Case No: 3401391/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Hatchett	**v**	**Bradecca Restaurants T/A McDonald's Restaurant**

Heard at: Bury St Edmunds **On: 11, 12 & 13 September 2017**

Before: Employment Judge M Warren

Members: Mr Sutton and Mr Brazkiewicz

Appearances:

For the Claimant: In person.

For the Respondent: Ms Shrivastava, Counsel.

JUDGMENT having been sent to the parties on 4 October 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The Issues

1. In this case the claimant brings claims of disability discrimination. The issues were identified at a preliminary hearing before Judge Postle on 16 June 2017. At the outset of the hearing I discussed the list of issues with the parties and amendments were made as a consequence of those discussion. I quote below the issues as identified by Judge Postle, with the amendments agreed at the start of this hearing appearing in bold:

> *2. By one claim form filed on the 5th December 2016 the Claimant made claims under the Equality Act 2010 for the protected characteristic of disability. These involve claims for direct discrimination Section 13, discrimination arising from disability Section 15 and Harassment under Section 26.*

3. The disability relied upon by the Claimant is stress, anxiety and depression. That is now conceded by the Respondent as satisfying the Section 6 definition of disability under the Equality Act 2010.

4. What is not accepted or conceded by the Respondent is whether the Respondents knew or could it reasonably expected to have known that at all material times the Claimant was a disabled person for the purposes of the Equality Act 2010.

Direct discrimination Section 13

5. On the 20th July 2016 the Claimant was not permitted to attend the Team Building event in question.

(1) Did the Respondent treat the Claimant less favourably than the Respondent treated or would have treated another in materially similar circumstances to the Claimant?

(2) The Claimant relies upon the comparator of Lisa Chadband.

(3) Was the reason for the Claimant's treatment the Claimant's disability?

Discrimination arising from disability Section 15

6. The Claimant was not permitted to attend the Team Building event on the 20th July 2016 ***and was not scheduled for shifts after 22 July 2016****.*

(1) Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability?

(2) If so, was the treatment a proportionate means of achieving a legitimate aim?

(3) (a) Further the Respondent did not schedule the Claimant for shifts after the 22nd July 2016. The Claimant was off work from the 11th July 2016.

(b) Not allowing the Claimant to attend a team building event.

Harassment under Section 26

7. Did Mr Aldred's emails to the Claimant dated the 14th and 20th July 2016 constitute unwanted conduct relating to the Claimant's disability which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant having regard to;

(a) The perception of the Claimant.

(b) The other circumstances of the case.

(c) Whether it was reasonable conduct to have that effect.

Jurisdiction

8. Did any acts of discrimination relied upon by the Claimant occur out of time? If so, do any such acts form part of "conduct extending over a period" for the purposes of Section 123(3) of the Equality Act 2010. And was the claim brought within 3 months of the end of that period, and if not would it be just and equitable to extend time for any reasons. ***The Respondent clarified that this is in relation to the harassment allegation in respect of the email of 14 July 2016 only.***

Evidence

2. We had before us three witness statements, one from the claimant and for the respondent, we had statements from Miss Jazzanna Taylor and from Mr Sean Aldred. We also had before us a properly paginated and indexed bundle of documents running to page number 288.

3. At the outset of the case we were presented with a timetable, a list of essential reading and a chronology by Ms Shrivastava. I am grateful to her for the effort in putting that document together. I am also grateful to her for the typed documents she prepared herself, which were typed transcripts of handwritten notes in the bundle relating to the grievance and grievance appeal. At the conclusion of the evidence, Ms Shrivastava presented us with written submissions, to which she has subsequently spoke.

The Law

4. In terms of the law, we have prepared a detailed exposition of the relevant law which I did not read through at the time; it would have taken quite a long time to read out and it is doubtful whether that would assist the claimant. I gave a quick layman's summary of the relevant law and said that I would set out the full explanation in any written reasons I might in due course be required to prepare.

5. Direct discrimination is where somebody treats someone badly because of their protected characteristic, in this case, disability. When I say treat badly, I mean treat badly as compared to how that person would have been treated, had that person not had the disability.

6. Disability related discrimination is where somebody is treated unfavourably because of something arising in consequence of the disability. The test is, "unfavourable" not, "less favourable", which means there is no need to compare the way one is treated compared to another without disability.

7. In the instance of disability related discrimination, there are two defenses open to the respondent which are relevant in this case. The first is the respondent could and does in this case say, it could not reasonably have been expected to have known that the claimant was disabled. The second

is that there can be objective justification for the treatment in question.

8. Harassment is where one is subjected to unwanted behaviour or treatment that creates an intimidating, hostile, degrading, humiliating or offensive environment; what we call the proscribed environment. Whether that environment has been created will depend upon the perception of the individual that is on the receiving end. It will depend on the circumstances of the case. But, we also have to ask ourselves whether the individual was reasonable in having that perception.

9. There are two cases about harassment, one is called Richmond Pharmacology and the other is called Grant, in which two very eminent Judges have warned tribunals about not cheapening the concept of harassment by making findings that the smallest slips of the tongue, smallest of mistakes and errors, amount to creating that atmosphere.

10. The lawyer's explanation of the law appears in the paragraphs below.

11. Disability is a protected characteristic pursuant to Section 4 of the Equality Act 2010.

12. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting him to any other detriment.

13. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

Direct Discrimination

14. Direct discrimination is defined at Section 13 as follows:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others…*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

15. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having his/her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he/she has been treated less favourably than that real or hypothetical comparator.

16. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, "on the ground of" the

particular protected characteristic. It was not the intention of Parliament to change the legal meaning of direct discrimination, as explained in the Explanatory Notes published with the Act at the time. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwiwu and Taiwo v Olaigbe [2014]IRLR 448 at paragraph 40 that there was no difference in meaning between, "because of" and "on the grounds of".

