out a wide range of portering duties. The claimant was absent from work between 25 to 27 January 2016, and 18 January 2016 to 21 January 2016 with eye problems, being a detached retina. He had a further period of absence between 8 August 2016 to 26 August 2016 with an ear infection. His further periods of absence relate specifically to his claims and our findings upon these are discussed below.

Chronology

39. On 7 October 2016, the claimant suffered a back injury whilst moving a cage which was used for transporting laundry bags around the hospital. At that time, he worked within the waste department. He was in pain and went to the Accident and Emergency Department. Two of his colleagues called the manager, Wayne Hobson to tell him about the accident and that Mr Campbell had gone to accident and emergency. Mr Hobson also received a call from the claimant's flatmate and colleague, Danny Hadfield, who advised him that the claimant had been taken home. Either later that evening, or the following day, the claimant called Mr Hobson and told him what had happened. We do not accept that the during that conversation Mr Hobson was annoyed or said " the doctor doesn't pay your wages". Although we note that Mr Hobson could no longer recall the conversation at all, we accept that memories fade and that the evidence given by Mr Hobson by way of an email dated 7 August 2017 at page 220 of the bundle reflects the contents of that conversation between them more accurately than the claimant's recollection.

40. An incident report in relation to the accident was not completed that day as Mr Hobson understood he needed to have the claimant with him when this was done. It was however completed at a later date with another manager Chris Smith. Mr Hobson was the claimant's duty manager, and he reported to the Portering Manager who initially was Mr Ian Coop, but Mr Coop was replaced by Mr Paul Corr on [28 November 2016].

41. The claimant was absent because of his back injury from 7 October 2016 until 20 December 2016 when he returned to work on a phased basis. In early November, he had hit the Trust's trigger point under its sickness review policy, having had three periods of absence, and was referred to occupational health

by Mr Coop. On 16 November 2016 he was invited to attend a sickness review meeting by Mr Coop. This was arranged for 24 November, but in fact took place on 14 December with Mr Corr who had by then taken over as the Portering Manager. This was in line with the respondent's procedures. An occupational health report was provided by the OH practitioner on the 22 November 2018 in which it was noted that he did not anticipate that the claimant would have any residual disability on an eventual return to work. At that stage however the claimant was not fit to return but the practitioner was hopeful that it would be in the not too distant future. He was referred for Physiotherapy, and the practitioner recommended that he be further reviewed once he had seen a specialist.

Allegation

ACT A: Between 11.10.16 and 24.11.16:

i. Wayne Hobson told the claimant's colleagues that he was going to lose his job.

ii. Wayne Hobson told the claimant's colleagues that Paul Corr was gunning for him, and he needs to be careful.

iii. Wayne Hobson told the claimant's colleagues that he was not doing himself any favours.

ACT B: On 14.12.16, Paul Corr did not act on concerns the claimant raised and denied that he had raised them with him.

42. The claimant alleges he was told of these comments by colleagues. Mr Hobson denies making those comments.

43. The claimant alleges that he raised these concerns with Mr Corr on 14 December at the sickness absence review meeting. Mr Corr denies this. We prefer the evidence of Mr Corr and Mr Hobson in respect of these allegations. We consider that had these complaints been raised with Mr Corr at that meeting (or at any other time) he would have dealt with them and would have referred to them in the letter written after the meeting. Mr Corr knew and had worked with both men. He knew the claimant and Mr Hobson were friends and we consider he would have recalled it if such allegations had been made by the claimant. Mr Baker's evidence we find was unreliable. He couldn't recall the date of the meeting initially nor who it was with. The statement he made was some 12 months after the event. In respect of the comments it is alleged Mr Hobson made, we do not find that they were said. Mr Hobson was the claimant's friend and visited the claimant during his absence to see how he was.

44. When Mr Corr took over as the Portering Manager, he saw absence management as an important feature of his role and took steps to ascertain the present position in relation to all staff who were absent on sick leave at the time. This included the claimant.

45. On 20 December 2016 the claimant returned to work on a phased basis. He was not in the waste department during this period and carried out light duties which was in line with the occupational health report. He had a limp during this period.

Allegation

ACT C: Between 20.12.16 and 23.04.17 Wayne Hobson calling the claimant "glass back" and "hop-a-long" whenever the claimant entered a room, shouting it down corridors, laughing and inciting other porters to do the same

46. Mr Hobson together with other colleagues had a jovial and friendly relationship. The portering team was one in which there was regular good-natured teasing between the members of the team. Mr Hobson confirmed that he referred to the claimant as 'hop a long' and 'glass back' as alleged, as did other colleagues, but this was taken as good natured fun by the claimant who fully participated and "gave as much as he got". We accept that this was the nature of the relationship between the members of the portering team, and Mr Hobson. We do not accept that it was every time the claimant came into the room or that there was incitement as alleged by the claimant but there were regular exchanges including the use of the words alleged by the claimant. Although Mr Hobson with hindsight reflects that he was not as professional as he should have been, and that in his role as manager, he was probably too close to the porters, we accept that the claimant fully participated and enjoyed these exchanges. We do not accept that it happened every time the claimant entered a room or that Mr Hobson incited others to make the same comments

47. On 5 January 2017 the claimant attended a stage one health review meeting with Mr Corr and a further occupational health report was requested. That report referred to managing his phased return on restricted duties and that the practitioner was hopeful that he would improve in the coming weeks with ongoing physiotherapy and pain killers. Within that report, the practitioner advised that a manual handling risk assessment be performed of all his work activities in view of his back condition and requested that it be forwarded to the practitioner before the next OH appointment on 8 February 2017.

48. On 14 January the claimant's phased return to work ended, but he remained on light duties.

Allegation

ACT D: Between 10.01.17 and 14.03.17 the claimant was made by Wayne Hobson and Paul Corr to work ad-hoc shifts on random days of the week

49. The claimant's shifts during the time he was on restricted duties were not the '4 on 4 off' shifts that he had worked on his substantive role in waste. He was provided with his shifts a week in advance and the respondent ensured he did not work any night or morning shifts. He made no complaint about the shifts he was working at that time.

Allegation

ACT E: Following OH recommendations on 10.01.17 and 08.02.17 Paul Corr did not complete a risk assessment for the claimant meaning that the claimant's manual handling difficulties and job risks were never identified or addressed

50. On 8 February the claimant attended for a further occupational health review. At this time Mr Corr had sent the generic risk assessments for the claimant's role to the occupational health practitioner. In the report, dated 10 February, the OH Practitioner confirmed that the claimant was booked for a procedure on 14 February 2017 which might improve his pain but that if it didn't improve then he may need to be referred to a surgeon for more detailed evaluation. He confirmed that he was only able to continue with light duties as resuming heavy and manual handling duties may well aggravate his symptoms. A further appointment was arranged for 14 March 2017. He referred to the risk assessments and noted that he had been provided with general risk assessments and not those specifically tailored to the claimant and his conditions. He advised that it may be prudent to consider specific risk assessments in conjunction with the claimant to take into account the specific manual handling issues for him in light of his specific conditions.

51. No specific risk assessments were carried out in respect of Mr Campbell before the reoccurrence of his back injury. We heard from Mr Corr on this issue and Mr Corr's explanation for not doing so was that at the time the claimant was not undertaking the waste management role as he was on light duties, and as such there was no risk to him.

52. Between 10 January 2017 and 8 February 2017, the claimant alleges that he told both Mr Hobson and Mr Corr that he wanted a specific risk assessment carried out. Mr Hobson and Mr Corr deny this. We prefer the evidence of Mr Hobson and Mr Corr on this point.

