EMPLOYMENT TRIBUNALS

Claimant: Mr M Chowdhury

Respondent: Sparring Partners Ltd

Heard at: London Central Employment Tribunal

On: **22, 23, 24, 25 October 2019**

Before: Employment Judge Quill; Ms O Stennet; Mr K Lenneman

Appearances
For the claimant: In person
For the respondent: Mr S Jagpal, consultant

JUDGMENT

(1) The claim of direct discrimination because of disability, contrary to Section 13 of the Equality Act 2010 fails and is dismissed.

(2) The claim of discrimination arising from disability, contrary to Section 15 of the Equality Act 2010 fails and is dismissed.

(3) The claim of harassment related to disability, contrary to Section 26 of the Equality Act 2010 fails and is dismissed.

(4) Judgment and reasons were given orally, and written reasons were requested at the hearing.

REASONS

Introduction

1. The claim was issued 25 February 2019, following a period of early conciliation which lasted from 11 December 2018 to 25 January 2019. The claim relates to the Claimant's employment with the Respondent.

The Claims

2. The claim alleges that the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010.

3. It alleges that there has been
   3.1 direct disability discrimination and
   3.2 harassment related to disability and
   3.3 discrimination arising from disability

4. The respondent denies all the claims. It does not admit that the claimant is disabled and it also suggests that some of the allegations are out of time

5. A preliminary hearing took place on 24th of June 2019 and a list of issues was produced. This was in our hearing bundle and is set out below.

The List of Issues

6. Whether the Claimant was disabled at the material times by reason of post traumatic stress disorder, depression and anxiety.

7. Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled.

8. Whether the following act/omissions occurred as alleged by the claimant in his Particulars of Complaint:

   (a) On 4 June 2018, Samira Kamara verbally abused the Claimant;

   (b) On 4 and 5 June 2018, without any prior notice, Jonathan Hanley pulled the Claimant into a formal meeting where minutes were taken and inaccurate minutes were subsequently provided;

   (c) On 18 June 2018 Jonathan Hanley, without prior notice, pulled the Claimant into a formal meeting where minutes were taken and false accusations made of "gossip";

   (d) On 4 July 2018, Scott Vernon invited the Claimant to a disciplinary hearing on the same day to answer false allegations and without giving him any time to prepare. The invitation letter suggested only two possible outcomes. At the end

of the hearing Mr Vernon adjourned the hearing for 30 minutes but then disappeared for 1.5 hours;

(e) Jonathan Hanley asked him to attend training on 11 August 2018. There was no training on that day and it was never rescheduled;

(f) On 24 August 2018, Samira Kamara verbally abused the Claimant;

(g) On 3 October 2018, Sarah Walton telephoned the Claimant and put pressure on him to leave the company;

(h) On 4 October 2018 Scott Vernon telephoned the Claimant and threatened, abused and insulted him;

(i) On 5 October 2018 Scott Vernon arrived 20 minutes before the end of the Claimant's shift and conducted a meeting with him that lasted 1 hour 35 minutes;

(j) The Claimant's colleagues were informed about and discussed his sickness;

(k) Mr Vernon did not send the Claimant on sales training and did not give him any feedback on the skills that he needed to improve to be promoted into sales.

9. If any of them did, whether they were acts of direct disability discrimination or disability-related harassment

10. Whether the acts at (e) to (k) were, in the alternative, acts of discrimination under section 15 of the Equality Act 2010 on the basis that the Claimant was treated unfavourably because of his sickness absence which arose in consequence of his disability

The Hearing and Evidence

11. The Respondent provided a bundle which was approximately 360 pages. The Claimant also provided a bundle of approximately 230 pages. There was a significant amount of duplication between the two bundles.

12. We had written statements, and heard witness evidence

12.1 from the Claimant, who called no further witnesses

12.2 on behalf of the Respondent, from Scott Vernon (in relation to whom there was also a supplementary statement), Sarah Walton, Samira Kamara and Jonathan Hanley. Mr Hanley gave his evidence via video link from Italy.

Disability Issue

Findings of Fact relevant to disability

13. The case management orders included an order that the claimant was to send to the

respondent all his medical records (including his GP notes, hospital records and reports of any medical profession professional who has treated him) relating to his PTSD, depression and anxiety and a witness statement setting out the impact of his conditions on his normal day-to-day activities at the material time.

14. On 1 August 2019, the claimant sent an email to the tribunal and the respondent which said:

    I write to you regarding the tribunals order for an explanation on how my disability affects my daily life.

    My post traumatic stress disorder with anxiety and depression makes it very hard for me to carry out day to day tasks. This mental impairment makes it hard to get ready in the morning, makes it difficult to concentrate and makes gives me incredibly high amounts of anxiety. Carrying out tasks sometimes comes to a premature end due to loss of focus. The depression and anxiety prevents me from getting enough sleep most nights of the week. Some nights I get zero sleep.

15. We also took into account a letter addressed "to whom it may concern" dated 19 June 2019, from the claimant's GP. This letter said.

    I AM WRITING TO CONFIRM THAT THIS MAN HAS A PERSISTING POST TRAUMATIC STRESS DISORDER CAUSING ANXIETY WITH DEPRESSION, PARTICULARLY SEVERE SINCE HE CONSULTED ME IN AUGUST 2018.

    HE HAS ONGOING STRESS & ANXIETY NEEDING HIGH DOSE MEDICATION; HIS CONDITION HAS A DETRIMENTAL EFFECT ON UNDERTAKING NORMAL TASKS IN DAILY HOME LIFE WITH SIGNIFICANT SLEEP DISTURBANCE.

16. A summary sheet headed past medical history said under the heading "problem" anxiety with depression and under the heading "date," said 6 August 2018. It also identified the problem as "active".

17. We were provided with some GP notes. The earliest entry was 6 August 2018. The claimant informed us that 6 August 2018 was the first time that he saw a GP in

relation to the condition which he alleges is a disability.

18. The only other medical treatment for this condition which the Claimant mentioned to us was a single consultation via Skype with a professional, which was a private appointment arranged by his parents. The Claimant was not sure of the date of that. Our finding, based on the contents of the GP notes, is that this did take place and it occurred in November or December 2018.

<u>GP Notes</u>

19. The entry for 6 August 2018, records that the claimant informed the GP that he was very tense and that this affected his work, concentration and sleep, and that sometimes he felt nauseous and vomited. The GP wrote that the claimant looked tense, tearful and exhausted. The GP also commented that the claimant needed medication and a psychiatric link worker referral.

20. The medication prescribed was citalopram 10 mg tablets one per day. The GP decided that the claimant should be seen again in 2 weeks. An entry on 10 August 2018, records that the GP surgery has made an email referral for a psychiatric link worker.

21. Entry for 14 August 2018, reports that claimant had indicated there had been some improvement since the previous appointment and that he was anxious less often. It says that his concentration was impaired. A fit note was issued and the entry on the fit note was going to be general debility duration 14 August 2018 to 21 August 2018.

22. In an entry dated 31 August 2018, the GP noted that the claimant reported that he was feeling very anxious. He was having difficulty sleeping and concentrating. He had a reduced appetite. His weight had gone down by 5 kg. He was feeling depressed and pessimistic. Sometimes he became tearful. He was having nightmares and flashbacks. The note says that the Claimant believed that he could not cope with work at that time (and had been absent) that citalopram was not helping. The claimant was still waiting for the appointment from the mental health link worker.

23. There was telephone consultation between the claimant and the surgery on 10 September 2018, which said that the claimant's condition was unchanged.