17. In Onu, Underwood LJ explained that what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator's mind in leading him to act in the manner complained of. The leading authority on the latter case is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

> *"…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…*
>
> *I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."*

18. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds*

or protected acts had a significant influence on the outcome, discrimination is made out."

Disability Related Discrimination

19. Disability Related discrimination is defined at section 15 as follows:

(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.

20. The difference between Direct Discrimination on the grounds of disability and Disability Related Discrimination is often neatly explained in these terms: direct discrimination is by reason of the fact of the disability, whereas disability related discrimination is because of the effect of the disability.

21. As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

22. There are 2 separate causative steps: firstly, the disability has consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN)

23. If there has been such treatment, we should then go on to ask, as set out at Section 15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

23.1. Whether there was a legitimate aim, unrelated to discrimination;

23.2. Whether the treatment was capable of achieving that aim, and

23.3. Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

24. The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.

25. There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.

26. Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.

27. The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.

28. "Legitimate aim" and "proportionate means" are 2 separate issues and should not be conflated.

29. The tribunal must weigh out quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

30. The tribunal should scrutinise the justification put forward by the Respondent , (per Sedley LJ in Allonby v Accrrington & Rosedale College [2001] ICR 189).

31. In this case, the Respondent relies on the defence provided for at section 15 (3) – that it did not know and could not reasonably be expected to know, that Mr Hatchett was disabled. The Equality and Human Rights Commission Code of Practice on Employment (2011) explains, (at paragraph 5.15) that an employer must do all it can reasonably be expected to do to find out if a worker has a disability. It gives as an example someone who has depression with a good performance and attendance record who has been repeatedly late and has made mistakes. This sudden change should alert the employer to the possibility that this was connected to a disability and it is likely to be reasonable for the employer to explore with the employee whether the difficulties are because of something arising in consequence of disability.

Harassment

32. Harassment is defined at section 26:

> *"(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 in subsection (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.*
>
> *(5) The relevant protected characteristics are—*
>
> *…*
>
> *disability;*
>
> *…."*

33. We will refer to that henceforth as the proscribed environment.

34. The conduct complained that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred.

35. The EAT gave some helpful comments by way of guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but his comments apply to cases of harassment in respect of any of the proscribed grounds.

> *"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

36. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769. Of the words, "intimidating, hostile, degrading, humiliating or offensive" he said that Employment Tribunals *should not cheapen* the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

Burden of Proof

37. In respect of the burden of proof, Section 136 reads as follows:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

38. The Court of Appeal gave guidance on how to apply the equivalent provision of s136 under the previous discrimination legislation, in the case of Igen Ltd v Wong and Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps, that guidance may still be relied upon, see Underhill LJ at paragraph 14 in Greater Manchester Police v Bailey [2017] EWCA Civ 425. We have carefully observed in this case in considering the claim of indirect discrimination, on the basis that those steps assist equally well under the Equality Act 2010.

39. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation. That case also confirms that a mere difference in treatment is not enough.

40. There has at the time of considering our decision in this case, been some controversy in this regard, with the decision of the EAT recently handed down in Efobi v Royal Mail Group Ltd UKEAT/0203/16/DA suggesting that there is no initial burden of proof on the Claimant, (which is how the legal concept of the provision of s136 has always been described). However, it seems to us that the prevailing view is that of Underhill LJ in the Court of Appeal in Greater Manchester Police v Bailey [2017] EWCA Civ 425 where, at paragraph 14 he approved the continuing reference to the guidance in Igen v Wong and said that in effect, the Claimant has to establish a *prima facie* case.

41. In The Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 Kerr J helpfully explained, (paragraphs 36 and 37) that section136 places no burden on the Claimant, but enacts a mandatory finding of discrimination where there are facts, (not necessarily proven by the Claimant, but found by the Tribunal by the end of the hearing) from which the Tribunal could conclude, absent an explanation, that there was discrimination.

Time

42. Section 123 of the Equality Act requires that claims of discrimination must normally be made within 3 months of the act complained of, or such further period as the Tribunal considers just and equitable. Where an act continues over a period of time, time runs from the end of that period, from the last act.

43. In the case of Hendricks v Metropolitan Police Commissioners [2003] IRLR 96 the Court of Appeal on the question of what amounted to a continuing act, cautioned Tribunals against looking too literally for a policy, rule, practice, scheme or regime, but rather to look for incidents which are linked to each other and which are evidence of a *"continuing discriminatory state of affairs".* As Mummery LJ put it at paragraph 52 of that Judgment:

> *"The question is whether that is an act extending over a period as distinct from a succession of unconnected or isolated or specific acts, for which time would begin to run from the date when each specific act was committed".*

Findings of Fact

44. The respondent concedes that the claimant was a disabled person at the relevant time by reason of his stress, anxiety and depression, but it does not accept that it knew or could reasonably have been expected to have known that he was disabled.

45. The respondent is a McDonald's franchise, consisting of ten stores, as they call them. At Barton Mills, there are approximately 100 employees. The respondent group has approximately 800 employees.

46. The respondent's witnesses from whom we heard, had no training in disability issues specifically. We were told that managers completed online training on diversity. Mr Aldred thought that there was an equal opportunities policy, but he was not sure where it was. He did not know what Occupational Health was. He thought that the franchisor McDonald's, provided Human Resources support, but he was not sure. The witnesses seemed to be unaware from where or how they could access Human Resources support.

47. There is in fact an Equal Opportunities Policy in the handbook, that appears in the bundle at page 129. In there, there is a brief reference to disability as a protected characteristic. There is a brief reference to direct and indirect discrimination, to harassment and victimisation and a brief acknowledgement of the duty to make reasonable adjustments. There is no

detailed guidance on how to deal with situations involving employees with disability or on the expectations of such employees.