53. We accept that there may have been general conversations about risk assessments between the portering staff and their managers, including the claimant, for instance at the later waste meeting, but we find there were no specific requests made by the claimant for individual risk assessments on the waste job. At that time the claimant was carrying out light duties and was waiting for a further report and if necessary, treatment on his back. We consider that this is an instance where, after the passage of time, the claimant's memory and recollection is not accurate. We consider that had Mr Corr or Mr Hobson been asked specifically by the claimant for a risk assessment to be carried out, they would have arranged it, or at least would have given him the explanation which Mr Corr has provided to this Tribunal.

Allegation

ACT F: At a staff meeting between 09.02.17 and 07.03.17 Paul Corr:

i. did not invite the claimant to the meeting,

ii. did not acknowledge the claimant's concerns when he attended anyway and raised them,

iii. made a comment that there were now "no excuses for injuries on the job".

54. Between 9 February and 7 March, whilst the claimant was undertaking light duties, Mr Corr called an informal meeting with the waste team to discuss the new shift system and how the additional hours were working. This meeting included only those members of the team who were on shift at the time. The claimant was not invited as he was not working on the waste team at the time but having been told by a colleague that it was taking place, he attended. There was no intention by Mr Corr to specifically exclude the claimant. Had he not wanted the claimant there, Mr Corr could have asked him to leave. During the meeting there was discussion about health and safety issues including risk assessments.

55. The claimant says he made specific recommendations, but these were ignored by Mr Corr during the meeting. The evidence referred to by the clamant on this point is inconsistent. In his witness statement at paragraph 24 he suggests that he raised an idea to solve one of the issues, being to carry hand-held luggage scales. He says the response was 'no'. This was denied by Mr Corr who says he would have recalled it if that had been said and neither of the claimant's colleagues remembered it. We do not consider that was a suggestion made by the claimant in that meeting.

56. In the claimant's later investigatory interview on 13 July 2017, he said that he had brought up the problem with cardboard and green bins and he says Mr Corr didn't respond. Both his colleagues Bev and Kev recalled that the claimant raised concerns about risk assessments, but they didn't mention this issue specifically.

57. We do not accept that there were any specific suggestions put to Mr Corr at that meeting though we accept that there were discussions about risk assessments more generally, including the difficulties with the green bin and cardboard area and movement around the site. This issue was not however in our view ignored by Mr Corr. He was aware of it and had previously raised it with senior management, but funding was required to make any changes. The statements of the claimant's colleagues do not support the claimant's version of events and there is no evidence as suggested by the claimant that either of them were in fear for their jobs when they provided those statements during the investigation.

58. We also prefer the evidence of Mr Corr in that he rejects that he told those in the meeting that there were 'no excuses for injuries on the job'. As set out above, we find the claimant's memory of that meeting less reliable than Mr Corr's and not corroborated by others at the meeting.

Allegation

ACT G: Prior to an OH appointment between 07.03.17 and 13.03.17 the claimant was told by:

i. Wayne Hobson and Paul Corr that if he was not fit to return to his waste duties following his review on 14.03.17 he would be removed from them and put on relief.

ii. Paul Corr that the claimant's job would be given to someone else.

59. Mr Hobson's version of the conversation is preferred by the Tribunal. The claimant came to Mr Hobson and was concerned that he may not be fit enough to return to the waste team. Mr Hobson advised him to speak to Mr Corr and that if the claimant believed he wasn't well enough to go back to waste, relief work might suit him better. We consider that this was an example of where the claimant read into a conversation something that was not there. Mr Hobson was offering another option, it was not a threat. Although employees might earn less money whilst on relief work, it was not a punishment or penalty and other employees worked on relief permanently.

60. On 15 March 2017 the respondent received a further OH report. This confirmed that the claimant was fit to return to work on his normal duties. It referred to the injection which the claimant had been given which appeared to have resolved his back problems. When Mr Corr spoke to the claimant about the report, the claimant was very pleased to be returning to his role and there was no discussion about further risk assessments. There was no formal meeting, but the claimant was looking forward to returning to normal duties after his holiday. The claimant suggests that he wasn't in fact recovered and had asked the OH Practitioner to say that he was well enough to return as he was fearful for his job. We do not accept this was the position. There is no evidence to support this. The OH Practitioner is a professional and had the claimant made that request, we do not consider that they would have acceded to it. We also consider that had the claimant raised the issue of the risk assessment again with the OH Practitioner, it would have been referred to in this report which it was not.

61. From 13 March to 9 April 2017 the claimant was absent on annual leave and went on holiday to Cuba. It was a 10 hour flight and the claimant suffered no ill effects to his back.

62. When the claimant returned to work, he resumed his role in the waste team and worked four shifts. On his fifth shift, he had a relapse of his back injury. We do not find that it was caused by an accident. More likely, having worked for four shifts, his back was once again causing him problems. The claimant told Mr Hobson that 'I can't do this anymore, I've got to go home'. We prefer the evidence of Mr Hobson on this point. The claimant's evidence as to the reason for his relapse changed over time and is inconsistent. Within his claim form, he says he was expected to lift overweight laundry bags above head height causing further injury. In his witness statement at paragraph 27, he says he was handling a tall metal cage when the wheels caught and it tipped

abruptly and jarred his back. Mr Hobson says that he was told on the day that the claimant was suffering back pain so he agreed he could go home. The OH reports after the incident refer to a recurrence of sciatica and make no reference to an accident.

63. Thereafter, the claimant was unfit to work because of his back injury. He was referred for another OH appointment. The report dated 31 May, said that he had suffered a substantial relapse of his sciatica, and advised that at that stage he was unfit for work. A further appointment was arranged for 21 June 2017 and the Doctor confirmed that it was likely that his condition was covered by the Equality Act. From 31 May 2021, the respondent was aware that the claimant was a disabled person by reason of his back injury.

Allegation

ACT H: Between 22.06.17 and 29.06.17 Wayne Hobson made the following derogatory comments about the claimant:

i. **"let's see how he pays his bills now he's only getting sick pay he'll be out on the streets" and laughed and joked about it;**

ii. **"there was no place for the claimant in portering";**

iii. **the claimant was just sat at home taking tablets, he'll be lucky to get a job in laundry.**

64. Whilst the claimant was absent, there was general chat about his predicament and continued absence. Anything Mr Hobson knew came via Danny Hadfield as Mr Hobson had not been in contact with the claimant during this period. It seems unlikely therefore that Mr Hobson would have known much about the claimant's finances and we do not accept that Mr Hobson was a person who would have made light of the claimant's situation. We therefore prefer the evidence of Mr Hobson and do not accept that the comments as alleged by the claimant were made.

65. The claimant alleged that Mr Corr had accessed his medical notes during the period 20.6.17 to 29.6.17. Mr Corr denied this. We accept Mr Corr's evidence. It was common knowledge within the respondent's workforce that if you access the Trust's systems and patient's records, there is a record that you have done so. The respondent produced evidence to show who accessed the claimant's records and it did not include Mr Corr. The claimant's suggestion that Mr Corr had gone to the Accident and Emergency department to access the records through a PC there does not have any credence and in our mind accessing a PC in full view of others where it would be an instantly dismissible offence is not credible.

66. On 3 July the claimant submitted a grievance against Mr Hobson and Mr Corr alleging a failure to follow Trust policies and Procedures and a patten of behaviour amounting to discrimination, bullying and harassment.