24. There was an appointment on 26 September 2018, which indicated that it might be necessary to increase the claimant's dose of medication to 20 mg tablets one per day. The psychiatric link worker had still not contacted the claimant and therefore there was a discussion about the GP chasing up. There were further consultations in October and November and the GP surgery continued to chase up the psychiatric link worker.

25. At an appointment on 26 November 2018, the claimant reported that he could not concentrate and cope, and it was getting worse and he was increasingly anxious. It reported that he was now going to see a private therapist. The entry for 21 December 2018, reports that one therapy session via a Skype connection had now taken place and that the claimant's mood was generally steadier.

26. Further appointments continued in 2019. In January 2019, the claimant was prescribed some additional medication for a short period of time. On 31 May 2019, the dosage of citalopram was doubled again.

27. The main symptoms mentioned were difficulties in sleeping and awaking with nightmares and that the claimant was stressed and tense. The description of "anxiety with depression" is stated consistently in the notes between August 2018 and July 2019.

Statements of Fitness to Work ("Fit notes")

28. In terms of the fit notes, which were provided to the respondent. The earliest of these is dated 14 August 2018 and covers the period 14 August to 21 August 2018, and it gives the assessment that the claimant is not fit for work and that was because of the condition "general debility".

29. The next one is dated 31 August 2018 and says that the claimant is not fit for work

for the period 27 August 2018 to 31 August 2018, and it names the condition as "depression and anxiety".

30. A fit note dated 10 September 2018 covered the period 6 September 2018 to 14 September 2018, and also referred to anxiety and depression.

31. A fit note dated 26 September 2018 covered the period 15 September 2018 to 30 September 2018 and again said that the claimant had not been fit for work with the condition stated being anxiety with depression.

32. A fit note dated 11 October 2018 stated that the claimant had not been fit for work and stated that the condition was anxiety with depression, post-traumatic stress. This covered the period 8 October 2018 to 10 October 2018.

33. Thereafter there are several more notes covering most or all of the period up to the end of July 2019 and which each report that the claimant is not fit for work due to anxiety with depression.

<u>Employer's sickness absence records as per its software system, SELIMA</u>

34. According to the employer's records, the claimant's sickness absence record was as follows.
    - 34.1 6 January 2018 one day's absence reported as being due to food poisoning and that the claimant had been to the doctors.
    - 34.2 5 March 2018 - one day: states the claimant had a virus and did not feel good.
    - 34.3 The claimant was off for 2 days on 26 and 27 March 2018. The claimant was for one day on 14 May 2018. No reasons are recorded for those absences.
    - 34.4 The claimant was possibly off for one day on 21 May 2018. He was not fit, but the records are unclear as to whether he was scheduled to work that day. The document records that the claimant had texted the respondent to say that he was not feeling well and that he had been to accident and emergency on the previous Saturday night as he had been feeling sick with no known cause.
    - 34.5 The claimant was absent for one day on 13 June 2018 and the recorded reason was that he was stuck in France.

34.6 The claimant was absent on 23 July 2018, and off for 3 days, 25, 26, 27 July 2018. No reasons are recorded and the Claimant was not paid for those days.

34.7 He was absent on 6, 7, 8 August 2018, and he was paid for one of those 3 days.

34.8 He was absent between the 13th and 18 August 2018 and he was paid in full for the whole week on the basis that he had a doctor's note.

34.9 He was then absent from work frequently during August to November. Starting on 26 November 2018 he commenced a period of absence which continues to date.

Communications with Hanley and Walton

35. The Claimant's case is that he told Mr Hanley around March 2018 that he was suffering from depression, anxiety and PTSD. Mr Hanley denies this. That therefore was a factual dispute for the tribunal to resolve.

36. On 27 March 2018, the claimant sent a text message to Mr Hanley to say that he was feeling "really bad, can't get myself out. Feeling super dizzy". This was followed by an emoji. Later on, the claimant sent a further message to say that he would be at work on the following day.

37. On 9 May 2018, the claimant informed Mr Hanley that he was attending a hospital appointment and might possibly be at work late on that day.

38. On 20 May 2018, there was a text message from the claimant to Mr Hanley stating *"I'm feeling extremely unwell today with vomiting. I don't think I will be fit for work tomorrow. Sorry for the inconvenience*".

39. On 21 May 2018, there was a series of email exchanges between Mr Hanley and Ms Walton.

39.1 At 0652, Mr Hanley recorded that he had received a text message to say that the claimant was not going to come in and that he was unwell with vomiting. Mr Hanley reported that it was his impression that the claimant had been off several times on a Monday and sought advice from Ms Walton.

39.2 Ms Walton's reply - at 942 the same day - advised Mr Hanley what he should say to the Claimant. She suggested that it was reasonable for Mr Hanley to point out that the claimant had been absent on four Mondays (5 March, 26 March, 14 May and 21 May). She advised him to inform the claimant that the respondent's policies required him to telephone to report absence, rather than send text message (only). She also suggested that it would be reasonable for Mr Hanley to ask the claimant if there was anything that the respondent needed to know about in relation to the reasons for the absences.

39.3 Mr Hanley's reply to Ms Walton was at 1046 and said that the claimant had been to the hospital and had some tests and that the claimant had reported that the doctors did not know the cause of his recent sickness problems.

40. On 21 and 22 June 2018, the claimant did not attend work. There were text messages and phone conversations between the Claimant and Mr Hanley. The Claimant told Mr Hanley that he had been to the doctors.

41. On 14 August 2018, the claimant sent a text message to Mr Hanley to say that he had been prescribed medication by the doctor and would need a few days off. He said that he would be returning to work on 20 August 2018 (a day earlier than the note suggested) and also said that the doctor had said that the claimant was suffering from post-traumatic stress disorder. The claimant said that he wanted this to be kept confidential with Mr Hanley informing head office only. Mr Hanley agreed. Mr Hanley said that he would inform Sarah Walton, but that nobody else needed to know. Other people (specifically the colleagues at the Claimant's place of work) just needed to know that the claimant was off sick.

42. Ms Walton wrote to the claimant by letter dated 29 August 2018, stating that the respondent was concerned about the claimant's health and his recent absences. In particular, she referred to the fact that the claimant had informed Mr Hanley by WhatsApp message that the doctor had diagnosed the claimant with PTSD.

43. A back to work meeting was held on 4 September 2018.

43.1 At the meeting, the claimant stated that he had severe depression and anxiety.

43.2 The claimant said that he had been on his current medication since 6 August

2018, but said that he previously been on other medication.

43.3 He said that he believed he had been ill for approximately 4 or 5 months.

43.4 Ms Walton asked him what tasks he was able to do, he said that he was able to do all work tasks. That is, he was able to do all work tasks on the days that he was fit for work, but that there would be some days when he was not fit due to his medical condition.

43.5 He reported that his symptoms affected his motivation his eating pattern and his ability to get ready and wake up.

43.6 In the meeting, the claimant said that, if contacted, his doctor would suggest that adjusted working was better for the Claimant, but the claimant reported that he did not want adjusted working.

43.7 Ms Walton asked for consent to contact the claimant's doctor, but the claimant declined to give consent. The claimant indicated that this was because the respondent might not understand the contents of a report from his GP. The claimant believed that it was better for the doctor's communications with the respondent to be via him rather than directly between his GP and the respondent.

43.8 The claimant and Ms Walton signed the meeting minutes on 4 September 2018.

44. A further return to work meeting took place on 1 October 2018. There was a discussion about the Claimant's seeking private treatment while awaiting NHS referral to come through. Ms Walton asked the claimant to provide fuller details of this treatment. As far as we are aware, those details were not provided to the Respondent.