48. The claimant's employment with the respondent commenced in June 2015. In his job application, he ticked a box to say that he was not disabled. He did that because he did not realise that his condition met the definition of disability in the Equality Act 2010.

49. The claimant says that he did answer some questions in handwriting, giving details of depression and the medication which he sometimes took, which he says the respondent's have removed from it's documentation. The respondent say that is not so. The application form and the documents he completed when he arrived at the respondent are at pages 63 to 66.

50. At page 196 are the minutes of the grievance meeting which took place in September 2016, during which it was noted that the chair of the grievance meeting, somebody called Andy Day, had shown the application form to the claimant to illustrate that there were no notes or any references to disability therein. The minutes do not record the claimant as protesting that he had written out such documents and they must have been removed. On the other hand, during his oral evidence, the claimant frankly acknowledged that he was not entirely clear when he had written this document out but that he did recall writing out some answers to some questions, setting out that he was taking medication for depression and that it was relevant to give that information because he knew that the medication might affect his ability to use heavy machinery. That is evidence that we found credible and accept.

51. An allegation that the respondent has removed documents from those submitted in evidence is a serious allegation and one that has not been made out. We do however, accept that the claimant told someone or put somewhere in writing from early in his employment, that he suffered from depression and that he took medication for it sometimes, which could make it unsafe for him to use machinery. That is corroborated in an email he wrote on 11 February 2016, to which we will turn shortly.

52. The claimant worked as a crew member. He trained at a store in Thetford pending the opening of a new outlet at Barton Mills. He transferred to Barton Mills in September 2015. He worked about 30 hours a week ordinarily. He was happy in his work and he received good performance reviews.

53. In July 2015 the claimant's wife fell pregnant. There were complications. The respondent changed his shifts so that he could attend regular hospital appointments with her.

54. On 8 February 2016, the claimant did not attend work when he was due. On 9 February he wrote an email, page 145. (A note about this and ensuing emails from the claimant: the addressee is shown as '1464 Barton Mills', this appears to be an email address to which managers of the Barton Mills store have access.) This particular email is marked for the attention of 'Sean', ie Mr Aldred. The claimant wrote that he wanted to talk to Mr Aldred

about what had happened the previous day and due to the delicate nature of the problem, he would rather speak to him first. However, having not been able to speak to Mr Aldred, the claimant then chose to send a long detailed email on 11 February 2016 to the same address, marked for the attention of 'Sean' which starts at page 146. The first paragraph of that email warrants quotation in full and it reads as follows:-

> "I don't really know how to write this so I guess I will just say it as it is. As mentioned on my application form, I suffer from depression and anxiety. I have been taking medication for this for several months now but recently I have seen my symptoms deteriorate. I am completely stressed out with my life at the moment, my anxiety is off the chart and is causing bouts of anger and panic attacks. Monday was a very bad day. It just all started going wrong and within 20 minutes of waking I was in full rage and stressing at everything. My wife had to call my GP and I went to see him in the afternoon. When I saw him I was still angry and anxious. He upped my anti-depressants to the highest dosage and told me to come back on Wednesday. Since then I have felt completely miserable, lethargic and panicky. My tablets also help me to sleep so the higher dosage is making me tired all the time. I started out with intentions this morning and used the little energy I have to try and stay focused however due to me having zero threshold for anything stressful, I have succumbed again."

55. In this email, the claimant also refers to having been in contact with local mental health services about treatment and counseling. He apologises for the trouble that he has created and he explains how his anxiety had put him off speaking with Mr Aldred previously because he was not sure how he would take it, but he does want to keep his job. Mr Aldred replied, page 147:-

> "Don't worry about anything this end. Get yourself sorted and keep me updated and when you're back etc"

56. On 17 February 2016, the claimant replied to Mr Aldred. He explained that his doctor had suggested that he reduce the length of his shifts. This apparently is to do with a wrist injury and to allowing him time at home with his wife and not on the face of it, to do with his mental health. He also thanks Mr Aldred for his understanding.

57. Miss Taylor replied as Mr Aldred was on holiday, page 149. She wrote to confirm that she was sorry to hear about the claimant's wrist and that she would be able to accommodate him with regards to the hours that he wanted to work. He replied at the top of page 149 on 17 February 2016, to thank her for doing that and explaining how it was a big help.

58. The claimant then had a few days off work and he returned on 22 February 2016 on reduced hours.

59. Because his wife's induction had been brought forward a week, Miss Taylor arranged for the claimant to have two weeks off between 25 February and 7 March 2016.

60. On 31 May 2016, the claimant did not turn up at work. This was because he'd had a row with his wife, he'd had an anxiety attack and he'd moved out to his father's.

61. On 1 June 2016, the claimant wrote to explain what had happened, page 159. The email is addressed to '1464 Barton Mills' but marked for the attention of 'Sean/Jazz'. He apologised for the previous day, explaining that he and his wife had an argument which had resulted in his moving out to his father's, in his having an anxiety attack and needing support from his GP as he was in a bad state. He said that after that he had calmed down and had moved his things to his father's. He said that he understood that he might get a warning for that as it counts as a, "no show" which he accepted. He apologised for letting personal matters spill into his work.

62. On 4 July 2016, the claimant emailed the respondent one and a half hours before his shift was scheduled to start, to say that he would not be attending work and that he'd had another row with his wife, this is at page 160. He refers to being locked out of his house and he says in particular:-

> "Furthermore my stress levels are at an all time high and I'm struggling to deal with any of this. Just remembered my anti-depressants are in the house too."

63. He writes of moving forward, that he knows he needs to get his life together, he is going to try and get in to see his doctor and he apologises for leaving everybody in the lurch. He received a response to that from Mr Aldred who replies:-

> "Got it, however this can't keep happening. I will need to review your scheduled hours moving forward."