67. An external HR advisor was appointed to investigate, and she met with the claimant on 13 July 2017.

68. The claimant remained absent from work and continued to attend sickness review meetings and OH appointments. During the sickness review meeting on 10 August 2017 the claimant advised Mr Coop, a manager he respected, that as a result of ongoing issues with his manager, he was suffering from anxiety and depression and taking medication.

69. The investigation into the claimant's grievance was completed on 24 August and a report sent to Mr Nigel Wylie. Unfortunately, Mr Wylie was on holiday at the time and did not see it until approximately the second week in September. He was unaware until then that he had been appointed to consider the grievance and there was a delay before he could meet the claimant, in part because he was on annual leave again.

Allegation

ACT I: Between 02.10.17 and 05.11.17 the claimant was moved to Fairfield Hospital for his phased return to work meaning that he had to travel for 2 hours per day instead of 20 mins per day and was unable to return to Oldham because his grievance was ongoing, and health and safety concerns had not been addressed

70. On 2 October the claimant returned to work on a phased return. He had expressed a wish not to work with Mr Hobson or Mr Corr whilst his grievance was investigated and proposed that they should be moved to a different hospital rather than him having to work away from Oldham. This was rejected by the respondent however the respondent agreed that he could work at Fairfield Hospital. The claimant had no objection to working at that hospital. Oldham was more convenient for travel but he didn't express any problem with Fairfield.

71. On 2 October he met with Mr Coop who carried out a risk assessment for his role at Fairfield which was initially for a 4 week phased return period during which the claimant was not to lift weights above 7kg, and thereafter the claimant was to return to full duties as advised by the OH practitioner. At Fairfield his role was to take and sign for deliveries.

72. The claimant's journey to Fairfield took him an hour. This was accommodated by the respondent within his working hours. The claimant was contradictory and vague in his evidence about whether he travelled by bus or whether he was driven to Fairfield and the time this took. It seemed to us that he was seeking to justify after the event why he later told Mr Coop that he couldn't carry on at Fairfield and asked for a transfer for his phased return to Rochdale. His evidence was unreliable on this point.

Allegation

ACT J: Between 06.10.17 and 09.11.17:

i. **The claimant was relocated to Rochdale**.

ii. Pam Miller called the claimant "bizarre".

iii. Pam Miller shared the claimant's relocation with Paul Corr in breach of confidentiality.

73. The claimant had also proposed that while the grievance was ongoing, he should be 'suspended on full pay'. This was rejected by the respondent and the claimant resumed work at Fairfield. During an email exchange with Mr Corr, Ms Miller asked Mr Corr whether he was aware of the situation with Mr Campbell? Mr Corr said that he believed Mr Campbell "wanted to suspend himself" and in response Ms Miller said "bizarre". This was a throw away remark and Ms Miller was describing the situation as opposed to a comment directed at the claimant as alleged. The claimant was not aware of this exchange until documents were produced as part of his subject access request.

74. In fact, because of holidays, the claimant only worked three shifts at Fairfield and on 31 October at his request, it was agreed he could move to Rochdale with effect from 2 November. On 9 November the claimant called in to say he was sick. He later said that he considered that the porters knew about his grievance and that the respondent had breached confidentiality. There wasn't any evidence of this.

75. On 25 October the claimant attended a grievance outcome meeting with Mr Wylie. The claimant was accompanied by his TU representative. At this meeting, Mr Wylie confirmed that based upon the grievance investigation, he overall did not uphold the grievances of bullying and harassment. He provided the claimant with a letter confirming the position. The claimant did not feel that the matter had been properly investigated, for instance in that there was no investigation into the failure to follow policies. Mr Wylie considered that some issues did need to be looked into further. Mr Wylie had relied upon the investigation report and had not seen the original grievance of the claimant. Mr Wylie agreed that he should investigate further and having done so invited the claimant to a meeting on 7 November.

76. On the advice of the claimant's Trade Union representative he did not attend as the representative considered that it was not following the grievance procedure, and instead submitted an appeal. As part of the reinvestigation that Mr Wylie conducted, he considered that the claimant's concern in relation to the individual risk assessment not being carried out by Mr Corr should have been upheld.

77. We have been unable to ascertain the basis of the claimant's allegation that Pam Miller shared his location with Mr Corr in breach of confidentiality during the period of October/November 2017. The claimant's reference in his statement to that period includes reference to the porters at Rochdale being aware that he had been moved because he complained about managers but no reference to Mr Corr or Ms Miller being responsible for this. The exchange

of emails between Ms Miller and Mr Corr referred to above does not assist either.

Allegation

ACT K: the claimant's DSAR took 7 months to be actioned

78. On 12 December 2017 the claimant submitted a Subject Access Request. Under the statutory procedure, the respondent had 40 days within which to respond. Some documents were provided on 19 January 2018, but the exercise was not completed until after the claimant had resigned. It cannot be said therefore that the SAR took 7 months to be actioned, rather that it took 7 months for it to be completed. There were difficulties with the search for documents as the claimant had changed his name part way through his employment and during the SAR process, he widened the scale of the search. The respondent did not comply with the statutory deadline and the ICO wrote to the respondent to admonish them for the delays in providing the information. The disclosure exercise was however thorough and was reviewed internally to ensure that full disclosure was provided, albeit outside the ICO's timescales.

79. The claimant's appeal was sent to the respondent on 6 November. Mr Jepson was appointed to consider the appeal and met with the claimant on 19 January 2018. The claimant was accompanied by his TU representative.

Allegation

ACT L: Between 01.01.18 and 13.03.18 Rob Jepson and Alison Brophy provided Paul Corr with updates about the claimant

80. Sometime after his resignation, the claimant became aware of an exchange of emails between Mr Jepson, Ms Brophy and Mr Corr. As some of the allegations were relating to him, Mr Corr did seek to find out where the grievance process was up to and in any event, he continued to have budgetary responsibility for the claimant. We do not find that there was any attempt by Mr Corr to influence the investigation or that the managers breached the claimant's confidentiality. There is no evidence that there was any sort of conspiracy between management as the claimant suggests. This may have been the claimant's perception after the event having seen these documents, but it is not born out by the evidence that we have been referred to. Mr Wylie and Mr Jepson's approach, in being willing to reinvestigate aspects of the grievance does not support the claimant's allegations.

81. On 26 January 2018, the claimant met with Mr Jepson again concerning his appeal. Mr Jepson also recognised that that there were gaps in the initial investigation and discussed two options with the claimant. These were set out in his letter dated 26 January 2018. They were that a reinvestigation be carried out, but he pointed out that this would take time and might not be in the best interests of the claimant and his health; or that he discuss an action plan to assist the claimant in returning to work and address the claimant's concerns. This could include mediation, agreeing a working patten which was

suitable to all parties and working with other members of team to assist in resolving the claimant's concerns.

82. The claimant was asked to indicate within one week which of the options he would prefer. We do not accept that the claimant gave his answer at that meeting. The claimant said in evidence that at the meeting "he didn't know what to do". Mr Jepson indicated that if he did not hear from the claimant, he would commence a reinvestigation. The claimant didn't provide an answer and at the date of the claimant's resignation, Mr Jepson had not recommenced his investigation. He hoped that the claimant would agree to trying to resolve the issue with discussion as he felt a further investigation would take some time to conclude which wouldn't assist the claimant.

