EMPLOYMENT TRIBUNALS

Claimant: **Mr L Lewis**

Respondent: **Network Rail**

Heard at: **Birmingham**

On: **15, 16, 18, 19, 22 & (in chambers) 23 May 2022**

Before: **Employment Judge Flood**
Mrs Forrest
Mrs Keene

Representation
Claimant: Mr O'Callaghan (Counsel)
Respondent: Ms Kaye (Counsel)

RESERVED JUDGMENT

1. The complaints of direct race discrimination and the complaints of victimisation set out at paragraphs 2.2.7 and 2.2.14; direct disability discrimination set out at paragraph 3.2.6; and harassment related to disability set out at paragraph 4.1.6. of the List of Issues were dismissed upon withdrawal.

2. The remaining complaints of direct age discrimination; direct disability discrimination; age related harassment; disability related harassment and victimisation (contrary to ss 13, 26 and 27 of the Equality Act 2010 ("EQA")) do not succeed and are dismissed.

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 7 November 2021, the claimant brought complaints of age, race and disability discrimination against the respondent, identifying allegations of 'victimisation', 'harassment' and 'discrimination'.

2. There was a preliminary hearing for case management before Employment Judge Flood on 25 April 2022 where particulars of the complaints the claimant wished to bring (which were not clear from the claim form) were discussed. The claimant provided particulars of the acts he wished to rely upon in respect of the various complaints and these were recorded in a draft list of issues. It was also identified that a number of the matters discussed and recorded were not in the claim form and so would require an amendment application. A further preliminary hearing was listed to consider such matters which came before Employment Judge Algazy KC on 21 November 2022 and 7 December 2022. The case management order sent to the parties following that preliminary hearing recorded that the claimant had withdrawn his claim for race discrimination. Employment Judge Algazy KC gave permission for the claimant to amend his claim so as to bring the complaints set out in the draft list of issues, with the exception of the complaint for failure to make reasonable adjustments. The claimant's application to amend his claim to add a complaint of failure to make reasonable adjustments was refused. The final list of issues agreed between the parties, based on that draft list of issues ("List of Issues") is set out below and referred to throughout the hearing.

3. During the course of the hearing, the claimant confirmed that he was no longer pursuing the allegations of victimisation set out at paragraphs 2.2.7 and 2.2.14; the allegation of direct disability discrimination set out at paragraph 3.2.6; and the allegation of harassment related to disability set out at paragraph 4.1.6. The List of Issues was updated to reflect these changes, and this is set out below with strikethrough text, where appropriate.

4. An agreed bundle of documents was produced for the hearing and where page numbers are referred to below, these are references to page numbers in the bundle. At the beginning of the hearing the claimant made an application to add an additional document, namely a letter dated 12 May 2014 from BUPA to the respondent in relation to the claimant's health. The respondent objected to this application. The Tribunal determined that the claimant would be permitted to admit this document, on the basis that it could be a document which was necessary for the fair disposal of the proceedings and no prejudice was caused to the respondent by admitting that document.

5. We also had a Cast List and Chronology and a list of key documents. The Tribunal has used the initials of various individuals as they are defined in the findings of fact in the List of Issues set out at paragraph 6 below.

The Issues

6. The issues to be determined by the Tribunal ('List of Issues') were as follows:

1. **Time limits**

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

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.1.2 If not, was there conduct extending over a period?
1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.1.4.1 Why were the complaints not made to the Tribunal in time?
1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Victimisation (Equality Act 2010 section 27)**

2.1 The parties agree that the claimant did a protected act by issuing Employment Tribunal proceedings against the respondent under case number 3300540/2019 on 19 January 2019.

2.2 Did the respondent do the following things:

2.2.1 Fail to provide the claimant with a transfer from the Marston Vale from 17 June 2019 (when the claimant says he requested a release date from JC of the respondent) until approximately January 2020;

2.2.2 Fail to provide the claimant with signaller conversion training at Rugby work station from 10 September 2019 (when the claimant says he requested such training from GF of the respondent) until January 2020;

2.2.3 PC refused the claimant's request to be issued Key Worker status on 11 November 2020 (preventing the claimant from continuing with training);

2.2.4 Require the claimant on or around 5 January 2021 to restart his training with a new and inexperienced trainer, GM. The claimant contends that GM had just completed his own training and the claimant was the first person he had trained;

2.2.5 PB, assessed the claimant in a negative manner during an assessment test held on 25 March 2021 where the

claimant was assessed as not competent to work on the work station and that no training could resolve the issue;

2.2.6 Fail to take action to resolve the claimant's complaints raised on 29 March 2021 about this assessment;

2.2.7 ~~Provide the claimant with unsigned and fabricated training reports said to have been prepared by GM, shortly after the meeting on 29 March 2021~~;

2.2.8 PC, informed the claimant in April 2021 that he was required to attend signalling school (which was something that an ab initio trainer would be required to do, not something a trainer with 15 years experience such as the claimant was required to do);

2.2.9 PC, refer the claimant for an occupational health assessment against his wishes on 15 March 2021;

2.2.10 PC, ignored the recommendation of the occupational health assessor (which indicated the claimant was fit to return to work and no further action was required) and refer the claimant for a further occupational health assessment on or after 26 March 2021;

2.2.11 PC, made a further occupational health referral in May 2021;

2.2.12 PC, failed to seek the claimant's consent for occupational health referrals after 26 March 2021;

2.2.13 PC, threatened the claimant disciplinary action in a letter dated 14 June 2021;

~~2.2.14 Amend the occupational health referral (date unknown, as claimant discovered this had been done as part of a subject access request);~~

2.2.15 PC, ask the claimant when he was being observed on a training simulator when he intended to retire;

2.2.16 Fail to provide the claimant with any support between 19 January 2019 and 7 November 2021

2.3 By doing so, did it subject the claimant to detriment?

2.4 If so, was it because the claimant did a protected act?

2.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

3. Direct disability discrimination

3.1 The claimant was a disabled person at all material times as a result of Anxiety and Depression

3.2 Did the respondent do the following things (same acts as relied upon at 2.2.9-2.2.14 and 2.2.16 above):

3.2.1 PC, refer the claimant for an occupational health assessment against his wishes on 15 March 2021;

3.2.2 PC, ignore the recommendation of the occupational health assessor (which indicated the claimant was fit to return to work and no further action was required) and refer the claimant for a further occupational health assessment on or after 26 March 2021;

3.2.3 PC, make a further occupational health referral on in May 2021;

3.2.4 PC, fails to seek the claimant's consent for occupational health referrals after 26 March 2021;

3.2.5 PC, threaten the claimant disciplinary action in a letter date 14 June 2021;

~~3.2.6 Amend the occupational health referral (date unknown, as claimant discovered this had been done as part of a subject access request);~~

3.2.7 Fail to provide the claimant with any support between 19 January 2019 and 7 November 2021

3.3 Was that less favourable treatment?

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

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

The claimant has not named anyone in particular who he says was treated better than he was and relies on a hypothetical comparator.