64. On 7 July 2016, the claimant returned to work for just two more shifts, on 7 and 8 July 2016. On the 11 July 2016, the respondent says that the claimant had an altercation with a colleague. The claimant says that is not correct, he just did not turn up at work. Miss Taylor and Mr Aldred said that he had been sent home from work. One would have thought that if that was the case, there would be a record of this and there is not. Miss Taylor and Mr Aldred acknowledged in evidence they did not have direct knowledge of this incident, but they say that they were told about it by another manager. Incredibly, both of them say they cannot remember who that was. The only evidence the respondent can actually point to is at page 193, a document produced as part of the grievance investigation. It is an email from a Mr Legood. In this email, Mr Legood does speak of the claimant, "loosing it" and, "snapping" at somebody, "shaking with anger". Mr Legood wrote that he agreed with the claimant that he should go home. There is no reference to when this occurred. Mr Legood is not here to give evidence. The claimant says he was never sent home. He acknowledges that he did have a couple of altercations with colleagues. He also acknowledges that he had a crisis on 11 July 2016; this is referred to in his email at page 162, but that does not necessarily mean that he was sent home. That comment is equally consistent with him having a crisis and not going to work.

65. At page 256, the respondent has produced his clocking attendance records and these show that he was not at work on 11 July 2016. The respondent refers to the claimant having agreed at the preliminary hearing that his last shift had been on 11 July. We accept that was a mistake by him and the claimant was not in fact at work on 11 July.

66. On 12 July 2016, there was an email from Miss Taylor to all staff regarding a team building event on 20 July 2016, this is at page 161. It refers to the event being on the 16 July, but we can see from a further email on 19 July, page 163, that the date was changed to the 20th. People were invited to put their name down on a post-it to say that they were going. It is said to be an event with prizes and awards, some food followed by games of rounders and football and the email anticipates that there will be a good time for all, with prizes for everyone.

67. On 13 July 2016, the claimant emailed the respondent, page 162, to apologise for not showing up at work on 11 July. Again, there is a paragraph at the beginning we need to quote more or less in full:-

> "I had a crisis on Monday and ended up in A&E following a prolonged period of anxiety. It came out of nowhere and the last thing on my mind was work. The way things were going on Monday I was certain I'd end up either in hospital or police station by the end of the day. I was eventually calmed down and given some Diazapan …. I was able to see a doctor yesterday, he has referred me to a psychiatrist and my GP now believes that I was misdiagnosed as depressed and thinks it could be bipolar disorder instead. I've had a telephone assessment today and I'm due to see the psychiatrist next week. I was advised that it is very likely I have bipolar disorder and once confirmed my medication will need to be changed as my anti-depressants will be completely ineffective in treating bipolar disorder. This would explain why I keep having relapses of severe low mood and anxiety as these are symptoms of bipolar disorder too and misdiagnosis is common unfortunately."

68. The claimant goes on to say that he was sorry about Monday, 11 July and he felt awful about it. He said that it was not like him to act so irresponsibly but when a mood kicks in, it is very difficult to control and difficult for everyone around him. He said that he was hoping that with the right treatment, he may be able finally to get control of life. He also said that his psychiatrist has said he would need to talk to work about his condition, but he is anxious about everyone knowing, including managers, as there is a stigma attached to mental health, particularly when it comes to bipolar disorder. He closes by saying that hopefully he will see them all either the next day or the day after, (Thursday 14th or Friday 15th of July 2016).

69. The claimant was expected into work on 14 July and there is then a series of emails that we will need to look at, they start at page 165. The first is from the claimant to the usual address, but for the attention of Mr Aldred or Miss Taylor. In this email, he says he does not think he is going to make it in that day, he is feeling very slow, has not slept well for weeks, he has been waking with tremors, he is sleeping on his father's sofa which is not

particularly comfortable, he is feeling low, lethargic and tired and keeps bursting into tears. He says that his anxiety is high and he has just taken some Diazapan to try and help with that. He says that he will be in contact again if anything changes and that he will let them know about the next day. He says he needs to work as it helps him to get away from it all.

70. Mr Aldred replied and this is one of the emails about which the claimant complains of harassment, so we quote it in full:-

> "Nick, I'm seriously loosing patience with all of this.
>
> I can't keep scheduling you shifts when you fail to turn up for most of them. I suggest you get yourself sorted before you return as I won't be scheduling you until you do. It is not fair on the people working today and or the other days you emailed as it makes us short of staff."

71. The claimant replied making his feelings about that email clear. He speaks of going through a lot of, "crap" at the moment, trying to keep himself together being very difficult. He said that he appreciates that the respondent has a business to run, but he has health issues and relationship issues and he cannot just click his fingers and make it better. He says he has a mountain to climb and that Mr Aldred's email was just downright insulting, he needed support, he cannot do it on his own and that Mr Aldred loosing patience is not very supportive. He acknowledges that he needs to get himself sorted, which is why he said he would do so. He said that he has been open about his situation, despite his anxiety and that all he was getting from Mr Aldred was a, "guilt trip and snarky remarks".

72. Mr Aldred replied a little later:

> "That's fine Nick but as I said in my email below, get yourself sorted and for now I won't schedule you, letting us know via email an hour before your shift is due to start isn't fair on the team.
>
> Also get a doctor to write to us with what's going on and what your needs are at our end and we can do what we can that way. At the minute it's all over the place and not helping any of us."

73. Thereafter on 19 July 2016, the claimant checked online and saw that he was scheduled to work shifts. He therefore emailed to check to see if he was expected in, saying that he was hoping to return to work on the next Thursday. Miss Taylor replied, as Mr Aldred was on leave, page 166. She confirmed that she had been expecting the claimant at work that day, 19 July, and she asks him to confirm when he will be returning, saying that she will be completing the schedule for the next week and there was a lot going on. She asks him to clarify when he will be available.