83. On 12 March 2018 the claimant submitted his resignation to Alison Brophy with immediate effect. In his letter, the claimant refers to his experiences concerning the Formal Grievance and mishandling of his concerns, including bullying and harassment by two of his managers, a failure to follow Trust policies and procedures and ignorance of health and safety concerns which posed a risk to him, others and the public. He considered that the actions of the management team amounted to a breach of trust and confidence and a fundamental breach of contract. He also referred to the failure to release information under his Freedom of Information request. He referred to this issue and the failure to resolve his formal grievance as the last straw.

The Law

Disability

84. The definition of disability is contained in the Equality Act 2010 at section 6. It states that:

A person (P) has a disability if -

(a) P has a physical or mental impairment; and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities

Section 212(1) defines "substantial" as more than minor or trivial.

85. Schedule 1 of the Act provides supplementary provisions, including at paragraph 2(1)

The effect of an impairment is long term if –

(a) It has lasted for 12 months;

(b) It is likely to last for at least 12 months, or

(c) It is likely to last for the rest of the life of the person affected.

And at 2(2):

If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is treated as continuing to have that effect if that effect is likely to recur.

86. Paragraph 5(1) of Schedule 1 states that an impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

(a) Measures are being taken to treat it or correct it; and

(b) but for the measures, the impairment would be likely to have that effect.

87. Further, Schedule 1 provides the power for guidance to be issued and that a Tribunal must take account of such guidance as it thinks relevant. The guidance which has been issued is the Guidance on Matters to be taken into account in determining questions relating to the Definition of Disability (2011). We have also had regard to the EHRC Code of Practice on Employment (2011) Appendix 1 in so far as it relates to the matters which we must decide.

88. The activities affected must be "normal". The Equality Act 2010 Guidance states at paragraph D3 that in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.

89. At paragraph C5 of the Guidance it states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'.

90. The Guidance further states at paragraph C2 that the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect.

91. When considering if an impairment is "long term" that consideration must be as at the time of the discriminatory act and not at the date of the hearing.

92. We have also had regard to the decision of the EAT in Goodwin v Patent Office 1999 ICR 302 in which guidance was given as to the proper approach to adopt when applying the provisions relating to disability. Although this case related to the Disability Discrimination Act 1995, the approach is one which

can be adopted in determining section 6 of the Equality Act 2010. The four questions which we must address sequentially are:

(1) Did the claimant have a mental and/or physical impairment?

(2) Did the impairment affect the claimant's ability to carry out normal day to day activities?

(3) Was the adverse effect substantial?

(4) Was the adverse effect long term?

Discrimination Arising from Disability

93. Section 15 of the EQA provides that

(1) A person (A) discriminates against a disabled person (B) if —

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

94. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

(1) there must be unfavourable treatment;

(2) there must be something that arises in consequence of the claimant's disability;

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

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

95. If the employer can establish that it was unaware and could not reasonably have been expected to know that the claimant was disabled, the claim cannot succeed.

96. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:

31. ……the proper approach to determining section 15 claims …. can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."

97. The Court of Appeal in Robinson v Department for Work and Pensions [2020] EWCA Civ 859 considered causation in a section 15 complaint. Bean LJ at

paragraphs 55 and 56 of the judgment rejected a "but for" test in establishing whether the treatment (unfavourable treatment for a section 15 complaint and less favourable treatment for a section 13 complaint) was *because of* the claimant's disability or something arising in consequence of it. Bean LJ affirmed Underhill LJ in Dunn v Secretary of State for Justice [2018] (above) who stated that a prima facie case under section 15 is not established solely by the claimant showing that she would not be in the situation…if she were not disabled. The Tribunal must look at the thought processes of the decision maker concerned to ascertain "the reason why they treated the claimant as they did. Was it wholly partly because of something that arose in consequence of the claimant's disability?"

Duty to make reasonable adjustments

98. By section 20 of Equality Act 2010 the duty to make adjustments comprises three requirements.

99. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

100. A disadvantage is substantial if it is more than minor or trivial: section 212(1) Equality Act 2010.

101. Paragraph 6.28 of the EHRC *Code* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

(2) The practicability of the step;

(3) The financial and other costs of making the adjustment and the extent of any disruption caused;

(3) The extent of the employer's financial and other resources;

(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

(6) The type and size of employer.

102. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the Tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made.

Harassment

103. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

> *(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…*
>
> *(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

104. Chapter 7 of the EHRC Code deals with harassment.

Victimisation

105. Section 27 Equality Act provides protection against victimisation.

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because —*
>
> *(a) B does a protected act, or*
>
> *(c) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act —*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

106. It is clear from the case law that the Tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so did the employer subject the claimant to a detriment and if so was that because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

Burden of proof

107. Section 136 of Equality Act 2010 applies to any proceedings relating to a contravention of Equality Act. Section 136(2) and (3) provide that:

If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

108. We are reminded by the Supreme Court in Hewage v. Grampian Health Board [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Protected Disclosures

109. Protected disclosures are governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

(a) …

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…

(c) ……..

(d) That the health or safety of any individual has been, is being or is likely to be endangered.

(e) ……

The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in Parsons v Airplus International Ltd UKEAT/0111/17, a decision of 13 October 2017:

"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:

23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.

23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.

23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."

110. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons.

Detriment in Employment

111. If a protected disclosure has been made, the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

"A worker 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 the worker has made a protected disclosure."

112. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in Shamoon v The Royal Ulster Constabulary [2003] ICR 337: the test is whether a reasonable employee

would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

Constructive Unfair Dismissal

113. To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. In a case of constructive dismissal, a claimant has to show that he terminated the contract by resigning, whether with or without notice, but in circumstances in which he was entitled to do so by reason of the employer's conduct. The relevant section of the Employment Rights Act 1996 is section 95(1)(c).

114. The leading case is Western Excavating (ECC) Limited v Sharp [1978] ICR 221. In that case the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, the employee must establish there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

115. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can therefore cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident.

116. The 'last straw' does not by itself need amount to a breach of contract. Lewis v Motorworld Garages Ltd 1986 ICR 157, CA.

117. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

118. As the claimant relies upon the implied term of trust and confidence, in deciding whether there has been a fundamental breach, The Tribunal must look at the respondent's conduct which the claimant says caused him to resign. In doing so it must look at each of the allegations:

- to consider if the respondent did what the claimant says it did; and

- to consider if either individually or as a whole the respondent had reasonable and proper cause for doing each these things; and

- if they did not have reasonable and proper cause, then was the conduct calculated or likely to destroy or seriously damage trust and confidence.

119. If it is found that the claimant was dismissed, then it is necessary to consider the reason for such dismissal.

Automatic Unfair Dismissal

120. Section 100 renders a dismissal automatically unfair if the reason or principal reason is within the following:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

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

(i) in accordance with arrangements established under or by virtue of any enactment, or

(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,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to

take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."

121. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

122. Where the claimant contends for a reason which would be automatically unfair but the respondent contends for a fair reason, the proper approach is set out in paragraph 47 of the decision of the EAT in Kuzel v Roche Products Limited [2007] ICR 945, approved by the Court of Appeal at [2008] ICR 799.

123. In this case the respondent denies that the claimant was dismissed but does not seek to rely upon a potentially fair reason if the Tribunal finds that the claimant was dismissed.

Decision

Disability

124. The claimant pleads 3 different disabilities:

a. Chronic central serous retinopathy;

b. Back injury since December 2016;

c. Anxiety and depression since January 2017.

125. The respondent concedes that each of these impairments are disabilities but disputes the date on which claimant became disabled by virtue of his back injury.