3.4 If so, was it because of disability?

4. **Harassment related to disability (Equality Act 2010 section 26)**

4.1 Did the respondent do the following things: (same acts as relied upon at 2.2.9-2.2.14 and 2.2.16 above):

4.1.1 PC, refer the claimant for an occupational health assessment against his wishes on 15 March 2021;

4.1.2 PC, ignore the recommendation of the occupational health assessor (which indicated the claimant was fit to return to work and no further action was required) and refer the claimant for a further occupational health assessment on or after 26 March 2021;

4.1.3 PC, make a further occupational health referral on in May 2021;

4.1.4 PC, fails to seek the claimant's consent for occupational health referrals after 26 March 2021;

4.1.5 PC, threaten the claimant disciplinary action in a letter date 14 June 2021;

~~4.1.6 Amend the occupational health referral (date unknown, as claimant discovered this had been done as part of a subject access request);~~

4.1.7 Fail to provide the claimant with any support between 19 January 2019 and 7 November 2021.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. **Direct age discrimination (Equality Act 2010 section 13)**

5.1 The claimant's age group is over 60s (he is 62) and he compares himself with people in the age group under 60s.

5.2 Did the respondent do the following things (same act as relied upon at 2.2.15 above):

5.2.1 PC, ask the claimant when he was being observed on a training simulator when he intended to retire;

5.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no

material difference between their circumstances and the claimant's.

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

The claimant has not named anyone in particular who he says was treated better than he was and relies on a hypothetical comparator.

5.4 If so, was it because of age?

5.5 Did the respondent's treatment amount to a detriment?

5.6 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were the promotion of inter-generational fairness, including the efficient planning of the departure and recruitment of staff and promoting access to employment for a range of age groups.

5.7 The Tribunal will decide in particular:

5.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.7.2 could something less discriminatory have been done instead;

5.7.3 how should the needs of the claimant and the respondent be balanced?

6. **Harassment related to age (Equality Act 2010 section 26)**

6.1 Did the respondent do the following things: (same act as relied upon at 2.2.15 above):

6.1.1 PC, ask the claimant when he was being observed on a training simulator when he intended to retire;

6.2 If so, was that unwanted conduct?

6.3 Did it relate to age?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Findings of Fact

7. The claimant attended to give evidence and called one additional witness, Mr M Bellenie ('MB'), his Trade Union representative. Mr G Farmer ('GF'), Acting Local Operations Manager, Marston Vale – September to October 2019; Mr J Price ('JP'), Local Operations Manager, Stafford and the claimant's line manager - October 2019 to October 2020/the claimant's welfare manager, June/July 2021 – December 2022; Mr P Cutts ('PC') Local Operations Manager, Rugby ROC - October 2020 to November 2021 and the claimant's line manager - October 2020 to June/July 2021; Mr R Hartwell ('RH'), Operations Strategy Manager, West Coast South; Mr A Myers ('AM') Operations Manager, West Midlands Signalling Centre and Grievance Manager for Grievance 1; Mr B Chibanda ('BC'),Infrastructure maintenance Engineer and Grievance Manager for Grievance 2; Mr S Clare ('SC'), Infrastructure Maintenance Engineer, Stafford (secondee) and Appeal Manager for Grievance 2 all attended to give evidence. The respondent also admitted written statements from Mr J Cotton (JC), Local Operations Manager, Marston Vale and the claimant's line manager – from March 2017 to October 2019 and Mr K Khanna ('KK') Head of Health, Safety and Environment for West Coast South and Appeal Manager for Grievance 2. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

8. In order to determine the issues set out above, it was not necessary to make detailed findings on all the matters heard in evidence. We have made findings though not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may have been relevant to drawing inferences and conclusions. We made the following findings of fact:

8.1 The claimant is a 62 year old man and it is accepted that at all relevant times he is a disabled person for the purposes of section 6 EQA as a result of Anxiety and Depression.

8.2 The respondent owns and manages most of the railway network in Great Britain.

Contracts and relevant policies

8.3 The claimant started work on 14 March 2005 with the respondent as a Grade 7 Signaller based at West Hampstead. His contract of employment was shown at pages 183-4 and 187-199. We were referred various policies, procedures, collective agreements and management guidance materials of relevance to the issues in dispute throughout the hearing. This included Line Manager Guidance on Managing Absence

dating from 2010 (pages 204-229); Occupational Health line manager training session materials dated July 2018 (pages 272-286); a Managing for Health Policy and Procedure dated 1 September 2019 (page 320-321); and the Occupational Health Services User Guide ('OH Guide') dating from January 2020 (page 322-355). In particular, the parties referred us to the following sections of the OH Guide:

"2.7 Obtaining Informed Consent

Written consent is not required to refer an employee to occupational health however the referring manager must inform the employee that they are being referred to OH, the reason for the referral, and what to expect from the process including details of the advice being sought and how it may be used."
"2.8 The employee's right to refuse to give consent
An employee has the right to withhold consent at any point in the Occupational Health process. However, a Line Manager may then have to decide on the employee's future fitness for work without the benefit of OH advice."

8.4 The job description for a signaller was shown at page 183-4. Signallers are responsible for the operation of signalling equipment to ensure that trains run in accordance with rules and regulations and service timetables. The signaller role is considered to be "safety critical" due to the responsibility they have for the safety of the travelling public. Signallers are trained to a high level and expected to complete assessments regularly on their ability to perform this role. Signallers are required to work in accordance with the Rule Book, which is a lengthy document created by the Rail Safety and Standards Board. It contains a set of modules and handbooks and sets out the operational rules for application on the mainline railway. A signaller must also demonstrate good non-technical skills such as remaining controlled under pressure, multitasking, communication and attention to detail. A newly appointed signaller starts his or her period of training by attending Signalling School which is a mandatory 11 week course held at an independent learning centre. It is designed to give attendees detailed understanding of the Rule Book. Following successful completion of Signalling School, trainee signallers undergo practical training working on a simulator of a workstation. Site specific training for each location is required before an individual can take responsibility for that station and must be deemed competent by their line manager. Each signal box is graded between 1 to 9 based on set criteria. Generally, the higher the grade the busier the train service and more complex the day-to-day activities. Those signallers working at higher graded signal boxes are paid a higher salary.

<u>Transfer to and from Marston Vale</u>

8.5 In 2015 the claimant's role at West Hampstead was at risk of redundancy so with his agreement he was moved to Marston Vale in March 2015 as

a displaced signaller in accordance with the respondent's Promotion, Transfer, Redundancy and Resettlement agreement ('PTR&R'). Marston Vale was a Grade 4 Signal station whereas the claimant was a Grade 7 Signaller, so would be operating at a grade several levels lower than his contracted grade. The claimant's pay and conditions remained at all times at Grade 7. The claimant's line manager and the Local Operations Manager ('LOM') at Marston Vale from March 2017 onwards was JC.

8.6 The PTR&R envisaged that employees who had transferred under these arrangements would seek a vacancy at their contracted grade with a view to reverting to the correct grade as soon as possible. A meeting was held between the claimant, RH and JC on 20 June 2018 to discuss options for the claimant under the PTR&R, where the claimant was accompanied by MB and another union representative. Having been initially told by RH that there were no vacancies available for him, following the intervention of RB and a heated argument between his union representatives and RH, the claimant was then informed that he could move to Rugby Rail Operating Centre ('ROC') if this was his choice. The claimant was given the option subsequently to transfer to two alternative locations at grade 7 in either Rugby ROC (or to another vacant post at Wembley) or to remain at Marston Vale as a grade 4 signaller. He confirmed on 9 July 2018 that he wished to transfer to Rugby ROC (page 1608-1609). JP met with the claimant around this time to discuss the requirements of Rugby ROC and was aware he would become the claimant's line manager upon transfer as the LOM at Rugby ROC at that time.