74. The claimant replied to confirm that everything was up in the air, referring to Mr Aldred having said that he should sort himself out before he was scheduled for any more shifts. He explained that his medication had been stopped until he had seen the psychiatrist. He says that he would like to go back to work on Thursday, that is 21 July 2016, but he was thinking of going along the next day, 20 July, to the team building event. He refers to his friend Ryan having said that he was going and had suggested that the Claimant went along too.

75. Mr Aldred and Miss Taylor subsequently had a conversation about whether or not to allow the claimant to attend the team building event and concluded

that he should not. So then on 20 July 2016, page 167, at 12.48pm, Miss Taylor sent an email which reads:-

> "I think it would be best if you didn't attend this afternoon as it wouldn't look good seeing you there as not at work. Hope you understand."

76. The claimant replied saying that he did not understand and to him, it sounded like discrimination. He explained that he had been thinking that it might be good to gently ease himself back into it by attending the team building event. It was a good opportunity for him to see people without the pressure of work. He talks about his life having changed for the worse and Mr Aldred telling him he was loosing patience and now Miss Taylor saying he cannot attend this team building event.

77. Miss Taylor replied to ask the claimant for a phone number so that they could chat. The claimant replied saying that he was not prepared to handover his phone number, he did not want to talk on the phone, he found it easier to manage his anxiety by keeping to emails.

78. That was followed by an email from Mr Aldred on 20 July 2016, which again we will quote in full because it is alleged to amount to harassment:-

> "If we could it would be better to talk face to face or phone call. I feel you are misinterpreting what we are saying and not fully understanding.
>
> We do care about our employees including you, we don't mean to come across like we don't care about what you're going through because we do. But all we get from you is the odd email saying you can't get in to work, and at times only an hour or so before your shift starts. This is why it wouldn't look good to some of the team, we've had 3 people missing all week and you being one of them, it's been hard work for them in this weather and it's not fair them seeing you playing rounders but not at work.
>
> Get that letter to us from your GP so we can start to put things right, until then all I've got is what you're telling me and it's not enough I'm afraid."

79. The claimant replied to say that he could not misinterpret soemtign that has been written in black and white, quoting passages from earlier emails saying that it would not look good if he went to the team building event and that Mr Aldred was, "seriously losing patience." He protests at the suggestion that he had failed to turn up for, "most of" his shifts, and explains how his illness is affecting him.

80. Now a word or two about the comparator upon whom the claimant relies, Lisa Chadbund. She was allowed to attend the team building meeting, although she had been absent from work. She was recovering from heart surgery and she was happy for everyone to know that. The respondent says that the claimant wanted his illness kept confidential and that it was. Also, the respondent says that Miss Chadbund had not been cancelling shifts at short notice or not turning up, whereas the claimant had.

81. On 21 July 2016, the claimant visited his doctor and was issued with a fit

note, page 259. This fit note says that he may be fit to work, taking into account the doctor's advice that he work altered hours. The doctor suggests that his shifts be reduced to a maximum of five hours, with no more than three shifts per week. Unfortunately, the claimant did not produce that fit note to the respondent at the time that it was issued.

82. The claimant visited his GP again on 28 July 2016. He was issued with a further fit note, which said he may be fit to work, taking into account the GP's advice which on this occasion, was that it be with mutual discussion with the employers. The GP expressly said that he was fit to go back to work. The claimant's GP wrote a letter 'to whom it may concern' dated 28 July 2016. In this short letter, the doctor confirmed that the claimant had been suffering with depression as a result of stress:-

> "As part of his rehabilitation it is important that he is engaged in work. I have provided a fit note that he is stable enough to resume his duties (following an appropriate discussion with yourselves)."

83. On 2 August 2016, the claimant met with a Ms De'ath of the respondent. He handed her the two fit notes that we have just referred to and the letter that we have just quoted. It has been suggested to us by Ms Shrivastava that the evidence was that only the first of those two fit notes were handed to Ms De'ath, not the second one. What Ms De'ath said is not challenged, which is that she said the hours would not be much good to the claimant as they were not enough to pay the bills and she suggested that he contact the Job Centre for advice on benefits. Ms De'ath said that management had not been trained, "in these sort of things" that she had never met anyone with depression and that this was all new to her.

84. On 3 August 2016, the claimant visited his doctor again and on this occasion, he was issued with a further fit note (page 181) which states that he is not fit for work and certifies him as unfit for work for the remainder of August.

85. The claimant raised a grievance on 16 August 2016 which was heard on 9 September. The outcome was provided on 14 September. He appealed the outcome, which was heard on 9 October and the appeal outcome was provided on 10 October 2016. These are not matters that we have needed to go into to decide the issues, other than to observe that in a statement provided for the grievance investigation, Mr Aldred commented, (page 185) that in his view, it was not a good idea that the claimant attend the team building, because with the amount of time that he had had off and his late sickness leaving shifts short, he did not think it would look good to the rest of the team.

Conclusions

Respondent's Knowledge of Disability

86. We will first deal with the respondent's defence that it could not reasonably have been expected to know that the claimant was disabled. The requirement is that they ought to have done all that they reasonably could,

to find out if the claimant was disabled. In the words of the statute, "that they could not reasonably be expected to know that he was disabled". When I asked Ms Shrivastava about this in closing, she said that the respondent's case is that the claimant was asked to provide a doctors letter and Miss Taylor gave evidence, (vehemently denied by the claimant) that she had many discussions with him about his circumstances and his needs. In any event, if Miss Taylor had many conversations with the claimant about his circumstances and his needs, she ought very much to have been made aware, had she been appropriately trained as a manager or if she had sought Human Resources advice, that the claimant was likely to meet the Equality Act 2010 definition of disability.

87. In deciding what the employer might reasonably have known, it is relevant to take into account the size and administrative resources of the employer. This is a business with 800 employees. Such a business ought to ensure that it has appropriately trained managers, who are aware of the issues that can arise in relation to disability. It ought to have appropriate procedures in place for managing absence that deal with potential disability issues. It ought to have a diversity and equal opportunities policy that provides guidance on disability issues. Its managers ought to have ready access to expert Human Resources advice.