126. The Tribunal must therefore decide when the claimant's back injury started to have a long term substantial adverse effect upon his ability to carry out normal

day to day activities. Taking each of the steps in Goodwin v Patent Office in turn. There is no dispute that the claimant had the physical impairment of a back injury. Between his accident on 7 October 2016 and the injection on 14 February 2017, we find that the claimant's back issues had a substantial adverse effect on his normal day to day activities, though his condition had improved towards the end of that period. He attended OH appointments on the dates set out in the findings above in addition to seeing his own GP. The claimant's disability impact statement sets out the difficulties he had with normal day to day activities. From 7 October until approximately 20 November 2016, the claimant spent most of his days lying down to relieve his pain. He needed assistance to wash, dress and stand or walk. He was taking analgesia. From 20 November 2016 his condition gradually improved, but he was still taking painkillers. He needed some assistance with some aspects of personal care and was unable to help with housework. He returned to work on 20 December 2016 on a phased return and light duties. He continued to take heavy painkillers as reported in the OH report of 11 January 2017, but his condition was improving. We have taken into account the Guidance on Matters to be taken into account in determining questions relating to the Definition of Disability (2011). Substantial need only be more than "minor or trivial" and we find that the adverse effect was substantial during the period to 14 February 2017, as we are obliged to discount the affect of any medication, in this case painkillers when making that assessment.

127. We must then consider whether that adverse effect was long term? The effect of an impairment is long term if it has lasted for 12 months; is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

128. In the claimant's case the substantial adverse effect ceased when the claimant had the injection in March 2018. By that date the Occupational Health practitioner reported that he was fit to resume his full contractual duties and was discharged from the clinic. There was no suggestion that there would be any residual problems or reoccurrence of his issues, and therefore no indication that the substantial adverse effect was likely to or could well last 12 months.

129. We must further consider whether section 2(2) applies in that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is treated as continuing to have that effect if that effect is likely to recur. The Guidance states that conditions with effects which recur only sporadically or for short periods can still qualify as long-term impairments if the effects on normal day to day activities are substantial and are likely to reoccur beyond 12 months after the first occurrence. That assessment should be made at the date of the alleged discriminatory acts. During the period that the claimant was signed off from work from 23 April 2017, the evidence presented to the Tribunal in the form of the Occupational Health report dated 31 May 2017 demonstrates that he had had a substantial relapse of his sciatica. It was poorly controlled even with multiple painkillers and was substantially affecting his mobility, gait and manual handling capability. The OH doctor at that stage considered that it was likely his condition was protected under the Equality Act. We consider that as at the

reoccurrence of the claimant's injury on 23 April 2017 (and not before that date), there was a substantial adverse effect on the claimant's normal day to day activities which was likely to reoccur beyond 12 months after he first suffered the back injury on 7 October 2016. In assessing therefore whether the substantial adverse effect was likely to reoccur at the date of any alleged discriminatory acts prior to 23 April 2017, we find that it was not. The claimant was therefore disabled by reason of his back injury under the Equality Act 2010 from 23 April 2017.

130. The claimant was therefore disabled from the following dates:

a. Chronic central serous retinopathy (accepted by the respondent at all material times);
b. Back injury from 23 April 2017.
c. Anxiety and depression (accepted by the respondent from January 2017).

Knowledge

131. The respondent concedes that it was aware that claimant was disabled by virtue of Chronic central serous retinopathy at all material times. It concedes that it was aware that claimant was disabled by virtue of his back injury from 31st May 2017 when OH practitioner confirmed that his back issue was a recurrence of his sciatica. We accept the respondent's concession on this issue and find that it was not until it saw the report of the OH doctor of 31 May 2017 that it could have been aware that the claimant's condition might reoccur. There was nothing which could have alerted them to the fact that the claimant's back condition was a recurring condition before that date. Indeed, all of the OH reports supported the view that the back issue was limited in nature and impact and he would recover from it. The respondent denies that it was aware or ought reasonably to have been aware that claimant was disabled by virtue of anxiety and depression prior to his resignation.

132. The claimant says he was disabled by reason of his anxiety and depression from January 2017. The first report from the OH practitioner that refers to depression is September 2017. There is reference in that report of recently prescribed anti-depressants, and that the claimant attributed these depressive symptoms to work related issues. The later report dated 2 November makes only passing reference to his mental health and focusses upon his physical difficulties. On 16 November 2017 he was signed as unfit for work by his GP by reason of stress at work. Although the respondent may have been put on notice that the claimant may have been a disabled person by reason of anxiety and depression when it referred the claimant to the OH practitioner concerning this absence, the report of 7 December 2017 states that "Mr Campbell is currently experiencing a psychological reaction to his perceived stress that is generated by the situation at work." It was not reasonable for the respondent to have understood from this or from the earlier reports that the claimant's mental health was having a significant and long-term effect upon his normal day to day activities. The claimant had an input into this report and did not highlight it. We do not consider that the respondent had knowledge or ought reasonably to have been aware that the claimant was a disabled person

by reason of depression and anxiety during his employment with the respondent. That position did not change during the remainder of the claimant's employment.

Dates of Knowledge of Disabilities

133. The respondent therefore had knowledge of the claimant's disabilities from the following dates:

a. Chronic central serous retinopathy (accepted by the respondent at all material times);
b. Back injury since 31 May 2017.
c. Anxiety and depression (no knowledge during the claimant's employment).

134. Turning to our further conclusions.

135. We make reference to the burden of proof above. This is something that we have considered and applied where appropriate. We have in our conclusions only made specific reference to section 136 of the Equality Act where we feel that it is necessary to do so.

Proven Allegations

136. In view of our findings of fact, we are dealing only with those allegations which the claimant has shown occurred. The Tribunal has found the following allegations proven to the extent set out below:

a. Between 20.12.16 and 23.04.17 Wayne Hobson called the claimant "glass back" and "hop-a-long". **(ACT C)**

b. Following OH recommendations on 10.01.17 and 08.02.17 Paul Corr did not complete a specific risk assessment for claimant. (**ACT E**)

c. At a staff meeting between 09.02.17 and 07.03.17 Paul Corr:

i. did not invite the claimant to the meeting (**ACT F(i)**)

ii. did not acknowledge the claimant's comments about risk assessments relating to the difficulties with the green bin and cardboard area and movement around the site. (**ACT F(ii)**)

d. Between 02.10.17 and 05.11.17 the claimant was moved to Fairfield Hospital for his phased return to work and was unwilling to return to Oldham because his grievance was ongoing. (**ACT I**)

e. Between 06.10.17 and 09.11.17:

i. The claimant was relocated to Rochdale at his request. (**ACT J (i)**)

ii. Pam Miller called the claimant's actions in asking to be suspended "bizarre" (**ACT J(ii)**)

f. The claimant's DSAR took 7 months to be completed (**ACT K**)

g. Between 01.01.18 and 13.03.18 Rob Jepson and Alison Brophy provided Paul Corr with updates about claimant. (**ACT L**)

Direct discrimination/section 15 discrimination/Harassment/Victimisation

137. It was agreed at the outset of the hearing that the issues which the Tribunal needed to consider in respect of the proven allegations were:

138. In respect of each what was the reason or principal reason for such treatment? Was it:

a. less favourable treatment because claimant is disabled in respect of any of his 3 disabilities?

b. Unfavourable treatment because of something arising in consequence of the claimant's disabilities?

c. Unwanted conduct related to disability?

d. In respect of allegations 4(j)(k) and (l) only: A detriment because on 3 July 2017 claimant raised a grievance?