8.7 Before a signaller can take responsibility for a new area unsupervised, it is a requirement of the National Operating Procedures (pages 237-271) that site specific training for the new location is carried out. The training programme involved the use of a simulator to go through various scenarios that signallers will face in the new location. On completion of that training (which normally takes 6 to 7 weeks) an assessment is carried out to determine whether the signaller is competent in applying the rules and non-technical skills. In addition, signallers who have been off work for six months or more are also required to undergo a period of retraining and assessment on their return to work (even in the same location). It was acknowledged by the respondent that a significant amount of time away from the day-to-day business of the respondent could potentially result in a 'natural skill/knowledge fade'.

<u>Operational irregularity and sickness absence</u>

8.8 On 24 July 2018 an incident occurred involving the claimant, which was referred to as an operational irregularity, relating to dealing with a request to cross the track from a member of the public and his alleged failure to report the incident. The claimant agreed that this was a potentially serious matter. Following that incident, the claimant was stood down from

safety critical duties whilst an investigation took place. During this period of investigation, arrangements for the claimant's transfer to Rugby ROC were paused.

8.9 The claimant was off sick with Anxiety and Depression between 16 August 2018 and 11 January 2019 and sickness certificates for that absence were at pages 404 and 419. The claimant was referred for an occupational health ('OH') assessment on 3 October 2018 (page 406) and an interim OH report was produced on 18 October 2018 (page 409-10) reporting that the claimant was suffering "*significant symptoms of stress related anxiety and depression*". Psychological support was recommended and a further OH report was prepared on 12 November 2018 confirming a change to the claimant's prescribed antidepressant medication and requesting that the claimant be provided with access to face-to-face cognitive behavioural therapy ('CBT') through the respondent's health provider, Validium.

8.10 On 28 November 2018 the claimant started the Early Conciliation process and subsequently presented a claim for race discrimination and race -related harassment on 19 January 2019 ('ET Claim 1') (the 'Protected Act'). JC was aware of ET Claim 1 as he was one of the respondent's witnesses in those proceedings. JP also became aware of ET Claim 1 at some point during the proceedings as he was supporting (as a welfare manager) one of the respondent's witnesses.

8.11 On 24 January 2019 the claimant attended a further OH appointment which recommended that the claimant could return to work to "*non-safety critical duties*" on a phased basis for three hours a day for three days a week as recommended by his GP (page 421-423). The claimant returned and a return to work meeting was held with JC (page 429) on 5 February 2019 which recorded that the claimant was on medication, namely Citalopram 40 mg per day, and that he must be accompanied at all times for safety critical duties. This recorded that the respondent's chemist on-call service had been notified in respect of this prescription medication (which was a requirement of the respondent's business in circumstances where employees in safety critical roles were prescribed medication).

8.12 On 4 January 2019 the claimant was referred to Validium for CBT sessions which started on 19 February 2019. At page 458 to 461 we saw the psychological assessment report prepared on 19 February 2019 by the counsellor at Validium. This included details of the claimant's current health symptoms and also noted that the claimant had reported to the counsellor that he was:

"now officially back at work but unable to go into work as there is no agreed role for him that is risk-free yet. He reports that the current disciplinary process must be settled before a role can be agreed."

It also recorded that the claimant was "*unable to carry out duties until the*

investigation is settled". It was suggested by the claimant that this did not necessarily refer to the disciplinary investigation, but we find this was what was being referred to in the context of the rest of the document. The claimant did not return to active duties and appears to have been performing tasks such as completing online knowledge tests and e-learning training courses as part of his phased return.

8.13 At page 1673 the claimant drew our attention to an email he says was sent to JP (who was to be his line manager on transfer to Rugby ROC) on 8 May 2019 which confirms that he has been informed he will be starting at his new position at Rugby ROC and asking JP for a start date. This email also gives information about the claimant's phased return to work and that he was currently on Citalopram 40 mg tablets. This email further states that the claimant was keen to return to work so he could "*get this period behind me and move on*". In evidence JP told us he never received this email. There was no evidence of any reply, and the claimant confirmed no reply was received. There does not appear to have been a follow-up or chaser email from the claimant to JP. We accept that this email was sent but also accept that JP did not receive or see it. We find that had such an email been seen by JP, some action would have been taken not least a referral to the chemist on-call or some response about a possible start date. The claimant stated that he further emailed JP asking for training materials and that he be permitted to attend work to shadow a signaller, both of which requests were denied. There was no copy of these emails in the bundle and JP denied having received such emails. We conclude that these emails were not sent at this time. We find that the claimant was unwittingly conflating later requests made for training materials and for shadowing to take place which were made to PC with communications taking place at this time.

8.14 On 5 June 2019 the claimant was issued with a final written for the 'operational irregularity'. The claimant appealed against this sanction and an appeal hearing was held on 16 October 2019, where the claimant's appeal was not upheld.

Arrangements for transfer to Rugby ROC

8.15 On 17 June 2019 the claimant contacted JC to ask about his transfer to Rugby ROC and was advised by JC that he was waiting for JP to return from work the following week to provide a start date (page 474). There was no follow up response from JC to the claimant from that initial e mail. JP was informed in June 2019 that the claimant was ready to transfer to Rugby ROC, so he made arrangements for the claimant to begin his training. There was only one trainer for signallers at Rugby ROC at this time, Mr T Donaghey ('TD'). TD had been temporarily released from Rugby ROC to assist at the newly opened Manchester ROC at the time and so it was not possible for him to start the claimant's training until TD returned on 14 October 2019. There was further correspondence involving JP, JC and the respondent's Operations Manager Mr T Tipper

between 22 and 24 August 2019 relating to the arrangements for the claimant starting at Rugby ROC (page 1675). This made reference to JP having discussed the issue with TD and asked him to put a training plan together and referenced a conversation between the claimant and JP about the standards required at Rugby ROC. JP confirmed in cross-examination that he selected TD as the trainer for the claimant, that he was not aware of any one else could undertake the training and he did not consider that as a delay until October 2019 to start training the was unreasonable. We accepted this evidence. He agreed that there was no discussion with the claimant at this time about transferring to other locations in light of any delay.

8.16 JC moved out of the LOM role to undertake signalling training in September 2019. In his absence, GF stood in as LOM for Marston Vale and became the claimant's acting line manager. It is not clear whether there was any contact between the claimant and GF when he first became the claimant's acting line manager. GF was aware of ET Claim 1, although could not remember when he was informed about this telling us he imagined that JC told him. His knowledge of ET Claim 1 was "*quite limited*" knowledge, just that it was a claim of race discrimination. GF told was informed during a handover with JC that the claimant was "*waiting for a date to be confirmed for his transfer to Rugby ROC*". On 10 September 2019 the claimant contacted GF to ask for the earliest date he would be transferred to Rugby. GF then spoke to JP to enquire about a start date for the claimant and was told that the trainer (i.e., TD) had been allocated to a project in Manchester ROC lasting until the end of September. GF informed the claimant of this on 11 September 2019 (page 476) and stated that there would be contact at the end of September to arrange a start date for the training required to enable the claimant to operate as a signaller at the new location, Rugby ROC. When asked in cross-examination whether there were any other trainers available, GF said that TD was the only one he was aware of and that he did not make any enquiries about other suitable trainers. He explained that as TD was available at the end of September, the wait to commence training seemed "*normal and reasonable*" to him so he did not query it. We accepted this evidence.