88. What could be reasonably expected of an employer of this size in these circumstances is at the very least, for enquiries to have been made of the doctor, (with the permission of the employee of course, but by the employer) as to the nature of the illness, its duration, its effect on day to day activities, the prognosis, when a return to work might be expected, whether there are disadvantages in the work place because of the condition and whether there is anything the employer can do to assist the employee. More usually, one would expect an employer of this size to have arrangements in place for the employee in question to be referred to expert occupational health advice. To expect someone with mental health issues to go to his or her doctor and secure a letter that deals with these issues is unrealistic and woefully inadequate.

89. In our judgment, the steps taken by the respondent were less than could reasonably have been expected of them and the respondent could have reasonably been expected to know that the claimant was disabled.

<u>Direct Discrimination</u>

90. To succeed, the claimant must have been treated less favourably than a comparator because of his disability. There must be no material difference between the circumstances of the comparator and the claimant. The claimant relies on Lisa Chadbund as an actual comparator. She had been off work following heart surgery; this meant that she was not scheduled for shifts because the respondent knew she was not available for work. She was not therefore calling in to cancel shifts, nor was she turning up without having called in to say that she was not coming in. Miss Chadbund was also happy for her colleagues to know that she had been absent because of the heart operation. The nature of her absence and the issue of confidentiality make her circumstances different from that of the claimant's

and she is not therefore an appropriate comparator.

91. We must therefore construct a hypothetical comparator, that is someone who is not disabled, who has been absent from work and has called in to cancel shifts or who has not shown up for shifts without calling in, in the same way that the claimant had. The hypothetical comparator would have a reason for his or her absence, but would not wish work colleagues to be made aware of them. Would that hypothetical comparator have been treated any differently from the way that the claimant was treated? Would Mr Aldred and Miss Taylor have told that person that he or she was not to attend the team building event? There are no facts from which we could conclude that they would not have done so, that they would not have told the hypothetical comparator not to attend, such that we would have to look to the respondent for an explanation. In fact, we have the respondent's explanation, an explanation that emerged in the evidence of Mr Aldred and Miss Taylor. Their explanation is that the team building event is a reward to staff who have been regular attenders, who have been reliable. The difference in treatment of Miss Chadbund is because she had not been unreliable, she had no shifts scheduled during her illness and her recovery. The claimant was the very opposite of the purpose of the team building, he was regarded as unreliable. We are satisfied that the claimant's disability played no part consciously or unconsciously, in the decision of Miss Taylor and Mr Aldred not to allow him to attend the team building and his claim of direct discrimination must therefore fail.

<u>Unfavourable treatment Arising from Disability</u>

92. The defence in s.15(2) of the Equality Act 2010 is not available to the respondent.

93. There are two allegations of unfavourable treatment; not allowing the claimant to attend the team building event and not scheduling him for shifts after the 22 July 2016. We will deal with each in turn.

94. For this claim to succeed, there must have been some unfavourable treatment, the test is not less favourable; there is no need to compare the treatment of the claimant to the treatment of someone else. The disability must cause something and the unfavourable treatment must be because of that something.

Not being permitted to attend the team building event

95. The team building event was a reward for reliable employees, it entailed free food and drink, some fun playing sport and awards presented with a sense of fun. It is plainly unfavourable treatment not to permit an employee to attend that event. The claimant's case is that his disability caused him to be absent from work, either giving late notice that he would not be attending for his shift or simply not turning up at all. The respondent says that there were other causes of his absence; his wife's difficulties in her pregnancy and his relationship difficulties with his wife. The respondent also says that his disability did not prevent him from giving notice of his absences.

96. It is clear to us on the claimant's evidence, which we accept, that his depression had been triggered by his wife's difficulties with her pregnancy and their subsequent matrimonial difficulties. For the claimant, work was not stressful, it did not cause his depression, he enjoyed his work. It is the symptoms of depression that are the primary cause of the claimant's absences. He was unable to cope at home, that triggered his depression. The symptoms of his depression meant that he was unable to attend work. At times, his mental turmoil was such that he did not think to, or could not face, calling-in to say that he would not be attending. The respondent demonstrates a lack of insight when it suggests that the claimant's disability did not prevent him from giving advanced warning to the respondent that he would not be attending.

97. The respondent advances justification for its unfavourable treatment, (were we to so find) that their concern was to protect the claimant's desired confidentiality as to the reason for his absence. We have two observations about this. The first is that it is surely a matter for the claimant. Certainly, one might ask him if he is sure that he wants to attend, given that he is likely to be asked questions by his colleagues. But ultimately, it is a matter for the claimant. On that basis alone, we would say that this was not a proportionate means of achieving what may have been a legitimate aim. However, as it is, we find that protecting the claimant's confidentiality was not the purpose behind preventing him from attending the team building. The purpose was, the aim was, to adhere to the primary function of the event, which was to reward and thereby encourage reliability. That is a legitimate aim, but the means to achieve that in the claimant's case had the effect of denying someone whose absence had been due to disability, the pleasure of attending this event in circumstances in which he had indicated that he felt it would help him in achieving his return to work, (see the claimant's email of 20 July 2016 at 1.32pm, at page 167).

98. A proportionate means was not therefore adopted to achieve the legitimate aim. The respondent's reliance on the justification defense therefore fails and the claimant's complaint of disability related discrimination in relation to the team building event succeeds.