The Law

45. Section 6 of EA 2010 states (in part)

> (1) 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.
> (2) …
> (3) In relation to the protected characteristic of disability—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

…

46. Schedule 1 of EA 2010 states (in part)

2 Long-term effects

(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 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.
(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 to be treated as continuing to have that effect if that effect is likely to recur.

5 Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.
(2) *"Measures"* includes, in particular, medical treatment and the use of a prosthesis or other aid.

Our analysis re the disability issues

47. The respondent invited us to make a finding that the claimant was not within the definition and reminded us that it is the claimant's responsibility to satisfy us, on the balance of probabilities, that the claimant is in fact, within the definition of a disabled person. The respondent pointed to the lack of precision in the claimant's email dated 1 August 2019 and also suggested that the GP's letter dated 19 June 2019 was even less precise and confirmed only the significant sleep disturbance.

48. Our view, taking the evidence as a whole, including the contents of the GP records and the fit notes as well as the claimant's email and GP letter is that the claimant has demonstrated that he is a disabled person within the meaning of section 6 of the Equality Act 2010.

49. The claimant has satisfied us that he does have an impairment which has a substantial effect on his day-to-day activities. He does find it difficult to concentrate and to focus. In addition, he finds it difficult to get ready in the mornings. These effects are caused by a combination of the condition of depression itself, as well as being related to the lack of sleep, and also nightmares, which are brought about by the conditions of post-traumatic stress disorder and depression.

50. As of the date of the hearing, the impairment has lasted more than 12 months.

However, we have to decide when the Claimant first came within the definition. In particular, we have to decide if the Claimant came within the definition prior to 4 June 2018 or, if not, by which date he did come within the definition.

51. We think that the Claimant is wrong to state that he told Mr Hanley in March 2018 that he was suffering from depression, anxiety or PTSD. That recollection is not consistent with the contemporaneous evidence. We are satisfied that the first time the Claimant told Mr Hanley (or any of the respondent's employees) about those conditions was in August 2018. Both the wording of the Claimant's own communications in August, and the words and actions of Mr Hanley and Ms Walton in August (and subsequently) are consistent with the Claimant having made the reference to these conditions by text message on 14 August 2018, and not earlier.

52. We also take into account that the Claimant's own account is that he first saw his GP about the condition on 6 August 2018, and not as early as March 2018.

53. However, the fact that the Claimant did not see his GP, or tell the Respondent, about the impairment until August does not mean that it would not be possible for him to come within the definition of a disabled person before August 2018.

54. The Claimant points to the fact that the wording of his GP letter implies that the impairment might have existed prior to August 2018. He is not wrong to say that, but it is of limited assistance, because the GP does not address the issue of when the impairment began.

55. The Claimant's account to the Respondent, in March 2018, of feeling "super dizzy" and/or not being able to get out, are not symptoms specifically ascribed by the GP to PTSD or depression.

56. In May 2018, the vomiting which the Claimant described, is not inconsistent with the symptoms which the Claimant later described to his GP. However, vomiting can have many causes.

57. Based on the evidence presented to us, we are not satisfied that, prior to August

2018, the Claimant had an impairment which was likely to last for at least 12 months.

58. However, we are satisfied that, as of 6 August 2018, he did have an impairment which the GP considered serious enough to require medication and psychiatric referral. We infer from that that as of 6 August 2018 the condition was likely to last for at least 12 months.

59. Therefore, it is our finding that the Claimant was within the definition of a disabled person from 6 August 2018 onwards

FINDINGS OF FACT

60. The respondent operates gyms and has around 11 outlets.

Sales

61. The respondent's group sales manager is Sophie Hamilton. She interviewed the claimant on 30 November 2017 for a sales position. This was the second round of interviews, the claimant having been successful at the first round.

62. Ms Hamilton did not believe that the claimant would be suitable for sales work and he was not offered a sales position. Subsequently, the claimant started with the respondent as a receptionist and Ms Hamilton met him from time to time when she was visiting the Covent Garden branch. She was still not impressed with him. At Mr Hanley's request, Ms Hamilton held a meeting with the claimant. She remained unimpressed, but she invited him to attend the next sales training session. The Respondent regularly has sales training sessions for its employees.

63. At the sales training, which took place in the early part of 2018, the claimant did not impress Ms Hamilton and she noticed that he seemed to be looking at his phone under the table during the session. She therefore did not recommend him for a move into sales. Ms Hamilton was the person with authority to make such a decision for the Respondent.

Prior to June 2018

64. The claimant started employment with the respondent in December 2017. He was a receptionist at its Covent Garden branch. The claimant's contract required him to work 40 hours per week.

65. There were generally 3 shifts that a receptionist might be required to do.
    - 65.1 The earliest shift required a 5:30 AM start and would include assisting with the opening of the gym.
    - 65.2 There was a middle shift from 11 AM to 8 PM.
    - 65.3 Alternatively, there was a late shift which finished at around 23:30 and required the receptionist to assist with the closing of the gym.

66. In order to open or close the gym, a minimum of 2 staff were required to be present. They did not necessarily need to be 2 receptionists, as it could, in principle, be any 2 members of staff. However, most commonly it would be 2 receptionists.

67. At the time, the claimant started work, the reception manager was Jennifer O'Neill. On 12 January 2018, the claimant came to see the general manager, Mr Jonathan Hanley, and complained about the way in which the reception manager (Ms O’Neill) had spoken to him. He said she was too assertive.

68. After having spoken to Mr Hanley and returned to reception the claimant then began to use his phone to record Ms O'Neill. The claimant repeatedly asked Ms O'Neill to repeat herself for the benefit of the recording. Ms O'Neill was extremely upset by the claimant's behaviour. She complained to Mr Hanley about it and she also asked to be transferred. Mr Hanley sent an email dated 12 January 2018, stating that the claimant ought not to have recorded any conversation with Ms Hanley and that this type of behaviour was not tolerated by the respondent. The email went on to say that if he wanted to raise an issue about a colleague’s alleged behaviour in future, this should be reported directly to Mr Hanley and that Mr Hanley was always willing to help. The email asked the claimant to confirm that he understood the contents.

69. On 15 January 2018, Mr Hanley sought advice from Sarah Walton, human resources

manager, about the incident. She supplied advice to Mr Hanley and suggested that he document the Claimant's complaint about Ms O'Neill, Ms O'Neill's complaint about the Claimant and what he, Mr Hanley, had done to address the issue.

70. On 23 January 2018, the claimant replied to Mr Hanley's email of 15 January. The claimant asserted that he had had good reasons for recording Ms O'Neill. The email said that the Claimant apologised for any inconvenience and that he wished to move forward. It said that he had formed a good relationship with the rest of the team and he wished to "get back to making "Covent Garden Gymbox the best one there is!"

71. On 20 March 2018, Mr Hanley received an email from a new member of the gym which praised several members of staff one of whom was the claimant.

72. In May 2018, the respondent was seeking to ensure that its employees completed what the respondent regarded as necessary GDPR training. Staff who did not complete this e-learning within the required time were potentially obliged to attend disciplinary hearings.
    72.1 The respondent believed that the claimant had not completed the necessary training, despite reminders.
    72.2 A letter was provided to the claimant on 29 May 2018 about a disciplinary hearing the same day at 2PM.
    72.3 Following the hearing, the same day, Mr Hanley gave the claimant a written warning, which was due to last 6 months. The letter recorded the claimant's explanations for failing to do the training in time as being
        72.3.1 that he had been away on holiday, and then that he tried to complete work, but had been unable to do so,
        72.3.2 that while colleagues may have done the training during their personal time he did not have time to do so, and
        72.3.3 that even though he had not done the training itself, he was aware of the need for data protection.