8.17 The claimant completed his CBT sessions with Validium on 6 September (page 1645-1651).

8.18 A further email was sent to the claimant by GF on 9 October 2019 (page 477-478) confirming that his training would commence on 14 October 2019 and the claimant was instructed to report to Rugby ROC on that date. The claimant started work at Rugby ROC on 14 October 2019 with JP appointed as the claimant's line manager and commenced training on the Stafford Workstation with TD. A training log showing dates on which training was undertaken was shown at page 530 and detailed records of the training undertaken were at pages 482-560. These documents record

the claimant attending training sessions on dates between 21 October 2019 and 10 March 2020. The claimant had a number of absences from work between October 2019 and January 2020. This included annual leave for the whole of December 2019 which was arranged and agreed in advance with JP to fit in with the training schedule and the availability of TD (page 479-481). JP was asked in cross examination whether he should have asked the claimant to postpone his annual leave in order to complete the training earlier, but he disagreed stating that annual leave dates had already been booked off and that it was acceptable for training to be prolonged in the event of such annual leave taking place. The claimant alleged that his training programme was continually interrupted due to TD's availability. The claimant also directed us to an email from TD on 14 January 2020 referring to difficulties with the claimant's training being arranged (page 1678). We find that it was primarily because the claimant had built up considerable amount of annual leave which needed to be taken which was the reason for the stop/start nature of the training between October and December 2019, albeit that the availability of TD may have contributed.

Training from January to March 2020

8.19 The claimant completed a more consistent period of training between January and March 2020. At pages 1679 to 1681 we saw notes of training conducted by TD. On 12 March 2020 the claimant was assessed on Stafford Workstation by TD. At page 561-577 we saw the report completed by TD of the results of this assessment, describing how the claimant had performed on three scenarios conducted on the simulator. Each of the three simulator scenarios was failed. TD also made the following comment in his assessment report:

"*During the processes it became evident that [claimant's] major issues are not technical but his non-technical skills. Below are the areas that I believe he needs to address to put him in a position to work the Stafford workstation safely and efficiently."*

A number of suggestions for improvement were made (page 565-577) and the report went on to describe the negative factors observed as "*considerable but by no means insurmountable*". TD put together a development action plan ('DAP') in March 2020 which recommended a further 4 weeks of dedicated 1-1 training (page 1254-9). However, JP told us that he did not believe the claimant was ever issued with or saw this plan as he did not then return to work between March – October 2020 as COVID-19 restrictions were in place.

Period of Covid restrictions March 2020 onwards

8.20 On 26 March 2020 the first national lockdown in the UK came into effect. At this time access to the respondent's building was restricted to essential workers only. The claimant was not considered a key/essential worker as he was a trainee, and the safe and efficient running of the

railway did not depend on him being present at Rugby ROC. The respondent's use of the simulator for training purposes was ceased. There were strict arrangements in place for access to the respondent's building and it was agreed with the respondent's trade unions that anyone not essential would not attend work at all. JP wrote to the claimant on 9 April 2020 confirming that whilst restrictions were in place concerning access and social distancing it was not possible for the claimant's training to be carried out at Rugby ROC, with a further email being sent on a similar nature on 20 April 2020 (page 1684).The respondent's witnesses agreed in cross-examination that it was open to the respondent to designate which of its workers were deemed to be essential workers. At page 714 we were shown a copy of a letter issued to employees who were identified as key workers, although this did not apply to the claimant. We accepted the evidence that the claimant did not fulfil the requirements to be allocated key worker status at that time. The claimant also admitted in cross examination that asking him to stay at home during this period was the safest thing to do to protect his health.

8.21 Although Covid restrictions more generally within the country started to be lifted from 1 June 2020 onwards, in the respondent's ROCs the restrictions remained broadly the same throughout 2020. In addition, TD was identified as a vulnerable worker and required to shield at some time during 2020. JP told us that he spoke on the telephone and communicated by email with the claimant during this period of absence. There were no copies of emails between the claimant and JP during this period. We find that there was some ad hoc contact but no structured plan for contact and support during this period. The claimant spent the period between March and October 2020 familiarising himself with the Rule Book and we accepted the claimant's evidence that despite doing this, it was difficult to keep up his knowledge of the Rule Book when not putting it into practice every day as a signaller.

8.22 In October 2020 PC became the claimant's line manager as a result of a restructure and held a welfare meeting with the claimant on 14 October 2020 (see notes in e mail page 694). The notes record a discussion between PC and the claimant that the claimant was due to be on holiday between 18 October and 1 November 2019 and between 12 December 2020 and 5 January 2021. The claimant disputed that this discussion took place at all on the basis that the notes referred to the claimant being on holiday to Sardinia, which was incorrect. However, we find that the discussion took place broadly as recorded in these notes, albeit an error may have been made as to the holiday location. It was further recorded that due to leave accrued that the claimant would restart his training in January 2021. It further referenced the intention that the claimant return to the workplace to shadow a team to observe the workstation which was something that the claimant was "*keen to do*". JC agreed that the claimant had requested this during the meeting in October 2020.

8.23 On 2 November 2020 a second 4-week COVID-19 lockdown was announced. At page 1260 we saw a copy of an email from PC to JP recording that the claimant was due to return to work that week to observe, but noting that given the current lockdown, JP was of the view that the claimant could not attend as planned. The email noted that PC would inform the claimant unless JP had any other ideas as to what the claimant could undertake during this period. PC sent an email to the claimant on 11 November 2020 informing him that he will recommence training in the New Year as it is not possible for the claimant to come back in and observe in the workplace (page 715-716). The claimant alleged that he requested key worker status on this same date and was refused. No email was produced recording such a request or refusal and we find that no specific request was made but the claimant was informed as per this email that he would be unable to return to work to shadow as planned due to the lockdown which commenced on 2 November 2020. Although lockdown ended on 2 December 2020, much of the country was still under restriction throughout December and on 6 January 2021 England entered a third national lockdown.

8.24 The claimant agreed that as of November 2020 he had not disclosed to PC that he had brought Tribunal Claim 1 but expected it was "*public knowledge*" and the "*rumour mill was active*". The final hearing for Tribunal Claim 1 Took place in June 2020 with the reserved decision being published on the public register of judgements on 16 October 2020. We accepted that PC was unaware of Tribunal Claim 1 at this time and that he became aware of it on or around 20 January 2021 when the claimant aske for leave to attend a remedies hearing. We also accepted the evidence of PC that he never asked the claimant (or anyone else) what the claimant's tribunal claim was about, as it was not important to him, and he wanted to give claimant a "*fresh start*". We also note that PC was a manager in the Stoke region until his transfer in October 2020.

<u>Second training period January to March 2021</u>

8.25 On 11 January 2021 the claimant recommenced training on Stafford Workstation attending work at Rugby ROC from this date. Measures had by this time been in place in Rugby ROC to keep employees safe so it was deemed appropriate by the respondent to restart the claimant's training. PC told us that had not reviewed the training notes and assessment report produced by TD. He was aware of the DAP that had been produced but took the decision that the claimant's training should be restarted afresh due to the time lapse between March 2020 and January 2021 rather than take the steps outlined in the DAP. At this time TD no longer worked for the respondent and the trainer who had been assigned to the Rugby ROC was GM. GM was new to the role of trainer having been a signaller at Rugby ROC since August 2015, but stepped up to the training role to replace TD. The claimant was the first signaller (along with another signaller who commenced his training at the same

time) that GM had trained. It was put to JC and JP that the selection of GM was always likely to have caused issues with the claimant who unlike other trainees had been an experience signaller some time. This was not accepted, and it was denied that the claimant was being set up to fail. We accepted this evidence. It might have been helpful for PC and/or GM to review the DAP to see which areas in particular to focus the claimant's training on. However, we accepted that the decision to restart training afresh was one made with good intentions.