Not scheduling the claimant for shifts after 22 July 2016

99. In his email of 14 July 2016 at page 164, Mr Aldred told the claimant that for now, he would not schedule him for shifts. One should remember that the context is the claimant's earlier email to say that he would not be in that day, he would contact Mr Aldred later about the next day, stating that to work helps. Mr Aldred told the claimant to get his doctor to write with what his needs are and what they can do. We have already found that the respondent's failure to take the initiative of contacting the claimant's GP itself or referring him to Occupational Health, is a failing on its part. Simply telling the claimant that it will not schedule him for shifts when he wants to work, is plainly unfavourable treatment. The reason Mr Aldred would not schedule the claimant for shifts was as he said, that he had lost patience with the claimant, not turning up for shifts or giving late notice that he was not going to attend. The reason the claimant was not turning up or cancelling at short notice is as we have explained above, because of the

effect of the symptoms of his disability. The non-scheduling of shifts is because of the poor attendance, which is because of the disability. It is therefore less favourable treatment related to disability.

100. Can the treatment be justified? Ms Shrivastava's submission is that Mr Aldred and Miss Taylor believed that the claimant was unfit to attend and given the detrimental impact non-attendees have on the business and work colleagues, it was an appropriate course of action. Certainly, ensuring that one has adequate staffing levels to meet your business needs and to avoid an adverse working environment for those who are at work, is a legitimate aim. However, the context of the refusal here is that the respondent should already have referred the claimant to Occupational Health or at the very least, by now have written to his GP itself, as we have indicated. Had it done so, it might already have been in a better position to make a judgment call on whether to schedule him for shifts. Mr Aldred's knee jerk reaction in a fit of pique on 14 July 2016 in this context, is not a proportionate means of achieving that aim.

101. In an email on 19 July 2016 at 9.02am, (at the top of page 166) the claimant has explained how the team building event would help him come back to work and that he would like to return on the 21 July 2016. The respondent refused to allow him to attend the team building event. In that context, refusing to allow him to attend work was not a proportionate means of achieving a legitimate aim. Mr Aldred says it was up to the claimant to tell him when he was fit to return, but Mr Aldred had already told him he was not going to schedule him.

102. The situation is compounded by the claimant's meeting with Ms De'ath on 2 August 2016, when he presents her with the fit note and the doctors letter, (pages 260 and 261). As we said in our findings of fact, what was said at that meeting is not challenged; he handed over the letter and fit note, she said to the claimant that the hours would not be much good to him because he would not earn enough to pay his bills, she suggested he contacted the Job Centre for advice on benefits, she said that management were not trained in these sort of things, she had never met anyone with depression and all this was new to her. That is frankly breathtakingly appalling, it is a wholesale failure on the respondent's part to meet its obligations under the Equality Act 2010 and indeed to the tax payer and society at large. It is no surprise, in light of that reaction, that the next day the claimant was certified by his GP as wholly unfit to work.

103. The legitimate aim of ensuring adequate staffing levels has not been pursued by proportionate means and the defence of justification in this respect, therefore fails.

104. Ms Shrivastava mentioned at the conclusion of our oral Judgment, that we appear to have overlooked that one of her submissions on potential justification was the perception of the claimant's work colleagues were he to attend the team building event, given that he had been cancelling shifts, and that it was an event to reward. We said that we would look at that point and we have done. The submission did not appear in Ms Shrivastava's written submissions, but she did mention this in her oral submissions. We remain of the view that the discriminatory act of not allowing the claimant to attend the team building event cannot be justified. If one weighs in the balance the potential adverse reaction of work colleagues, wondering what he is doing at that event when he has recently not been showing up for

shifts, as against the affront and hurt to the claimant and the potential of the team building event for assisting him in his return to work, the significantly greater harm is in not permitting him to attend. There is no evidence that anybody would have taken it as amiss had the claimant attended the team building event, but even if the respondent had concerns about such a reaction, it seems to us very minor as compared to an employer's obligations toward it's disabled employees.

105. The claimant's complaint of disability related discrimination in his not being scheduled for shifts after 22 July 2016 therefore succeeds.

Harassment

106. We very much have in mind the caution expressed by Lord Justices Underhill and Elias in Richmond Pharmacology and Grant respectively. Can the wording in these two emails by Mr Aldred really be said to create a hostile, intimidating, humiliating or degrading environment? We must have regard to the claimant's perception, the circumstances of the case and whether it is reasonable for him to have such a perception. The claimant's perception was that he saw the two emails as intimidating and hostile, that is evident from his email replies. It is worth repeating the words of those two emails, page 165:-

> "Nick, I'm seriously losing patience with all of this.
>
> I can't keep scheduling you shifts when you fail to turn up for most of them. I suggest you get yourself sorted before you return as I won't be scheduling you until you do. It is not fair on the people working today and or the other days you emailed as it makes us short of staff."

And at page 170:-

> "… all we get from you is the odd email saying you can't get in to work, and at times only an hour or so before your shift starts. This is why it wouldn't look good to some of the team, we've had three people missing all week and you being one of them, it's been hard work for them in this weather and it is not fair them seeing you playing rounders but not at work.
>
> Get that letter to us from your GP so we can start to put things right, until then all I've got is what you're telling me and it is not enough I'm afraid."

107. Those emails are aggressive, they are expressing irritation, they are lacking in understanding and insight. In short, they are hostile. They are also degrading in their lack of recognition of the nature of the claimant's illness. In those circumstances, we are of the view that it was reasonable for the claimant to perceive the two emails as creating the proscribed atmosphere. The two emails are together linked, they are a continuing course of conduct, which is Mr Aldred's adverse reaction to the claimant's absence. The claim in respect of the email of 14 July 2016 is not therefore out of time. The respondent suggests that the emails are not related to the claimant's disability, but they are, they are a reaction to his absence, which is as a

consequence of his disability.