73. The disciplinary outcome letter does not record that the claimant had asserted any disability either during the disciplinary hearing on 29 May 2018 or during any earlier conversations with Mr Hanley.

74. A few weeks before the claimant had started work, around 1 November 2017, Ms Samira Kamara started work at the Covent Garden gym as a receptionist. In May 2018, she became reception manager at the same branch.

75. Prior to her elevation to the post of reception manager, Ms Kamara and the claimant had had a friendly relationship during the months in which they had both been receptionists. Ms Kamara was excited at her new appointment and she wanted to do her best to make sure that she was a good manager. Ms Kamara believed that her relationship with the other receptionists would need to change now that she was the manager.

4 June 2018

76. On 4 June 2018, the claimant and Ms Kamara were both in the reception area. A customer bought a padlock. The customer seemed to have some difficulties operating the padlock. There was, at the time, and there remains to this day, a difference of opinion between the claimant and Ms Kamara about why that was.
    76.1 In the claimant's view, the issue was that this type of padlock sometimes did not work properly and, if a padlock showed any signs that it might get stuck in the future, it was better to replace it immediately. In the claimant's view this was firstly good customer care, but secondly, could also avoid a situation where the respondent might have to use bolt cutters on the padlock in the future and potentially damage the door to a locker.
    76.2 In Ms Kamara's view, the padlock was operating normally and she believed that the difficulties might have arisen because the correct code had not been used on the padlock.

77. The claimant, on noticing the difficulties which the customer was having with the padlock, offered to replace it by giving her a new one. Ms Kamara overheard this and intervened. Ms Kamara successfully showed the customer that the padlock appeared to be working normally, but she confirmed to the customer that if it did develop a problem the customer should bring it back to reception. The customer then left the reception area.

78. After the customer had left, the claimant informed Ms Kamara that the padlock was defective and would give further problems in the future. Ms Kamara indicated that she did not necessarily agree with that and said that in any event, the claimant needed to ask her for permission to give out a replacement padlock free of charge. When the claimant asked why he needed her permission, Ms Kamara replied that it was because she was now his manager.

79. It was not always necessary for a receptionist to ask the reception manager's permission, and – in particular - receptionists had authority to make such a decision by themselves if there were no managers on hand. However, Ms Kamara's opinion was that any receptionist should consult with the reception manager about such a decision if the reception manager was actually in reception at the time. On 4 June 2018, Ms Kamara did not give the Claimant a full explanation of her opinion (ie that receptionists should consult the manager if the manager was present, but might have the authority to make the decision for themselves in the absence of a manager).

80. On 4 June 2018, after Ms Kamara had indicated to the claimant that she believed that ought to have consulted her prior to offering a new padlock to the customer, she believed that was the end of the matter and there was no need for further discussion. However, the claimant continued to talk about the issue. Therefore, after a few minutes she suggested to him that she would like to speak to him in the private office, which was downstairs.

81. At first, the claimant said that anything that Ms Kamara wanted to say should be said in the reception area and that he did not wish to leave the area. However, the claimant did subsequently follow Ms Kamara out of reception. As they went downstairs the claimant spoke loudly to Ms Kamara and continued to make clear that he did not agree with what she had said to him. He sought to persuade her to sit down with him in another public area which was on the way to the office. Ms Kamara declined and insisted that they go to the private office.

82. On the way to the office, the Claimant said to Ms Kamara "remember where you come from, man". She was offended by the comment which, at the time, she took

to be a reference to her race. In fact, the Claimant was referring to the fact that Ms Kamara had previously been a receptionist. The Claimant did not like being told what to do by Ms Kamara for that reason: ie that they had previously been colleagues of the same grade, but she was now more senior to him.

83. During the conversation in the office, Ms Kamara said to the claimant that she thought he was "bullshitting". Ms Kamara believed that she gave the claimant the opportunity to speak, but that - whenever she tried to reply to his points - he interrupted her and talked over her. Furthermore, when she tried to speak he mocked her by repeating what she said, and laughing. He also started to write things down. She told him that she thought he was being childish. During the meeting:
    - 83.1 The Claimant raised his voice first, and then Ms Kamara raised her own voice to the Claimant, in response to his having done so.
    - 83.2 Ms Kamara said that she thought he was being childish. That was in response to his actions, and his attempts to mock her.
    - 83.3 She said "I am your manager" in order to attempt to make the Claimant realise that there was a formal structure and that he was not appropriately taking account of the fact that she was more senior than him in that structure.
    - 83.4 Ms Kamara became angry. That was in response to what the claimant said. It was, in part, because she believed at the time that he had made a reference to her race. Later on, Ms Kamara came to accept that the comment "remember where you came from" was actually a reference to the fact that she had previously been a receptionist before becoming a manager, rather than to her race, but that was not how she interpreted it on 4 June 2018.

<u>4 and 5 June Meetings with Hanley</u>

84. After this incident, the claimant approached general manager, Mr Hanley and said that there was something which he wished to report in relation to the reception manager's behaviour. Mr Hanley promptly arranged to meet the claimant with a note taker – Carmen Alphie - present. The reason for doing this was that the general manager wanted to be sure that he had an accurate record of what the claimant was alleging. He had in mind the human resources advice which he had received following the incident between the Claimant and the previous Reception Manager

the previous January.

84.1 The notes of the 4 June meeting taken by Carmen Alphie were handwritten and were 4.5 pages of A4 paper.

84.2 The first 2 pages of the notes were specifically about the claimant's version of the 4 June incident.

84.3 The majority of the 3rd page was the claimant's comments about who might be witnesses to the incident and the claimant's comments that he wanted the matter investigated as workplace harassment.

84.4 The last 6 lines of the 3rd page, record that Mr Hanley asked the claimant about some matters not directly related to the Claimant's complaint about Ms Kamara, namely: why the claimant had been using his mobile phone while on duty in reception and whether he had yet completed the GDPR training.

84.5 After the claimant's response on those matters, there were 5 lines where Mr Hanley is reported as saying that there should be no phones on reception and also that he would be speaking to all the receptionists to tell them not to smoke next to the building.

84.6 The meeting concluded with the claimant repeating that he wanted Mr Hanley to investigate the 4 June 2018 incident.

85. On 5 June 2018, the claimant had a further meeting with Mr Hanley at 1430. This time the note taker was Chris Allen. Mr Hanley said that having discussed the matter with the claimant and Ms Kamara, his decision was that neither of them had been in the wrong in relation to the 4 June incident.

85.1 Mr Hanley said he had spoken to Ms Kamara about the way she needed to conduct herself as reception manager and he noted that she was still in the transition period.

85.2 Mr Hanley went on to inform the claimant that he was disappointed that he, Mr Hanley, had asked the claimant to complete the e-learning (in relation to which the formal written warning had been given) and that this training remained incomplete, but even so, that the claimant had, within working time, been seen (by Mr Hanley) using his phone at reception on Monday 4th of June.

86. Mr Hanley sent a copy of the notes (prepared by Alphie and Allen respectively) of both meetings to the Claimant by email at approximately 7 PM on 5 June 2018.

87. The following day, the claimant replied by email to say that he disputed the accuracy of the notes. The claimant asserted that the minutes were almost entirely inaccurate. The email also asserted that the claimant was stunned that Mr Hanley had focused on the e-learning and the phone incident when the subject matter of the meeting was supposed to have been the incident with the reception manager.