8.26 The claimant met with PC and GM on 6 January 2021 and a training plan was put together. The claimant contended that during this first meeting he informed PC about the medication he was taking for depression and anxiety and when PC said he was unaware of this, the claimant expressed surprise as he felt JP should have communicated this on handover. PC denies that this conversation took place. We find that the claimant is mistaken in his evidence that the conversation regarding medication took place on 6 January 2021, and this is in fact referring to the later conversation about medication on 3 March 2021. We conclude that had this conversation took place, a chemist on-call report would have been made. It would have perhaps been helpful for PC, as the claimant's line manager, to have had some awareness of his previous health issues, but we accept that these were not disclosed to him by JP or anyone else at this time. The claimant, PC and GM signed a learning contract on 15 January 2021 setting out the parameters for the training period (page 737-8) which anticipated that the training would take up to 6 weeks.

8.27 At pages 717-736 we saw a copy of the training plan which contained the handwritten comments from weekly reviews which took place between GM and the claimant, completed signed by both the claimant and GM. In addition to these handwritten comments on the training plan, GM produced his own weekly typed training report detailing the claimant's progress for each week when training took place (pages 1265-1267, 1269-1272, 1274-1278, 1285-1287, 1290-1292, 1302-1304 and 1377-1382). These reports were produced for the benefit of PC and sent by email each week to PC (pages 1653-1663). In addition, PC prepared separate further notes of the claimant's progress recording the weekly training review discussions that took place with the claimant (pages 753-754, 760-761, 1268, 1273, 1279-1280, 1288-1289, 1293, 1298-1301, 1305 and 1383). Similar reports were prepared by PC for other trainees, and we saw examples at page 1066 and 107. Neither GM or PC shared these additional documents with the claimant at the time and the claimant did not sign or add his comments to these documents, in the same way as he did with the handwritten training plan. The claimant had alleged that GM's and PC's notes had been fabricated but this allegation was withdrawn during the course of the hearing. We find that the notes made and recorded in these documents by GM and PC were genuine and broadly accurate of their observations. It is unfortunate that the claimant

was not shown at the time and asked to sign to confirm accuracy, as this may have avoided later disputes about what was discussed.

8.28 The reports prepared by GM and PC indicated that for the first three weeks of the claimant's training things were progressing well with GM noting in Week 1 that the claimant was "*keen to learn*" (page 1265) and PC noting that the claimant was "*enthusiastic and participated fully*" (page 1268). PC's notes for week two record that the claimant was progressing well and that he was "*slightly nervous because of the length of time that he has been away from working a workstation*" (page 1273). The note for week 3 recorded that the claimant had reported difficulties reading the letters in the head codes of trains which he felt may be caused by his bifocal glasses. PC recorded informing the claimant that it was his responsibility to have his eyes tested to make sure it has the right glasses for the job (page 1279). However, at this time in week 3 it was recorded that the claimant was on track to have his assessment in week 6 as planned (page 1280). The claimant alleges that there were difficulties with the training process after the first few days with GM disagreeing with the claimant as to his "*signalling style*" which the claimant described as "*safe but different*" from GM. He describes an incident where a heated debate took place ending with GM refusing to train him, using profanity and calling PC to resolve the issue.

8.29 PC's evidence was that difficulties began to arise during week 4 of the training. GM records in his note of this week (page 1285-7) that there were errors during simulations involving misunderstandings and that the claimant was apportioning blame for his mistakes elsewhere, including blaming GM himself for giving incorrect information. There was also a record of the claimant informing GM that he was feeling tired when he got home and was unable to read his training material and so requested an earlier finish. PC's notes of week 4 record similar points and also note that training would be extended into week 7 to allow the claimant to catch up on progress on one matter (page 1288-89). We find that the problems arose from week 4 onwards, that there was a difference of views between the claimant and GM but that the heated debate the claimant refers to took place on a later occasion (see paragraph 8.36 below.

<u>Observation on 12 February 2021 and alleged retirement comment</u>

8.30 PC conducted an observation of the claimant carrying out axle counter failure scenarios on 12 February 2021 which was the end of week 5 of the claimant's training. The claimant's account of this observation was that PC was in the training room with him whilst GM was in a separate room and that following the exercise, whilst he was still sitting at the workstation, PC (who was standing behind him) asked him a few questions about the observation and whether the claimant felt confident and then proceeded to ask him:

"When are you planning to retire?"

The claimant's evidence was that he was surprised and shocked; that this question was inappropriate because his plans for retirement were private and had no bearing on his current role. He said he was "*extremely upset*" by this question. He told us that despite being taken aback, as a gentleman, he answered the question explaining that he did not plan to retire for another eight years. The claimant disputes that a suggestion was made to him on that day that he should attend signalling school.

8.31 PC's recollection is that on observing the claimant he observed that he was making dangerous decisions for example using reminders and reminder override to regulate trains, which is not they are for. He stated that although the claimant had informed him in January 2021 that he was "*rusty*" on his rules PC realised following the observation that there were significant gaps in the claimant's Rule Book knowledge. PC states that he suggested to the claimant that he re-attend Signalling School, but the claimant refused this offer. PC denied that he asked the claimant when he was planning to retire.

8.32 PC made a record of this meeting in his week 5 weekly review notes (page 1293) and his report of his observations (page 1294-1297) on the positives and negatives. This report mentioned a debrief having taken place after the scenarios were finished where PC records the claimant becoming defensive when his observations were pointed out stating that PC asking him a question about why actions had been taken during the observation had put him off. This also recorded the claimant informing PC that he was rusty having not operated a workstation for three years. PCs note concluded that the claimant's training was 2 weeks behind schedule and that he was concerned that the claimant not taking responsibility for making mistakes. These notes also record PC mentioning to the claimant that to support him PC could send him to Signalling School in May and that the claimant would think about it over the weekend. We accepted PCs evidence that this was suggested as an opportunity to help and support the claimant to get back to the standard he had been at as a grade 7 signaller.

8.33 We find that the observation and subsequent debrief took place broadly as set out in the notes at page 1293. PC did suggest to the claimant that he could attend Signalling School as an option during this discussion. The note at page 1293 specifically references the suggestion about Signalling School. This is also corroborated in the weekly trainee report completed by GM the following week (week six) where he notes (page 1304) that the claimant was unhappy at the prospect of having Signalling School mentioned on Friday of the last week.

8.34 We also find on the balance of probabilities that PC did ask the claimant about his retirement plans. We find that this did not occur during the observation itself, but during an informal conversation that took place after. We make this finding because:

8.34.1 The claimant has been broadly consistent throughout in his allegation that a question of this nature was asked by PC, albeit that the allegation was not made to the respondent until August 2021, four months later.

8.34.2 The doctor's notes produced by the claimant as part of the grievance appeal (see below) record the claimant reporting to his GP that a question was asked of this nature. Whilst we note that the discussion with the doctor took place six weeks after the alleged comment and simply records what the claimant has reported to his doctor (rather than independently verifying that the comment was made at all), this is still probative evidence supportive of the claimant's account that a question was asked.

8.34.3 PC's account on this matter has changed slightly throughout with his more contemporaneous view at the time of the grievance being that he could not remember making such a comment and his evidence to the tribunal being that he denied asking the claimant when he was retiring or that such a conversation took place. We find that PC's initial account is accurate in that he simply had no recollection of asking this question. This is likely to be because there was no particular reaction at the time from the claimant and it was an issue that arose in the context of general conversation at the end of the working day, not in the context of a high pressured situation as the claimant submits.