108. The claimant's complaint of harassment related to disability succeeds.

109. Before I finish, there are some further comment that we wanted to make. We wanted to say that Miss Taylor and Mr Aldred strike us as decent people who were doing their best. None of this, it seems to us on the information before us, is their fault. The claimant himself had kind things to say about them in evidence. They in turn were very polite about the claimant. They just did not seem to know any better and that is the fault of their employer, not them. An employer this size should ensure that its managers have training on how to deal with disability issues, they should have policies and procedures in place for referrals to Occupational Health and in particular, to competent expert Human Resources advice. Up until 14 July 2016, Mr Aldred had treated the claimant decently, he was right not to have disciplined the claimant for his absence, (although it has to be said that appropriate absence management policies may have headed off these problems) and what was missing, was an early referral for medical advice.

Remedy

110. Following judgment on remedy and after a break, we proceeded with a remedy hearing. The events of the remedy hearing are in some ways unfortunate. Mr Hatchett had prepared for today, a revised schedule of loss. Unfortunately, he did not tell us about that and did not give a copy of it to Ms Shrivastava before we started the remedy hearing. She therefore proceeded to cross examine at length on matters relating to the impact of the discrimination that we have found to have occurred, on Mr Hatchett in terms of potential personal injury and on going loss of earnings. Whereas in fact, what the schedule of loss produced by Mr Hatchett in his closing remarks, revealed to us is that he drops the loss of earnings claim. There are various items of expenditure for which he claims reimbursement, in total sum of £115 and he seeks an injury to feelings order which he submits should be somewhere in the region of £10,000.

111. Ms Shrivastava's submission simply was that the Vento figure award for injury to feelings should be in the lower band of Vento and there should be no award for travel expenses.

112. On the schedule of loss, where there are expenses claimed in connection with the litigation, that is not claimable as damages. Those are what we would call costs, costs of the proceedings, which would be a separate matter. There is no costs application before us.

113. In terms of travel expenses, the cost of travelling to the respondent's Thetford premises for grievance meetings, are expenses or losses incurred as a consequence of the discrimination, because the discrimination lead to the grievance. The claim there is just £13.11 and we allow it.

114. Fuel costs for attending the preliminary hearing is a matter of what we call costs in the litigation, not damages, so we cannot award that.

115. In respect of the costs of attending stress management and anger management courses, we could not say that those were as a consequence

of the discrimination, because so much else was going on in the claimant's life that was behind his ill health that would have caused him to attend those courses, we cannot say they were caused by the discrimination, so we cannot allow those.

116. Similarly, the claim for travelling expenses to pay wages in to the bank to cover direct debits is too remote for us to allow.

117. So that brings us to the all important and fundamental question of what the injury to feelings award should be.

118. In the case of (1) Armitage, (2) Marsden and (3) HM Prison Service v Johnson [1997] IRLR 162 the EAT set out five principles to consider when assessing awards for injury to feelings in cases of discrimination:

> 118.1. Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.
>
> 118.2. Awards should not be too low as that would diminish respect for the policy of the legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.
>
> 118.3. Awards should bear some broad general similarity to the range of awards in personal injury cases. This should be done by reference to the whole range of such awards, rather than to any particular type of award.
>
> 118.4. In exercising discretion in assessing a sum, Tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.
>
> 118.5. Tribunals should bear in mind the need for public respect for the level of awards made.

119. Further guidance was given on the range of awards by setting out three bands of compensation for injury to feelings by the Court of Appeal in the case of Vento v Chief Constable of West Yorkshire Police (2) [2003] IRLR 102. Those bands were as follows:

> 119.1. The top band should normally be from £15,000 to £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.
>
> 119.2. The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

> 119.3. Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

120. The Vento bands were subsequently amended to take into account inflation, see the case of Da'Bell v NSPCC [2010] IRLR 19. In the case of AA Solicitors v Majid UKEAT/0217/15/JOJ (paragraph 22) Mr Justice Kerr said that it was not necessary for Employment Tribunals to await guidance from the appellate courts before raising the thresholds of those bands further, to take into account inflation.

121. In a personal injury case known as Simons v Castle [2012] All E R 90 the Court of Appeal held that General Damages awards for personal injury should be increased by 10% in all cases where Judgment is given after 1 April 2013. After a period of uncertainty, with conflicting decisions from the EAT, the Court of Appeal has now in De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879 confirmed that injury to feelings awards should similarly be uplifted.

122. In De Souza the Court of Appeal invited the Presidents of the Employment Tribunals in England & Wales to issue fresh guidance, adjusting the Vento figures for inflation and the Simmons 10% uplift. On 5 September 2017 the Presidents of the employment tribunal's for England & Wales and Scotland issued such guidance in respect of cases on which proceedings were issued on or after 11 September 2017. That comes too late for this case, however the methodology recommended for cases issued before that date seems to have unimpeachable logic and we therefore adopt the approach set out at paragraph 11 of the Presidents' guidance in recalculating where the Vento boundaries should be as at November 2016, when these proceedings were issued. We divided each of the figures by 178.5 being the RPI figure as at the date of Vento and then multiplied by 265.5 being the RPI figure for November 2016. We then multiplied the results of those calculations by 10% to add the Simmons v Castle uplift, rounding up or down to the nearest 10.

123. On that basis, the Vento bands should be for the purposes of this case:

Top:	£24,540 to £40,900
Mid:	£8,180 to £24,540
Bottom:	£810 to £8,180

124. This is a case where there have been four incidents of discrimination; in that there are two letters causing harassment and two incidents of disability related discrimination. The employer respondent has to take its victim as it finds him, the eggshell skull principle. Here is a person who is vulnerable because of his illness and he has been greatly upset by what happened, as evidenced by his emails at the time, as well as the evidence that we have heard from him. Our view is that this is a case that is in the upper reaches of the lower band or maybe just the lower edges of the middle band. We

have had regard to the value of these sums in every day terms. We have had regard in broad terms, to the level of awards that are made for personal injury. The conclusion that we have reached is that the appropriate award should be £8,000, and therefore the compensation award is £8,013.11.

_____
Employment Judge M Warren

Date: …27/11/2017……..

Judgment sent to the parties on

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For the Tribunal office