139. If the answer to (b) is yes, was the respondent's treatment of the claimant a proportionate means of achieving the legitimate aim.

140. If the answer to (c) is yes, did that conduct have the purpose or (reasonably have the) effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(ACT C) Between 20.12.16 and 23.04.17 Wayne Hobson calling the claimant "glass back" and "hop-a-long".

141. The claimant relies only upon his back impairment as a disability in respect of this allegation. As he was not disabled by reason of his back injury at his time all discrimination claims must fail.

(ACT E) Following OH recommendations on 10.01.17 and 08.02.17 Paul Corr did not complete a specific risk assessment for claimant.

142. The claimant relies upon his back and eye impairments in respect of these allegations. He was not disabled by reason of his back impairment at this time therefore all discrimination claims in respect of this disability must fail. There was no evidence put to us that the claimant's eye condition was relevant to this risk assessment. The OH reports focussed upon the assessment being related to the claimant's back injury. The aspect of his role which Occupational Health was asked to assess resulted from the claimant's back

injury and the carrying and lifting of weights. We do not find that the reason for the failure to carry out a risk assessment was because of his eye condition (section 13); because of something which arose in respect of his eye condition as the requirement for the claimant to have this risk assessment was not related to his sight but to his back (section 15): or unwanted conduct related to his eye condition for the same reasons (section 26 harassment) . The claimant has the burden initially to show facts from which we may find that discrimination has occurred, and we find that he has been unable to discharge that burden. As such these claims fail.

(ACT F) At a staff meeting between 09.02.17 and 07.03.17 Paul Corr:

(i) did not invite the claimant to the meeting

143. The meeting to which these allegations relate occurred before the claimant was disabled by reason of his back condition. As such the claimant relies upon the eye condition. The Tribunal must therefore consider the questions posed in the list of issues in respect of the claimant's eye condition only as that was the only relevant disability at that time.

144. The claimant was clearly upset that he had not been invited to that meeting. This was not intentional and our findings are such that it was not any form of deliberate act by Mr Corr; the reason was that he had included only those who were working on shift that day and were in the waste team at that time. He had intended to discuss the change of shift patten. The claimant has not shown any facts from which we could decide that the reason he was not invited was because of his eye condition (section 13); or that it was because of something which arose as a result of his eye condition. The reason which that the claimant was not working on the waste team was because of his back injury, not his eye condition (section 15). Similarly, the failure to invite him, even if unwanted conduct was not related to his eye condition as that was not the reason he was not on the waste team at that time (section 26)

(ii) did not acknowledge the claimant's comments about risk assessments relating to the difficulties with the green bin and cardboard area and movement around the site.

145. It was accepted by Mr Wylie in the grievance outcome that issues about the movement of the green bins and the cardboard compactor was something which was raised by the claimant at the meeting. It was not put as a suggestion but rather an issue which arose out of the claimant raising issues about risk assessments. Mr Wylie felt that the claimant should have had an explanation from Mr Corr that this was an issue he was aware of and had been raised with senior managers, but there were insufficient funds at that time to remedy it. We find that this was the only concern which the claimant has shown was raised by him at that meeting. It wasn't acknowledged by Mr Corr, but the claimant has not discharged the burden of showing facts from which the Tribunal could conclude (in the absence of any other explanation) that the lack of acknowledgement by Mr Corr was in any way because of his eye condition (section 13), because of something arising as a consequence of

his eye condition (section 15) or unwanted conduct which was related to his eye condition. These claims therefore fail.

(ACT I) Between 02.10.17 and 05.11.17 C was moved to Fairfield Hospital for his phased return to work and was unwilling to return to Oldham because his grievance was ongoing.

146. The claimant relies upon his back injury. Whilst his grievance was ongoing, the respondent accepts that claimant was moved to Fairfield Hospital. It was with his express agreement and without objection. The claimant has not shown that this was less favourable (section 13) or unfavourable (section 15) treatment or unwanted conduct (section 26). It was to assist the claimant in being able to return to work as soon as was possible and to ensure he did not need to work with those against whom he had raised grievances.

(ACT J) Between 06.10.17 and 09.11.17:

(i) The claimant was relocated to Rochdale at his request.

147. The claimant relies upon his back injury. The claimant's move to Rochdale was at his own request. He found the travel to Fairfield difficult and the respondent sought to assist. The claimant has not shown that this was less favourable treatment (section 13); unfavourable treatment because of something arising from the claimant's back injury (but in any event this could be justified by the respondent on the basis of the phased return and that it was to accommodate the claimant), and was not unwanted conduct (section 26).

(ii) Pam Miller called the claimant's actions in asking to be suspended "bizarre"

148. The claimant has not shown that the comment was anything other than a throwaway remark about the situation. Ms Miller did not call the claimant "bizzare" but rather she was referring to his purported request. This would not amount to less favourable or unfavourable treatment and the claimant has not discharged the burden of showing facts from which the Tribunal could conclude (in the absence of any other explanation) that the comment was in any way because of his back injury (section 13), because of something arising as a consequence of his back injury (section 15) or unwanted conduct which was related to his back injury. We do not conclude that Ms Miller's purpose was to cause any offence to the claimant. In considering whether it was reasonable that the comment (which came to the claimant's attention when he received his SAR papers) had the effect of violating claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, we conclude that it was not. These claims therefore fail.

(ACT K) The claimant's SAR which was submitted in December 2017 took 7 months to be completed.

149. The claimant relies upon his back injury and his anxiety and depression in respect of these allegations. In view of our findings concerning the

respondent's lack of knowledge of anxiety and depression amounting to a disability during the claimant's employment, we are only concerned with the back injury as the disability upon which the claimant can rely. The claimant says that this is direct discrimination; discrimination arising from his disability being his absence from work and the request for risk assessments and because he brought a grievance; and harassment. When the claimant did not get a response to his SAR, he suspected the respondent was hiding something and that there was some reason for not disclosing further documents, however we find that there was no such intention. He received some disclosure at his appeal hearing. The person responsible for searching for the documents had no involvement in the claimant's management or decision making on his grievance. The failure by the respondent to comply with the statutory time limits was a mixture of work pressures and the changes to the search as a result of the claimant's change of name and him widening the scope of the request. The claimant has been unable to show facts from which we could conclude that the failure to action the SAR was because of his back injury, arose as consequence of his absence from work (which at that time was his stress at work) or any request for risk assessments. Further that there was any conduct which had the purpose of or would viewed objectively amount to harassment within the meaning of the Equality Act 2010. In any event, had the burden shifted, the respondent would have been able to show that its actions were not for any discriminatory reason. As such each of the claims fail.

(ACT L) Between 01.01.18 and 13.03.18 Rob Jepson and Alison Brophy provided Paul Corr with updates about the claimant

150. The claimant relies upon his back injury and his anxiety. In view of our finding in respect of his anxiety, that impairment cannot be relied upon. The claimant again brings claims of direct discrimination/discrimination arising from his disability being his absence from work and the request for risk assessments and because he brought a grievance and harassment. In view of our findings concerning these discussions, the claimant has not shown evidence from which we can conclude that there has been discrimination, further the discussions did not amount to less favourable or unfavourable treatment. Although the claimant might have disliked the idea that discussions happened, there were legitimate reasons for Mr Corr to discuss his position with Mr Jepson and Ms Brophy which were not because of or related to the claimant's disability. If we had found that the updates did amount to unfavourable treatment because of something arising from the claimant's back injury being his absence from work and the request for risk assessments, the respondent could justify these discussions. Further viewed objectively, it cannot be said that these discussions had or would have had the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. They were normal discussions and there was no evidence that there were any underlying attempts by the respondent to conspire against the claimant as he suspected.