8.34.4 It is entirely plausible that a general enquiry about the claimant's plans was made in the context of an informal conversation between the claimant and PC occurring after the observation was complete. After starting the training positively, PC was at this point concerned about the claimant's abilities. The claimant had not performed well during the observation. PC was discussing possible suggestions to assist the claimant (e.g., Signalling School). The claimant mentioned again the fact that he had been away from the workstation for three years and was rusty. Previous discussions had taken place about eyesight difficulties. It is possible therefore that an innocuous question was posed to the claimant about his future plans in this general context.

8.35 However, we also find that the claimant was not as he suggests "*extremely upset*" by this question. He proceeded to answer it. He made no complaint to PC at the time, as if he did, we find it would have been recorded in PCs notes (which did record the claimant blaming PC for asking questions as to why he was taking the actions he did whilst observing and thereby unnerving him). The claimant made no complaint about this to GM at the next opportunity, where again GM's notes record that he did complain generally to GM about the observation on 15 February 2021 (page 1302) and about the suggestion of Signalling School being made on 18 February 2021(page 1304). The first mention

of the question being asked is during the claimant's conversation with his GP on 31 March 2021, which took place shortly after the claimant had failed his assessment with PB. Moreover the claimant does not include a complaint about this question in his written grievance. It comes up only during the grievance meeting held with BC in August 2021. We conclude that PC made a passing comment during an informal conversation which he subsequently did not recall, as it was not a significant event. The claimant did recall the question but was not offended or upset by it at the time. As events developed, the claimant started to attach more significance to this question than was meant at the time by PC or taken by the claimant himself.

8.36 On Monday 15 February 2021 (the start of week 6 of the claimant's training) a dispute arose between the claimant and GM which required PC to attend Rugby ROC despite being on annual leave. GM records it in his weekly report as the claimant being unhappy about the scenarios run during Friday's observation. PC provides a detailed account of what took place in his weekly review notes (page 1298-1301). He states receiving a call at 8:30 a.m. from GM and subsequent call from the claimant at 9 a.m. when the claimant told PC he was unhappy with what PC had said and done during his observation. It noted the claimant raising concerns including stopping the claimant to asking questions whilst he was carrying out the scenario which put him off; why was told he could not use reminders as this was something he had always done before; issues with the timetable; that GM was taking his questions as a criticism or challenge; and why PC had asked him about not taking notes. PC then records his responses to each of the issues raised. PC's note of his weekly review which took place on 26 February 2021 (the end of week 7) records that a brief discussion took place. It also recorded that the claimant told PC he did not wish to attend Signalling School but would be better learning the Rule Book himself.

<u>Brief sickness absence and discussions in early March 2021</u>

8.37 On 3 March 2021 the claimant was off sick. PC's evidence which is consistent with his note at page 753 refers to the claimant texting him and then phoning at 4:23 in the afternoon. It records the claimant telling PC that he had spoken to his doctor and that he was experiencing withdrawal symptoms having stopped taking medication which meant he was having problems during the training. It records the claimant telling PC he had been taking Citalopram 40 mg twice a day since 2018 but had come off them on 25 January 2021. It made reference to symptoms of loss of memory and feeling tired and the claimant informing PC he would be taking the next seven days off sick. PC's note records that he mentioned to the claimant he may have to refer the claimant to OH Assist because of the symptoms mentioned. It is also noted that a further text was sent by the claimant to PC that day stating that having spoken to his union rep he did not understand why an OH Assist referral would be

made as this was only for long-term absence. We did not see a copy of that text message.

8.38 The claimant contends that PC's account of this conversation on 3 March 2021 incorrect. The claimant says that he simply informed PC that he would not be attending work for seven days as his doctor had re-prescribed Citalopram at 20 mg telling him that it would take a while to get used to the medication and that he should self certify for seven days, going back to work after this if he felt OK. We preferred the account of PC as to what took place on 3 March 2021 as there was a detailed contemporaneous record of the conversations. We find that the possibility of an OH referral was mentioned to the claimant on 3 March 2021.

8.39 The claimant returned to work on 10 March 2021 and a return to work interview was conducted by PC with the claimant on 11 March 2021 (notes at page 758-9). The matters recorded on the return to work form are fairly brief, mentioning the claimant having come off Citalopram and quickly being prescribed a lower dose from 3 March 2021. It also notes that the claimant was to "*think about what we may be able to do to support him going forward*". PC said he advised the claimant again that he would refer him to OH and that the claimant verbally agreed to this. PC said he also recollected the claimant mentioning that his younger sister had dementia which was playing on his mind as he kept forgetting things and have filled in two forms incorrectly, describing the claimant's reaction to these matters as a "*red flag*" making him even more concerned about the claimant's mental health. The claimant denied that issues around loss of memory were discussed at this meeting as he would "*never share this with his line manager*". We preferred PC's evidence on this point. The claimant agreed in cross examination that he was informed on 11 March 2021 that he would be referred to OH and that is when he spoke to his union representative as to whether that was appropriate. He also agreed that PC said the reason he was being referred to OH was because he had disclosed having a mental health illness. The claimant said he challenged PC on this, stating that he should already have been aware of this as it was not something new and the issues he had been suffering because he had stopped medication and so there was no need to send him to OH. There was no reference to an OH referral on the return to work form. We find that the claimant was informed on 11 March 2021 both that an OH referral would be made, and this was due to PC becoming aware that the claimant had a mental health illness that had been causing issues at work. A chemist on call medication review form was also completed on this day (page 757) disclosing details of the current medication being taken by the claimant.

<u>OH referral.</u>

8.40 On 15 March 2021 PC completed a referral form on the respondent's system to instigate an OH appointment for him. PC initially filled in the incorrect referral form under reference 3502403 (page 1518) which appeared to be a referral for night worker screening. At page 762 we saw entries from the occupational health system for 15 March 2021 showing that initial referral being created at 11:49 (which then generated an automatic questionnaire (page 763) being issued to the claimant at 11:54) and that referral then being withdrawn at 11:57. The correct referral was then made under reference number 3502418 (page 1516-7) stating that the reason for referral was an "*at work with health issue*". The referral contained additional information and questions including details of the medication changes and asking for advice in relation to additional support, whether the employee was fit to carry out a substantive post and asking for more information about the medication and working alone. These questions were provided to PC by S Choudhury, the respondents employee relations adviser (see page 1515) This referral generated a letter being issued to the claimant on 18 March 2021 informing him of an appointment on 26 March 2021 (page 76-45).

Assessment on 25 March 2021

8.41 The claimant had been originally due to take his final assessment to complete his training on 4 March 2021, but this was postponed as the claimant had a hospital appointment. The assessment was rescheduled and took place on 25 March 2021. The claimant was assessed by PB, an experienced trainer on the West Coast South region. PC said as his relationship with the claimant had become strained (following the discussion that took place on 15 February 2021) he felt it was better to have a completely independent assessor. The claimant was assessed on four different scenarios. Normally trainee signallers are assessed on 14 scenarios over a two-day assessment. However, as the claimant did not meet the required standard in the first four scenarios completed on day 1, nor had he completed enough of the scenarios to allow all 14 to be done in the time allocated, PB decided not to carry on with day 2. He assessed the claimant as 'Not Competent'. PB produced an assessment report (pages 768- 774) which set out his observations on each of the four scenarios undertaken. This report was provided to the claimant the day after this assessment. It noted that PB gave the claimant feedback, and the claimant acknowledged it had not been good day and he had made a lot of mistakes commenting that any training on the basics and had issues going on in his private life were affecting him and he had not slept well in the last few nights. PB's conclusion contained in the report stated:

"Lance is not competent to work on the workstation. I do not feel there is any amount of training that would resolve the issues Lance has".