88. Our finding is that the minutes were not inaccurate. They did not deliberately mis-state what was said at the meeting, and nor did they omit any significant information. They were neither intended to be, nor portrayed as, a verbatim record.
    88.1 The reason for both meetings is that the Claimant had made a complaint to Mr Hanley which Mr Hanley believed he needed to discuss. The first meeting was to get the claimant's version of events, and the second meeting was to report the outcome.
    88.2 The reason for having a note taker was to ensure that there was a record of what had been discussed.
    88.3 In relation to the alleged inaccuracy of the minutes, that was resolved on 4 July 2018, when the claimant and Mr Hanley both agreed that the minutes taken by Carmen Alphie would be ignored for any future purposes.

89. At the time that each meeting took place, the Claimant was not intimidated by either note taker's presence in the meetings, and he did not say so in his email of 6 June 2018. He did not believe that either meeting created an intimidating, hostile, degrading, humiliating or offensive environment.

<u>18 June</u>

90. On 18 June 2018, there was a further meeting between the claimant and Mr Hanley. Again, this was attended by Chris Allen as a note taker. The claimant was not given advance notice of this meeting. The meeting discussed allegations which had come to Mr Hanley's attention that the claimant had been discussing the events of 4 and 5 June 2018 with colleagues. The meeting was held because it was Mr Hanley's opinion that the Claimant was potentially acting inappropriately. It was an investigation meeting as a precursor to a potential disciplinary hearing.

<u>4 July 2018</u>

91. On 4 July 2018, the claimant was handed a letter signed by Sarah Walton. The letter informed the claimant of a disciplinary hearing at head office that same day. The letter gave the Claimant about one and a half hours' notice, which is same notice that any other employee of the Respondent's with less than 2 years' service would have been given for this type of meeting.

92. There were 4 allegations which were:
    92.1 accusing colleague of falsifying investigation minutes and discussing the allegation with other employees;
    92.2 refusing general manager's request to sign minutes at end of investigation meeting on 18 June 2018;
    92.3 altercations with team members and failing to work cohesively;
    92.4 failing to complete "trail" operational checks on 18 June 2018 and leaving work early, despite previous verbal warning on 5 May 2018, for the same issues.

93. The letter informed the claimant that two of the options which could be considered were termination of employment or a warning.

94. The meeting took place on 4 July 2018 and started approximately 12:10.
    94.1 Mr Vernon chaired the meeting, and he was accompanied by Ms Walton.
    94.2 The claimant was not accompanied. He was asked if he was content to proceed without anybody to accompany him and he said that he was.
    94.3 The claimant had only had a short period of time (less than 2 hours, which included the time spent travelling from Covent Garden to head office) in order to prepare for the hearing.
    94.4 The claimant did not ask for a postponement.

95. While the claimant was not expressly asked if he wished to seek a postponement on the grounds of lack of preparation time, the question about a companion implied that a postponement was a possibility. We are satisfied that the claimant was aware that he could have requested a postponement if he wanted one. The claimant was satisfied that he knew what the allegations were, and that he would

be able to address them in the meeting. The claimant's opinion is that he did address all of the allegations well in the meeting, and that it was as a result of the clear answers which he gave to Mr Vernon that Mr Vernon decided that there would be no further action.

96. The initial stage of the meeting lasted from approximately 12:10 until approximately 13:35. Based on the answers the claimant had given, Mr Vernon wished to make some further enquiries, and also to deliberate. In particular, Mr Vernon wished to telephone Jonathan Hanley to ask him some questions. Mr Vernon suggested to the claimant that he go and get a coffee for about 30 minutes.

97. In fact, it was longer than 30 minutes before the meeting was able to resume. This was because it took some time for Mr Vernon to be able to contact Mr Hanley, and to ask the questions that he wanted to ask, and then to deliberate. Mr Vernon did not seek to delay the resumption of the meeting unnecessarily. The resumed meeting <u>concluded</u> at 14:58. While we do not have an exact indication of time at which the resumed meeting started, our finding is that it was probably was approximately around 14:30 or thereabouts. This inference is based on an analysis of what was discussed between the resumption and up to 14:58, and an estimate of how long that discussion was likely to have taken.

98. At the start of the resumed meeting, Mr Vernon informed the claimant that there would be no further action in relation to the disciplinary allegations.
    98.1 He then went on to ask the claimant what the claimant was seeking from the respondent and discussed the fact that the claimant had said he was interested in sales.
    98.2 The claimant suggested that he had been waiting to hear back from Sophie Hamilton regarding the seminar which took place around January or February 2018.
    98.3 Mr Vernon gave the claimant some feedback from Ms Hamilton in relation to sales. He explained why Ms Hamilton had not been impressed with the claimant at the sales training.

99. At the time of the 4 July meeting, the Claimant did not feel intimidated. On the

contrary, the Claimant was satisfied with the meeting as a whole. In relation to the disciplinary side of things, he was satisfied that he had given a good account of himself, and that the matter was resolved. In relation to the additional discussion at the end of the meeting, he was happy that he had discussed a sales position and commented generally on his future with the Respondent.

Fire Marshal Training

100. On 1 August 2018, Mr Hanley sent an email to several staff at the Covent Garden gym to inform them that they should attend Fire Marshal training on Saturday 11 August 2018 at Farringdon. For whatever reason there appears to have been a mixup in the administrative arrangements. Exactly what happened was not clearly explained to us. Suffice it to say that the claimant did nothing wrong and that he attempted to comply with the instructions that he had been given. However, no Fire Marshal training was delivered to any employees on 11 August 2018.

100.1 The claimant did not lose out financially as a result of having to attend this abortive training session.

100.2 The respondent did not regard Fire Marshal training as essential for all of its employees. It regarded it as being preferable that each employee would have it. However, it was only essential that, at any given time, one of the staff on duty had had the training.

100.3 The respondent did not arrange for a further training session for the claimant before the commencement of his long-term sickness absence in November 2018. The claimant did not request that the training be arranged for him and did not book himself onto similar training via the respondent's intranet system.

100.4 The Claimant was not particularly upset or annoyed by the events of 11 August 2018. At most, he regarded them as a mild inconvenience.

24 August 2018

101. On 24 August 2018, there was a further argument between the claimant and Ms Kamara.

101.1 At the respondent's gym when application forms are completed by potential customers, they are scanned in and a copy is sent to head office by email. The hardcopy, having been scanned is put into a "scanned folder". On 24

August 2018, Ms Kamara asked the claimant to look for an application form in the scanned folder. The claimant said that there was no point in doing that because there was a copy of the form in the pending folder. Ms Kamara informed him that she was aware of the document in the pending folder because she had put it there herself and what she needed to know was whether there was a copy of the form already in the scanned folder.

101.2 The claimant said that he did not see why this was necessary and he also said that he was too busy to do it. Ms Kamara said that in that case, she would come upstairs and she would search through the scanned folder herself. She did this, and the form that she was looking for was not in the scanned folder.

101.3 That was the end of the matter as far as she was concerned, and she did not intend to speak further to the Claimant about his failure to do what she had asked him to do.

101.4 Later that day, as Ms Kamara was leaving, she noted that the claimant was on his phone. He was wearing his headphones and she formed the opinion that he was speaking to his girlfriend. She mentioned to the claimant that he was not supposed to be on his phone when working on reception.

101.5 As the discussion continued the claimant asked Ms Kamara if she had found the application form which she had been looking for. She told him that she had not. The claimant said to her that this proved that he had been right not to look through the scanned folder. He said that the way in which Ms Kamara had handled the matter was wrong.

101.6 Ms Kamara replied to say that she believed that the claimant was being disrespectful and rude. She said that she could not understand why the claimant would not look for something when she asked him to do so, given that – she said - the claimant was willing to carry out the instructions given to him other staff, such as the sales team and Mr Hanley. Ms Kamara said to the Claimant that he should stop “bullshitting" and that she tell her the real reason that he was not willing to carry out her instructions.