<u>Victimisation</u>

151. In respect of the original allegations (j)(k) and (l), being the final three listed above, the claimant contends that these were detriments which he suffered because he had raised a grievance on 3 July 2017.

152. The respondent accepts that the grievance which was submitted on 3 July 2017 was a protected act for the purposes of section 27(2) Equality Act 2010. The claimant must then show facts from which we could conclude (in the absence of any other explanation) that he has suffered a detriment and this was because he had raised a grievance. For the reasons set out above, we do not consider that the relocation to Rochdale at the claimant's own request, the comment by Ms Miller in her email and the updates to Paul Corr amount to a detriment to the claimant. In any event if these would amount to a detriment, the claimant has not shown that these or the delay in the completion of the SAR were because he had submitted a grievance. The respondent has in each case demonstrated that it had other reasons for the actions which were taken which were not related to the grievance which we have detailed in the relevant paragraphs above.

Failure to make reasonable adjustments

153. We must consider whether the respondent applied any of the PCPs relied upon. In considering this, we note that the practice must have an element of repetition about it and must be applicable to both the disabled person and to the non-disabled comparators. A one-off act can, however, amount to a practice if there is some indication that it would be repeated if similar circumstances were to arise in future. The PCPs relied upon by the claimant do not all fulfil these criteria. They are too limited, but we have wherever possible given the PCPs a wide meaning as referenced in the guidance in the EHRC's Employment Code and particularly in view of the claimant not having legal representation.

154. **PCP A:** A requirement to manually handle certain goods throughout his employment with the respondent.

155. **PCP D:** A requirement to perform heavy lifting, for example lifting heavy bags above shoulder height/manoeuvring large metal cages/bins by hand over roads and uneven surfaces throughout his employment with the respondent.

156. These PCPs were applied to employees in the Waste team. The claimant says he was put at a substantial disadvantage compared to a non-disabled person in that he could not manually handle certain goods without causing back pain/injury to his back; could not perform heavy lifting without causing back pain/injury to his back and in the period April – July 2017 could not return to work performing full duties because it would lead to back pain and/or further injury. (**SUB A, SUB C and SUB E)**

157. The claimant was disabled by reason of his back injury from 23 April 2017 and the respondent had knowledge on 31 May 2017. We are therefore only concerned with the period after 31 May 2017. During this period, the claimant was either on light duties or absent from work. Risk assessments were carried out and the respondent was receiving advice from the OH practitioner. At

such times therefore as he was absent from work or when he was on light duties, this PCP was not applied to him or was limited to the extent advised by the OH practitioner. We do not therefore consider that the claimant has shown that at the times that this PCP was applied to him he was put at a substantial disadvantage in comparison with people who did not have his disability (in this instance being his back injury) by not being able to manually handle certain goods or do heavy lifting without causing pain and injury, because this was not something the respondent required him to do. Looking at it a slightly different way, because the respondent made adjustments for the claimant by way of the light duties, the claimant was not put at that substantial disadvantage. As such no duty arose.

158. The further substantial disadvantage which the claimant relies upon is that in the period April – July 2017 he could not return to work performing full duties because it would lead to back pain and/or further injury. As the relevant period is from 31 May 2017, it was only from that date that the claimant suffered a substantial disadvantage of not being able to return to work such that the duty to make adjustments arose. He was absent from work at the time. The medical evidence was such that the claimant was signed off as unfit to work. The Occupational Health report of 31 May 2017 confirmed that he was unfit to return until at least until he was reviewed again on 21 June 2017. At a meeting on 15 June 2017 with Mr Corr, the claimant accepts that position. The adjustment now proposed by the claimant that a risk assessment be carried out or that he should have been placed on light duties, was not a reasonable one in view of the medical evidence and the claimant's own view at that time that he was unfit to return. There was therefore no failure to make a reasonable adjustment.

159. **PCP E:** The claimant was not disabled by reason of his back at the time he relies upon this PCP.

160. **PCPs B C & F**: In respect of the remaining PCPs upon which the claimant relies, the substantial disadvantage to which the claimant says he was subjected compared to non-disabled people related to his stress and anxiety. The respondent did not have knowledge of this disability nor of any substantial disadvantage that the claimant might suffer during the periods alleged by the claimant and as such even if these PCPs were applied, no duty to make adjustments arose.

Time limits

161. In view of our findings that there was no discriminatory conduct there in no need for us to determine this issue.

Whistleblowing detriment
Protected disclosure

162. Did the claimant make a protected disclosure? The claimant asserts that:

a. **PD A**: Between 10.01.17 and 08.02.17 he spoke to Paul Corr and Wayne Hobson and told them that OH's request for a specific risk assessment had been ignored and porters were raising concerns about the physical "dangers" and injury rate on the waste team. As we do not accept that the claimant has shown that these events occurred, this cannot amount to a protected disclosure.

b. **PD B**: During a meeting between 09.02.17 and 07.03.17 he raised concerns with Paul Corr about unsafe jobs on the waste team such as manual handling over-filled, sodden and very heavy laundry bags above shoulder height, manoeuvring large metal cages/bins by hand over roads and uneven surfaces (whilst trying to avoid pedestrians/vehicles), removal of green bins behind the kitchens and issues with safety in/around the cardboard compactor. The only matter which we find was raised at the meeting was that there were general discussions about risk assessments, including the difficulties with the green bin and cardboard area and movement around the site. We accept that in raising this issue the claimant was making a qualifying disclosure, being within section 43B(i)(d) in that he was disclosing information which in his reasonable belief was made in the public interest and tended to show that the health and safety of any individual has been, is being or likely to be endangered. As that disclosure was made to his employer it is a protected disclosure.

c. **PD C**: On 03.07.17 he submitted a grievance which detailed health and safety concerns within the portering department, specifically safety concerns within the waste team and omissions of the management team to tackle area of concern and breaches of their own policies and procedures. It is accepted by the respondent that this was a protected disclosure.

Detriment

163. In view of our findings the matters which are capable of amounting to detriments are those which we have found occurred after the waste meeting in February/March 2017 and thereafter the grievance which was lodged on 13 July 2017. In each case we must consider whether the making of the disclosure materially influence the respondent's actions. These are:

ACT F(ii) At a staff meeting between 09.02.17 and 07.03.17 Paul Corr did not acknowledge the claimant's comments about risk assessments relating to the difficulties with the green bin and cardboard area and movement around the site.

164. Mr Corr already knew about the issues raised by the claimant concerning the green bins and carboard area and he had brought them to the attention of the Trust to have them resolved. There were resource issues which meant that no remedial action could be taken at that time. The reason that further risk assessments were not carried out and that the claimant's concerns about these issues were not acknowledged at the meeting were because Mr Corr had already taken them forward without success. It was accepted as part of

the grievance process that Mr Corr should have acknowledged the claimant's concerns or at least provided him with an explanation, and as such we agree that the claimant suffered a detriment, but we consider that the respondent has demonstrated that Mr Corr's decision was not materially influenced by the claimant's disclosure.

165. On 13 July 2018 the claimant lodged his grievance.

ACT I: Between 02.10.17 and 05.11.17 the claimant was moved to Fairfield Hospital for his phased return to work meaning that he had to travel for 2 hours per day instead of 20 mins per day and was unwilling to return to Oldham because his grievance was ongoing.