8.42 The respondent's witnesses agreed that this conclusion had not been well worded. JP acknowledged that it was quite negative, and SC acknowledged that he would have liked to see some recommendations

for improvement in it, although having read the report he could see that PB noted that the claimant had made a series of catastrophic errors during the assessment. The claimant agreed in cross examination that the assessment revealed that non-technical skills had been lacking, as had been previously identified by TD. He was of the view that having never undertaken the action plan to correct these issues prepared by TD, it was the "*definition of madness*" to have asked the claimant to carry out the same assessment and expect a different result. The claimant did acknowledge that if the view of two assessors were that the claimant's non-technical skills were lacking it would not have been appropriate for him to be put back in a safety critical role. We find that it was very unfortunate that such a definitive and overly negative statement was made in this report by PB. It is clear that the claimant was upset and concerned by this comment in particular, understandably. Despite this wording making reference to further training being unable to address the deficiencies, there is nothing to suggest that the respondent did not intend to carry out further training or attempt to improve the claimant's performance.

8.43 On 26 March 2021 the claimant also attended an OH appointment by telephone with Mrs B McDonald, OH adviser. The claimant agreed that he consented to this telephone consultation taking place at the start of that consultation. The Interim OH report produced (page 810-811) noted that the referral had been made "*to discuss the changes in his medication regime and his* fitness *to work in a safety could critical role on his medication*". It further went on to note:

"Mr Lewis reports he is working in the training simulator learning a new system he requires for its role. In my opinion he is fit to carry on with his training and I will arrange a review with the occupational physician to assess your employee and answer your questions."

The report stated that the contents of the report had been discussed with the claimant and he had agreed to release the information to his manager and noted that the follow-on action of arranging a further review with the occupational physician did not require approval and no action was required by the manager. This report was issued to PC and in writing to the claimant (page 812) although the claimant indicated he had not received this by 6 April 2021.

8.44 On 29 March 2021 the claimant and PC met to discuss the outcome of the assessment which took place on 25 March 2021. Mr L Sheehy, a different LOM took notes of this meeting. The notes he prepared (approved/amended by the claimant having been sent these shortly after the meeting (see page 833)) were shown at page 823-832. These notes record that in this meeting the claimant challenged the content of the report contending that he had not been trained on the matters assessed and again stating that he had raised the issue of his knowledge of the Rule Book being rusty, but nothing had been done about it. The claimant

also raised issues with his eyesight stating that he was unable to attend an optician appointment. The option of the claimant attending Signalling School was again discussed with PC recommending signalling school to deal with the knowledge fade in relation to the claimant's rules. The claimant challenged this and suggested that he could recap his knowledge on the rules by reading the Rule Book independently, suggesting a period of 8 to 9 weeks. PC reiterated that he felt Signalling School would offer the claimant more structure and support in refreshing the rules but would go away and think about what the claimant had suggested to see if something could be structured.

8.45 Following a short break at the claimant indicated that he had felt abandoned when he finished at Marston Vale and that everything he did wrong was being highlighted and nothing right was commented on. The claimant raised again that he had issues with his mental health and felt stressed, specifically mentioning driving into work being stressful. PC reassured the claimant that he was trying to support him and to get him to pass. PC mentioned counselling that could be provided and suggested that the claimant speak to his doctor and come back with suggestions for support. The minutes further note PC saying:

"Forget about the assessment now, we need to concentrate on your health and getting you into mental state that is conducive to learning".

The notes also record the claimant stating he was proud of himself for addressing his mental health issues and acknowledging that they needed to be sorted out (which PC stated he was in agreement with). It also mentioned his sister's mental illness which had been playing on his mind. During cross examination the claimant disputed the contents of these notes, alleging that they were inaccurate. He acknowledged that Signalling School was discussed, but it felt like an instruction rather than an option. He accepted that the reason why PC offered that to him was because of PC had identified a development need to refresh his rules albeit in the claimant's view it was the wrong option. We find that the notes taken of this meeting by Mr Sheehy were accurate and reflected a true account of the discussions.

8.46 On 31 March 2021 PC received notification by email about OH referral referenced 3502418 stating that OH had been "*unable to schedule an appointment for [claimant] due to the employee being unwilling/not consenting*." (page 836). The claimant had received a phone call from OH scheduling an appointment which he found to be unusual and so questioned what it was for, ultimately informing them that he did not agree to the appointment. He admitted in cross-examination that had OH explained at that time that it was an appointment to process the previous assessment recommended, he would have accepted it. However, having declined the appointment on the telephone, this generated the OH referral referenced 350 2418 being cancelled and thus PC being notified.

8.47 The claimant also attended his GP on 31 March 2021. At page 837 we saw an extract from the claimant's GP records that was provided at the time of the claimant's grievance appeal. This showed that the claimant discussed with his GP some of the issues he was experiencing at work. It referenced the claimant having issues with his trainer feeling challenged when the claimant asked for explanations. It also noted:

"manager has asked him when he is thinking of retiring, so he feels there may be an underlying agenda he told him 6 to 8 years time due to mortgage commitments".

The GP notes also reference the claimant mentioning the assessment not being based on training and that meeting was scheduled for Tuesday of the following week (which would be 6 April 2021). It further mentioned that his manager had "*suggested he should go to training school for beginner signallers, but he is well experienced, and he could refresh using the rulebook*". It finished by noting:

"he thinks that there is an agenda as he took the employer to tribunal".

We find this was an accurate note of the discussion the claimant had with his GP on this date.

On 5 April 2021 the claimant emailed PC to inform him that his medication dose had been increased to 40 mg Citalopram as of 6 April 2021 (page 838).

Discussion on 6 April 2021 and further OH referral

8.48 On 6 April 2021 a meeting had been scheduled to take place between the claimant and PC to follow on from the meeting on 29 March 2021. This meeting did not take place because the claimant said he wished to have MB present for any such meetings. There was instead a brief discussion between the claimant and PC. The claimant said that during this conversation he was instructed by PC to spend time refreshing himself on the signalling rules sitting on the signalling floor in Rugby ROC, which he then did. PC said that discussed the OH referral with the claimant on this day explaining that the original referral had been closed down as the claimant had not accepted the follow-up appointment when called by OH on 31st March and that a second referral would be needed. PC also said that the claimant had indicated that he hadn't received the OH interim report at this time, so a copy was printed by PC for him. PC said the claimant verbally consented to this second referral which is denied by the claimant.

8.49 We find that there was a very brief conversation on this day with PC instructing the claimant to spend time on updating his rules knowledge. We accept that PC mentioned the need for a OH referral to the claimant to which no particular objection was made albeit the claimant may have not have expressly said he consented. We are satisfied that PC informed

the claimant that a referral would be made on this occasion and that it was required in order to continue the process that had started with the OH appointment on 26 March 2021.

8.50 On the evening of 6 April 2021, the claimant emailed PC about this requesting to carry out this study process at home and further noting:

"*as you are aware that I am experiencing a mental health condition, which has recently been exasperated by recent events at work. The process of driving myself to work is very unsafe, as indicated by the medical side effects noted, by the Optima health report dated 26/03 /21."*

The claimant also referenced Covid 19 health advice to work from home stating "*My ethnicity increases my vulnerability to infection*". This request was expressed to be made as a reasonable adjustment request. PC replied on 7 April 2021 agreeing to the claimant's request to work at home on a temporary basis to be reviewed each week. His email attached documents and revision material to aid the claimant's training and informed the claimant he should email PC every day detailing his progress. The email finished by offering the claimant PC's support if required.