101.7 The conversation became very heated. It left Ms Kamara in tears.

101.8 One reason for the Claimant’s comments was that the Claimant did not like being given instructions by Ms Kamara because they had previously been in the same job (receptionist) but now she was more senior to him.

October 2018

102. Mr Hanley ceased to be general manager of the Covent Garden gym with effect from 30 September 2018. Pending appointment of a permanent replacement, the acting general manager was Rochelle Cook. On 3 October 2018, Ms Cook informed Ms Walton that she had heard from staff that the claimant had said that he was going to leave his employment, or else had already resigned. On 3 October 2018, Ms Walton telephoned the claimant to ask for clarification, and, in particular, she asked him to confirm his proposed leaving date. The claimant made clear that he was not currently intending to leave, but that - if he did decide to leave - he would give 4 weeks' notice as required by his contract. Ms Walton did not seek to persuade the claimant to resign. The Claimant was not upset by the questions which Ms Walton asked. He was familiar with his contractual rights and obligations and was content to discuss those with Ms Walton.

103. During the phone call, the claimant informed Ms Walton that Ms Kamara had punched a monitor. He asked Ms Walton to look at the CCTV to see the incident. By looking at shift schedules, Ms Walton determined what times the claimant and Ms Kamara had been working together following the Claimant's return to work on 1 October. She did this in order to work out the possible times at which the Claimant could have seen Ms Kamara punch a monitor. Ms Walton informed Scott Vernon about the allegation. Ms Walton and Mr Vernon met to review the CCTV. They did so in the head office boardroom. They saw no evidence of Ms Kamara having punched a monitor. They did see the claimant applying deodorant and having a heated conversation with Ms Kamara.

104. Mr Vernon telephoned the claimant from the boardroom using a speakerphone as that was the only phone available in the boardroom. Mr Vernon informed the claimant that he and Ms Walton had seen the claimant applying deodorant in front of customers and asked the Claimant if the Claimant thought that type of behaviour was professional. The claimant replied that he did not know how to answer the question. The question was repeated and the claimant repeated his answer. On the third occasion, Mr Vernon told the claimant not to be stupid and that the claimant did know how to answer the question. The Claimant was offended by what was said to him during the conversation.

105. This is the only time Mr Vernon has used an expression similar to "don't be stupid" or "stop being stupid" with any employee.

106. The Respondent had a rule that no bags were supposed to be left behind reception desk and staff, including the Claimant were aware of the rule. Staff did, in fact, sometimes keep their bags behind reception in breach of this rule, but when managers saw this happening, they instructed the staff member to take the bag away from reception and store it elsewhere.

107. On 5 October 2018, the claimant telephoned Ms Walton. The claimant said he had some concerns which he wished to discuss with her. He gave no specific details but indicated that it was urgent. Ms Walton was not free to meet the Claimant immediately, but she mentioned the matter to Mr Vernon. Mr Vernon told Ms Walton that he would go to the Covent Garden gym to speak to the claimant. Mr Vernon arrived at the Covent Garden gym about 20 minutes before the claimant's shift was due to end and he expected that that would be sufficient time for the claimant to inform him of the concerns.

107.1 The meeting eventually lasted approximately one and a half hours. The claimant was paid for the additional time beyond the end of his shift (ie it counted to his contractual hours).

107.2 The meeting was one in which the claimant repeated matters which had previously been raised, as well as informing Mr Vernon that he believed Mr Vernon had spoken to him inappropriately the previous day.

107.3 Several times during the course of the meeting, Mr Vernon asked the claimant if that had now covered everything and said that if so, the meeting could end. Each time the claimant continued to talk rather than allowing the meeting to come to an end.

107.4 The Claimant was not upset or annoyed by the meeting and, on the contrary, it was a meeting to discuss topics which he had wanted to raise, and its duration was fixed by him.

108. On 11 October 2018, the claimant submitted a data subject access request to the respondent. In due course, the respondent replied to that request, although it did

not do so within the maximum time period allowed by the legislation.

109. On 11 October 2018, the claimant submitted a formal grievance. This was 8 pages. The grievance largely referred to the same allegations as indicated in the list of issues above.

110. Ms Kamara was not informed before 11 October 2018 that the claimant was off work due to depression and anxiety. Ms Kamara formed the view that the claimant was not always genuinely ill. One of the other receptionists, Poppy, formed the view that Ms Kamara did not believe that the claimant was genuinely ill for all of his absences.

111. The claimant was told by other members of staff that Ms Kamara told them not to listen to anything that he, the claimant, said. The claimant asserts that Ms Kamara's reasons for telling other staff not listen to him was that she wanted them to ignore his comments about reception duty tasks.

    111.1 Our finding is that the disputes between the claimant and Ms Kamara were discussed by colleagues.

    111.2 Ms Kamara's version of events is different to the claimant's in relation to what was said on, for example, 4 June and 24 August 2018. It is Ms Kamara's opinion that the claimant has not given fully accurate accounts of those arguments to other people.

    111.3 It is our finding that Ms Kamara did say to one or more individuals that they should not listen to what the claimant said. However, it is our finding that, when she did so, it was clear to those colleagues that she disputed what the claimant said about those specific arguments. She was not instructing staff generally to disregard the claimant in relation to work matters.

112. Ms Kamara did not inform any other member of staff that the claimant had depression or anxiety or PTSD, either before the Claimant’s longterm absence began, or at all. She did not know anything about his conditions until there was a mediation meeting arranged as part of the grievance procedure. She did not reveal what she had been told about his conditions after this meeting.

113. In relation to sales, during the discussion on 4 July 2018, Mr Vernon had made no promise to the Claimant that the Claimant would be appointed to a sales role. It was the Claimant's responsibility to persuade Ms Hamilton that he should be given such an opportunity. In October 2018, Mr Vernon did check the position with Ms Hamilton. As she told Mr Vernon, it remained Ms Hamilton's opinion that the Claimant was not suitable for a sales position.

114. Ms Kamara and Mr Hanley each sometimes had to arrange cover for the Claimant at short notice when he was absent. They each denied that this frustration had caused them to treat the claimant any differently than they would otherwise have treated him.

The law

115. Section 13 of EA 2010 states (in part)

> (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.

116. Section 15 of EA 2010 states

> (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.

117. Section 26 of EA 2010 states (in part)

> (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;
> …
> race;
> …

118. Section 123 of EA 2010 states (in part)

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

Direct Discrimination

119. Section 39 EA 2010 provides that an employer must not discriminate against an employee. The characteristics which are protected by the legislation include race and include disability.

120. When applying the definition of discrimination in accordance with section 13(1) EA 2010, it is necessary to consider how the respondent has treated the claimant and to consider whether it has done so less favourably than it has treated a comparator. The comparator can either be an actual person or a hypothetical person. Either way, the comparator's circumstances must be the same as the claimant's other than the protected characteristic in question.

121. In relation to disability the claimant relies on a mental health condition which he has described both as depression and anxiety and PTSD. Therefore, the relevant comparator would have to be somebody who did not have that condition.

122. If we are satisfied that the claimant has been treated less favourably than the comparator, then we must consider the reason for that difference in treatment. In particular, we must consider whether it is because of the protected characteristic or not. We must analyse both conscious and subconscious mental processes and motivations for actions and decisions.

123. Section 136 EA 2010 sets out the manner in which the burden of proof operates in a discrimination case. A two stage approach is necessary.