ACT J(i): The claimant was relocated to Rochdale at his request

166. The respondent has shown that these moves were at the claimant's request whilst the grievance was ongoing and to accommodate his light duties and travel. They did not in our view amount to a detriment. In any event, there was no evidence put forward by the claimant that the reason he was moved was because he had whistle-blown, rather, in respect of Fairfield it was because he did not wish to work with those he had raised the grievance against whilst it was being investigated and in respect of Rochdale because he found the travelling to Fairfield onerous. As such the respondent has shown reasons for these actions which were not related to the claimant's grievance.

(ii): Pam Miller called the claimant's actions in asking to be suspended "bizarre".

ACT K: Between 01.01.18 and 13.03.18 Rob Jepson and Alison Brophy provided Paul Corr with updates about claimant.

ACT L: The claimant's SAR which was submitted in December 2017 took 7 months to be completed.

167. We do not consider that the comment by Ms Miller in her email and the updates to Paul Corr by Mr Jepson and Ms Brophy amount to a detriment to the claimant. In any event, if these can be said to amount to a detriment, we are satisfied that the respondent has in each case demonstrated that it had other reasons which we have detailed in the paragraphs 148 and 150 above for the actions which were taken, which were not related to or materially influenced by the protected disclosures.

168. There is no persuasive evidence to support the claimant's contentions that the delay in the completion of the SAR were because the claimant had raised a grievance or raised health and safety issues at the waste meeting. The person responsible for searching for the documents was independent of those who were involved in the claimant's grievance and management. The failure by the respondent to comply with the statutory time limits was a mixture of work pressures and the changes to the search as a result of the claimant's change of name and him widening the scope of the request. The respondent

has shown that the reasons for the delay in completing the SAR were not related to the disclosures.

Time limits

169. In view of our findings above, we do not need to determine this issue.

Constructive unfair dismissal

170. Within the agreed list of issues, the reason for any dismissal is conflated with whether the claimant resigned in circumstances which amounted to a dismissal under section 95(1)(c) Employment Rights Act 1996, that is whether he was constructively dismissed. The correct approach is for us to firstly consider whether the claimant was dismissed and then if we find that he was, then consider the reason for that dismissal.

171. The claimant relies upon the respondent's conduct which he says amounted to a fundamental breach of the implied term of trust and confidence. The conduct upon which he relies is as follows:

a. Failure to carry out a reasonable investigation into the claimant's grievance;

b. Failure to uphold the claimants grievance when it was well-founded.

c. Breach of confidentiality by accessing the claimant's private health records to ascertain the results of his MRI scan and sharing that information with the claimant's work colleagues;

d. Failure to respond to the claimant's DSAR, including refuse to provide copies of documents;

e. Subjecting the claimant to detrimental treatment because he had made a protected disclosure/raised genuine health and safety concerns

f. Subjecting the claimant to acts of disability discrimination, including failing to make reasonable adjustments to allow the claimant to return to work

g. Failing in its duty of care for the claimant's health and safety –

h. He also relies upon the specific allegations set out in the list of issues at 4(e), 4(f) 4(h) 4(i) 4(k), some of which are encompassed in the above issues.

172. As the claimant relies upon the implied term of trust and confidence, in deciding whether there has been a fundamental breach, the Tribunal must look at the respondent's conduct which the claimant says caused him to resign. In doing so it must look at each of the allegations:

- to consider if the respondent did what the claimant says it did; and

- to consider if either individually or as a whole the respondent had reasonable and proper cause for doing each these things; and

- if they did not have reasonable and proper cause, then was the conduct calculated or likely to destroy or seriously damage trust and confidence.

173. Turning the conduct that the claimant complains about. We do not accept that there was a failure to carry out a reasonable investigation into the claimant's grievance. It is necessary to look at the grievance process as a whole. Although it was accepted by Mr Wylie and Mr Jepson that parts of the original grievance investigation were lacking, they both offered to reinvestigate and to ensure that the claimant's complaints were fully looked into. This was something which was rejected by the claimant when it was proposed by Mr Wylie, albeit on the advice of his union representative, and not taken forward by the claimant as part of the appeal process as he had resigned before the reinvestigation commenced. Although the claimant says that Mr Jepson delayed in progressing this as his letter indicated that if he did not hear from the claimant on the options put forward, he would take it forward, we consider that Mr Jepson had proper cause for waiting for the claimant to make his choice. He was concerned that a re-investigation would take time and put further stress and pressure on the claimant. He saw the alternative option as more likely to resolve issues and hoped the claimant would decide to go down that route.

174. Further, for the same reasons, the fact that Mr Wylie did not uphold the claimant's grievance initially cannot be viewed in isolation when considering the respondent's conduct. That was just one step in the process and when he met with the claimant, he recognised that there were gaps which needed further investigation which he sought to rectify. It cannot be said that the respondent's investigation and decisions in respect of the grievance were calculated or likely to destroy or seriously damage trust and confidence.

175. The respondent had not completed the provision of documents required by the claimant's SAR at the time that he resigned. Some documents had been provided at the time of the claimant's appeal hearing and although the respondent was admonished by the ICO for their delay there were justifiable reasons for the delay in completing the exercise as explained above. The request had been made in December and the claimant resigned in March. Unfortunately, the claimant at that time saw the delay as being deliberate and because the respondent had something to hide. This was his perception, but it was not correct. There was reasonable cause for the delay in not completing the process and it was neither calculated nor in our view likely to damage or seriously destroy trust and confidence.

176. Although we have found that there was no discrimination, detrimental treatment because the claimant had raised health and safety concerns or made a protected disclosure or failed in its duty of care towards the claimant, we have considered whether the allegations in themselves, which we have found to have happened, were without reasonable or proper cause calculated or likely to destroy or seriously damage trust and confidence. Viewed

individually and collectively we do not consider that they were. We have set out our view upon these matters above and there were explanations and context around each of the issues which provided reasonable and proper cause for the actions of the respondent as we have described. In any event we do not consider that the respondent's conduct was likely to destroy or seriously damage the trust and confidence which the claimant had in the respondent. The claimant had by the time of his resignation formed a view of the respondent and its conduct which was influenced by his mental health and his perceptions of the respondent's actions. He had lost faith in the respondent and did not consider that his grievance was being progressed and that the respondent was deliberately holding back documents he had requested under the SAR. He mentions these issues in his resignation letter as the last straw. Those views were reasonably held. At the time he resigned, the claimant did not know that Mr Jepson was not reinvestigating. The claimant had not made any further enquiries. Mr Jepson was seeking a resolution for the claimant to bring him back into work. He had in mind possible mediation. The grievance was still alive and would have been completed if the claimant had wanted it to. The claimant relies upon this and the delay in the SAR as the last straw and although these do not in themselves need to amount to fundamental breaches of contract, viewed collectively with the respondent's actions there was no conduct which would amount to a fundamental breach of the term of trust and confidence.

177. It is not therefore necessary for us to consider the remaining parts of the test in Western Excavating v Sharp (above). The claimant was not therefore dismissed.

Automatic Unfair Dismissal (section 100 and section 103A ERA)

178. As the claimant was not dismissed it is not necessary for us to consider the reason or principle reason under section 98 ERA or whether dismissal was for a health and safety reason under section 100 ERA.

179. The Tribunal apologies for the delay in providing its judgment to the parties. The case has been a complicated one with many intertwining issues which have required the Tribunal's full focus and time to determine.

Employment Judge Benson

8 December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 December 2021

FOR THE TRIBUNAL OFFICE