123.1 At the first stage the tribunal considers whether the claimant has proved facts (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. At this stage it would not be sufficient for the claimant to simply prove that he has been treated badly, or even that he has been treated less favourably than a comparator. There has to be some evidential basis upon which the tribunal could reasonably infer that the claimant's protected characteristic (consciously or subconsciously) caused the alleged discriminator to act in the way that they did. That being said, the tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

123.2 If the claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of the protected characteristic.

Harassment

124. It is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) EA 2010. The claimant has to prove that the conduct was related to the particular protected characteristic.

Discrimination arising from disability

125. In this case, the something arising from disability which the Claimant relies on is his sickness absence. The respondent asserts that it did not know, and could not reasonably have been expected to know that the Claimant had the disability before 14 August, or alternatively, before the GP sicknote first referred to depression.

Time Limits

126. Due to the date the claim was issued and the dates of early conciliation and subject to Section 123(3)(a) of EA 2010, the Equality Act allegations relating to acts prior to 12 September 2018 were out of time, subject to the tribunal's ability to extend time in accordance with Section 123(1)(b).

127. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period (up until 13 August 2018 or later) or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

Analysis and Conclusions

Respondent's knowledge of disability

128. It is our finding that the Respondent was not aware of the Claimant's disability prior to 14 August 2018, which was when the Claimant informed Mr Hanley that he had been diagnosed with PTSD. Prior to that date, the Respondent had no reason to believe that there was an underlying cause for the claimant's absences, because different reasons were given each time.

129. From 14 August 2018, the Respondent had knowledge of the Claimant's disability, and it could not reasonably have been expected to know of the Claimant's disability prior to that date.

Issue (a) On 4 June 2018, Samira Kamara verbally abused the Claimant

130. On 4 June 2018, both Ms Kamara & the Claimant raised their voices.

131. Ms Kamara would have handled the whole matter in the same way for any other receptionist not just Claimant.

132. Her reasons for wanting the conversation to take place in private had nothing to do with the Claimant's alleged disability, or his sickness absence. Her only reason was that she wanted the conversation to take place where gym members could not overhear

133. Ms Kamara would not have raised her voice but for the fact that the Claimant raised his voice first.

134. The Claimant was argumentative towards Ms Kamara, and this was her reason for making the statement "I am your manager". The Claimant was being challenging, and she believed it was necessary to be assertive in response

135. Nothing Ms Kamara did or said related to the Claimant's disability. She was also unaware of his disability at the time.

136. It was not Ms Kamara's intention to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

137. To the extent that the Claimant considered that the effect of the 4 June incident an intimidating, hostile, degrading, humiliating or offensive environment was created by the 4 June incident, it was not reasonable that the conduct of Ms Kamara would have that effect on the Claimant.
    137.1 He continued to grumble about her comment that she should have asked him before offering a new padlock to the customer. Her response of seeking to have a more detailed discussion in private is one that he ought reasonably to have expected and was not disproportionate.
    137.2 He mocked her, including by imitating her. Her response of calling him childish is one that he ought reasonably to have expected and was not disproportionate.

Issue (b) On 4 and 5 June 2018, without any prior notice, Jonathan Hanley pulled the Claimant into a formal meeting where minutes were taken and inaccurate minutes were subsequently provide

138. The meetings between Mr Hanley and the Claimant on 4 and 5 June 2018 were because (respectively) the Claimant had said there was something that might need investigating, and to give him feedback following the investigation.

139. Mr Hanley's reason for having the meetings minuted was that he wanted to have an accurate note of what the Claimant was alleging, and of how the matter had been dealt with, and he recalled the previous human resources advice about documenting complaints. The advice given on that occasion (in January) had been before the Claimant had had sickness absence, and before the Respondent was

aware that the Claimant had a disability. Furthermore, the meetings on 4 and 5 June 2018 were before the Respondent was aware that the Claimant had a disability.

140. We are not satisfied as a fact that the minutes were inaccurate. We are satisfied that the contents of the minutes were not connected to the claimant's alleged disability or to his sickness absence.

141. Mr Hanley would have taken any other receptionist, not just the Claimant, to a private meeting room in order to (a) learn more about a complaint about the Reception Manager and later (b) to feed back the outcome of his investigation into the complaint.

<u>Issue (c) On 18 June 2018 Jonathan Hanley, without prior notice, pulled the Claimant into a formal meeting where minutes were taken and false accusations made of "gossip"</u>

142. 18 June Meeting took place because Mr Hanley believed that the Claimant had inappropriately discussed the investigation of the 4 June incident with other staff members. Mr Hanley would have handled the 18 June meeting the same for any other employee.

143. We think it would have been better practice for the Respondent to write to the Claimant to inform the Claimant in writing about meeting, and what it was going to be about. However, we are satisfied that Gymbox had a regular practice - for all its employees - of arranging this type of meeting on an ad hoc basis. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that Mr Hanley would have treated the Claimant differently, but for his disability. Furthermore, on 18 June 2018, Mr Hanley and the Respondent were not aware that the Claimant had a disability.

144. The decision to hold the 18 June meeting, and not to give advance written notice, were in no way connected to the Claimant' s alleged disability or his sickness absence.

<u>Issue (d) On 4 July 2018, Scott Vernon invited the Claimant to a disciplinary hearing on the same day to answer false allegations and without giving him any time to prepare. The invitation letter suggested only two possible outcomes. At the end of the hearing Mr Vernon adjourned the hearing for 30 minutes but then disappeared for 1.5 hours</u>

145. For the 4 July meeting,
    145.1 There were more than two possible outcomes. In fact, the Respondent adopted the option of no further action.
    145.2 The allegations discussed at the meeting, and contained in the 4 July letter, were not allegations that the Respondent believed to be false.
    145.3 The allegations themselves were not related to the Claimant's alleged disability or sickness absence.
    145.4 The Respondent believed that the time allowed to him to prepare was sufficient and the Claimant did not ask for more time.

146. This tribunal thinks that it was not good practice to give such short notice of the 4 July hearing. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that Mr Vernon would have treated the Claimant differently, but for his disability. Furthermore, on 4 July 2018, Mr Vernon and the Respondent were not aware that the Claimant had a disability.

147. At the outset of the meeting, Mr Vernon did check with the Claimant that the Claimant was happy to proceed without being accompanied. If the Claimant believed he needed more time, he could have said so. In any event, the Claimant told us that he believed he was prepared even though he had under two hours.

148. The Claimant was not intimidated by the meeting and was happy to discuss future career progression during the meeting. The incident did not have the intention, or the effect, of creating an intimidating, hostile, degrading, humiliating or offensive environment

Issue (e) Jonathan Hanley asked him to attend training on 11 August 2018. There was no training on that day and it was never rescheduled

149. The Claimant was not treated differently to others. There was no connection to his alleged disability or his sickness absence. There was some sort of administrative mix-up by the Respondent. The Claimant was only mildly inconvenienced, and did not suffer any financial disadvantage.

150. The Claimant did not ask for it to be rearranged.

151. The incident did not have the intention, or the effect, of creating an intimidating, hostile, degrading, humiliating or offensive environment

Issue (f) On 24 August 2018, Samira Kamara verbally abused the Claimant

152. The discussion about not finding the form turned into argument after Claimant had said – towards the end of shift - that he had been right and Ms Kamara had been wrong about whether to look in the scanned folder.

153. Ms Kamara’s response was not motivated by the Claimant’s disability either consciously or subconsciously. She was only motivated by the fact that a receptionist was being disrespectful to her position as Reception Manager, and by the fact that the Claimant followed instructions from other managers but not her.

154. She did not have knowledge of Claimant’s disability as of 24 August. Nobody told her.

155. She did admit that she was frustrated at the fact that she sometimes had to get cover for the Claimant when he was absent. However, we are satisfied that that frustration over cover arrangements played no part whatsoever in what she said or did on 24 August.

156. It was not Ms Kamara's intention to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was not her, it was the Claimant, who caused the argument about his failure to look in the Scanned Folder by raising the matter much later the same day, after Ms Kamara had already considered the matter closed.

157. To the extent that the Claimant considered that the effect of the 24 August incident was that an intimidating, hostile, degrading, humiliating or offensive environment was created, it was not reasonable that the conduct of Ms Kamara would have that effect on the Claimant. She did no more than stand her ground when the Claimant sought to get her to admit that there had been no need for anyone to look in the Scanned Folder.

<u>Issue (g) On 3 October 2018, Sarah Walton telephoned the Claimant and put pressure on him to leave the company</u>

158. The allegation fails on the facts, because we found that Ms Walton did not put pressure on the Claimant to leave the company.

159. Ms Walton phoned because she believed that the Claimant was telling people that he was leaving. That was the only reason for her action. It was not to put him under pressure to leave. If it was true that he was leaving, she needed to know his proposed leaving date.

160. Ms Walton would have acted the same way for any other employee. Her actions in making that phone call, and the words she used on the phone, where not influenced by the fact that the Claimant had a disability, or by his sickness absence.

<u>Issue h) On 4 October 2018 Scott Vernon telephoned the Claimant and threatened, abused and insulted him</u>

161. The Claimant was not treated differently than anyone else. There was a rule which applied to all staff (not just the Claimant) about not leaving bags in reception. The Claimant was not the only person to break this rule.

162. We do not find that there is any evidence that, in the absence of an adequate explanation from the respondent, might lead us to infer that Mr Vernon would have treated the Claimant differently, but for his disability or sickness absence.

163. If Mr Vernon had seen any other receptionist put on deodorant in the reception area, or leave a bag behind the desk there, he would have told them not to do it.

164. Similarly, if Mr Vernon had asked anyone else the same question three times, and believed that the employee was being evasive or difficult, then he would have given a similar response to "don't be stupid"

165. His choice of words was not influenced by the claimant's medical condition or sickness record, either consciously or subconsciously.

166. It was not unreasonable for the Claimant to be offended by what was said to him. However, nothing that Mr Vernon said or did in relation to this incident was related to the Claimant's disability. In particular, "Don't be stupid" was not a remark related to the Claimant's disability. Mr Vernon was not implying that people with depression are stupid and/or that they lack intelligence. He was not implying that the Claimant lacked intelligence; he was implying that the Claimant was deliberately trying to avoid answering a question to which – in Mr Vernon's opinion - the Claimant knew the answer.

<u>Issue (i) On 5 October 2018 Scott Vernon arrived 20 minutes before the end of the Claimant's shift and conducted a meeting with him that lasted 1 hour 35 minutes</u>

167. There was nothing wrong with Mr Vernon - rather than Ms Walton - having the meeting with the Claimant. The meeting could have been much shorter, and it only lasted for the length of time that it did because the Claimant kept talking after Mr Vernon suggested that the meeting could end. The Claimant was not being required to stay at work against his will. The Claimant effectively got paid for the duration of the meeting (by having that time count towards the 40 hours he was obliged to work that week).

168. The meeting did not intimidate the Claimant. The meeting was in no way related to the Claimant's disability or sickness absence. The meeting came about because the claimant said that he had information to impart to his employer, and the meeting continued because the Claimant wanted it to continue.

169. Mr Vernon did not treat the Claimant differently than he would have treated another staff member because of the Claimant's disability or sickness absence.

<u>Issue (j) The Claimant's colleagues were informed about and discussed his sickness</u>

170. Ms Kamara's comments about the Claimant were not related to his disability and she did not know that he had a disability.

171. Her comments about the claimant were made because she believed that the Claimant had made untruthful comments about her.

172. Neither she nor other staff were told by the employer about the reasons for the Claimant's sickness absence. Some of them formed the opinion that the Claimant was not genuinely ill. That was beyond the respondent's control.

<u>Issue (k) Mr Vernon did not send the Claimant on sales training and did not give him any feedback on the skills that he needed to improve to be promoted into sales</u>

173. Mr Vernon would not have done more to persuade Ms Hamilton to offer the Claimant a sales post if the Claimant had no disability. Mr Vernon gave feedback to the Claimant in relation to why he had not been offered any sales post with the Respondent. The reasons that he had not been offered a sales post were not connected to his disability or his absences; he had already been unsuccessful in his attempts to obtain a sales post before he started working as a receptionist.

Time Limits

174. In relation to allegations which occurred before 12 September 2018, we have to consider if they form part of a continuing act.

175. Allegations (g), (h) and (i) each relate to specific dates after 12 September 2018 and are in time.

176. Allegations (j) and (k) each relate to acts alleged to have continued until after 12 September 2018 and are in-time.

177. Part of Allegation (e) is that training was not rescheduled after 11 August 2018. The Claimant did not ask for it to be rearranged after 11 August. Nonetheless, we will treat the part of Allegation (e) about the training not having been re-scheduled after 11 August 2018 as an allegation that the act continued until the start of the Claimant's long-term sickness absence (26 November 2018), bringing that part of allegation (e) in time.

178. Allegations (b) and (c) and (d) are connected to each other. However, in relation to the contents of the minutes from the 4 & 5 June 2018 meetings, there was no continuing act after 4 July 2018, when it was agreed that the minutes would not be relied upon for any future purpose. In relation to the 18 June (investigation meeting) and 4 July (disciplinary meeting), there was no continuing act after 4 July 2018, which was when the Claimant was told that there would be no further action taken against him in relation to the matters discussed on 18 June and 4 July.

179. In relation to the part of Allegation (e) that complains about the Claimant having been told to attend the training on 11 August 2018, or about it not taking place that day, there was no continuing act after 11 August 2018 in relation to the events of 11 August 2018.

180. Therefore, Allegations (b) to (d) and the part of Allegation (e) that relates to 11 August 2018 itself are all out of time, subject to the tribunal's ability to extend time where it is just and equitable to do so. We have taken account of the Claimant's sickness absence. However, we have also taken account of the fact that we have decided that the claims lack merit and that the Claimant was well enough to attend work for significant periods of time in June, July, August and well enough to raise a grievance and submit a data subject access request on 11 October. Furthermore, Mr Hanley had left the Respondent's employment, and, while they were in fact able to have him attend as a witness (via video link) it was prejudicial to the Respondent's defence that early conciliation did not commence until such a long time after the relevant dates. On balance, we were not satisfied that it would be just and equitable to extend time in relation to any of those allegations.

181. In relation to (a) and (f), to some extent the allegations were self-contained and the respective arguments between the Claimant and Ms Kamara on each of those dates did not continue beyond the date in question. We have found no breaches of the Equality Act on the part of the Respondent or Ms Kamara in relation to either of these incidents. That being said, we have taken into account that - as per allegation (j) - the Claimant also made allegations that Ms Kamara had spoken about him to other colleagues, potentially on dates after 12 September 2018, and our finding that her remarks about the Claimant related to the fact that she believed that he had made unreliable claims about 4 June and 24 August to other people. Therefore, on balance, we are willing to treat allegations (a) and (f) as part of an act alleged to have continued until after 12 September 2018. In the alternative, we find that it would be just and equitable to extend time so that allegations (a) and (f) can be heard alongside allegation (j).

Employment Judge Quill

21 Jan 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

23/01/2020

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FOR EMPLOYMENT TRIBUNALS