8.51 Between 7 and 12 April 2021 there was an exchange of correspondence between the claimant and PC regarding copies of weekly training reports. On 7 April 2021, PC sent to the claimant copies of his weekly training reports having received a request from the claimant (page 1602). On 11 April 2021 the claimant responded by asking for the hand written documents that had been signed by himself and GM and said that the typed copies of reports that had been provided to him were not recognised by him (page 843). PC sent the claimant the written reports on 12 April 2021 (page 842). Given that the claimant no longer challenges the validity of these typed documents, we do not need to explore this issue further.

8.52 On 14 April 2021 the claimant raised a grievance about PB's statement in the conclusion section of his assessment report ('Grievance 1') contending that it was "*malicious, false, nefarious, a negligent misstatement, that is damaging and defamatory"* and that PB *"was negligent, reckless and intentionally grossly undermined my career and character*" (page 845-6). The day after Grievance 1 was submitted, the claimant emailed JP to inform him that he was aware of PB's impending retirement at the end of May 2021, suggesting that time was of the essence. JP responded stating that he was aware of PB leaving the company and informing the claimant that he had been in hospital and was covering PC's line manager duties to deal with emergencies, and as JP did not regard this as an emergency, PC would revert to him the following week. It is not clear if this e mail was passed on to PC from JP. AM was appointed to investigate Grievance 1 and wrote to the claimant confirming his appointment and the next steps on 19 May 2021 (page 860-1). This letter included a statement that if the claimant had further

evidence which he wished to be taken into account, this should be provided. It further stated that if the claimant wished to call relevant witnesses, he should let the respondent have any names. No such evidence or names were provided in reply to this letter. This letter also reminded the claimant of the respondent's confidential counselling service through Validium.

Second OH referral and events following.

8.53 On 26 April 2021 PC emailed the claimant confirming a second referral to OH would be submitted because "*the previous appointment was not attended* or *completed*" (page 852). That referral was made on 29 April 2021 (page 853) under reference number 3533033 and a letter was sent to the claimant informing him of an appointment from OH on 7 May 2021 (page 854-857). On 12 May 2021 the claimant replied to PC's email of 26 April 2021. He referenced an earlier comment PC's email about ongoing support asking PC to explain what support was being provided. He also asked for a copy of the OH referral form and asked why a referral had been made (page 859). On 13 May 2021, PC replied answering his questions (page 857) informing the claimant that the occupational health assessment was based on information provided by the claimant about his health, stating that once a health issue had been declared PC had a "*duty of care to provide with the best possible support from OH*". This email also commented that PC felt he had done his best of the claimant's line manager to offer support and that PCs impression from the emails was that the claimant felt he was in a "*battle*" going on to state that the claimant and PC should be aiming for the same outcomes "*to improve your health and to get you back to work as a signaller*". The email asked the claimant to provide any suggestions about additional help or support that would aid recovery and speed up his return.

8.54 There was a further exchange of correspondence between PC and the claimant between 7 May 2021 and 21 May 2021 (page 862-866) with the claimant challenging comments made by PC and PC providing his response. There was mention of OH appointments during this exchange with the claimant asking for a copy of the referral letter as well as the reasons that PC requested the consultation. PC set out his explanation that the original telephone OH consultation mentioned an additional appointment with a health practitioner being required, but when this was booked, the claimant had declined to take part. PC informed the claimant that it was important for him to attend further assessment (also reminding him of one that was due to take place later that day) as part of his "*procedural obligations*" and to ensure that necessary support could be put in place.

8.55 The claimant did not attend the second OH appointment (page 1614) and e mailed PC the same day on 21 May 2021 asking when he could return to his normal duties (page 868). PC replied on 24 May 2021 stating that he would be unable to return to training as he failed to attend his OH

appointment that was required to confirm that the claimant was fit to return to further training booked following the claimant's disclosure of his mental health issues (page 867). The claimant challenged this in an e mail dated 24 May 2021 stating that an appointment was booked without his consent and without him seeing a copy of the referral sent. He reminded PC that he was not absent from work due to ill health but was working from home to refresh his rules as agreed. The email correspondence between the claimant and PC had by this stage become strained, but we note that the claimant was on a number of occasions offered the opportunity to contact the respondent if support was required.

8.56 On 14 June 2021 a letter was sent from PC to the claimant about the failure to attend the OH assessment (869-870). The letter contained two errors: firstly, it stated that the claimant had not consented to proceed with the first OH assessment on 26 March 2021 (which he had in fact attended); secondly it stated that it was the third time the appointment needed to be rescheduled (when in fact it was the second). The letter concluded with the following statement:

"*As this is now the third time we are rescheduling this assessment, please be advised that should you fail to comply with your procedural obligations to attend OH assessments, outlined in the "Managing for Health" policy, disciplinary action for failing to follow a reasonable management request, may be taken."*

The letter reminded the claimant of the respondent's confidential counselling service which could be contacted 24-hours a day. Whilst we understand that this is a relatively standard template letter that is of a type regularly sent in the event of non-attendance at medical appointments, it was not the most constructive letter to send to the claimant in these particular circumstances. Given the strained nature of the correspondence, the claimant became upset and concerned about what he perceived was a threat of disciplinary action being taken. We do not find that this was a threat of disciplinary action, but simply informing the claimant of possible consequences should he fail to attend OH appointments.

8.57 The claimant e mailed PC on 17 June 2021 responding (page 878-9) and stating that he felt threatened and victimised and that he had not refused to attend an appointment in March 2021 and had only refused the second appointment as he had not provided informed consent. The claimant also set out his recollection of the process that had taken place with regard to the OH referrals. PC responded on 24 June 2021 some of the points made about how the process had unfolded (page 877).

<u>Grievance and appeal process</u>

8.58 On 27 June 2021 the claimant raised a grievance against PC (Grievance 2) which alleged that PC was not supporting the claimant and refusing his return to work until an OH appointment was attended and alleging he

felt harassed and victimised (page 881-2). As a grievance had been raised by the claimant against PC, in June/July 2021 JP was appointed as the claimant's welfare manager.

8.59 The claimant attended a grievance meeting with AM on 30 June 2021 to discuss Grievance 1 accompanied by MB (notes 893 -891). The claimant said he was seeking a written apology from PB for his comments and some monetary compensation. AM acknowledged that the wording used by PB "*could have been put a lot more diplomatically*". MB alleged that the statement had damaged the claimant's career as a signaller and he believed it had been shared with other managers at Rugby ROC. The claimant confirmed he was complaining about the statement and not the contents of the report itself. The claimant suggested that the statement was defamatory as he has attacked the claimant's character, not giving an opinion. He asked whether PB had been spoken to. AM confirmed that PB had since retired and having taken a period of leave before retirement, AM never had the opportunity to speak to him. AM explained that as the statement had been based on the findings within the assessment report, and that there was no dispute that the comment had been made, that he did not need to contact PB. AM again acknowledged that PB's comment was badly worded and understood the claimant felt it was a personal attack. The claimant again challenged why nobody had spoken to PB pointing out that he had raised this issue as a concern with JP. We accepted AM's explanation as to why PB was not contacted. It might have alleviated some of the claimant's concerns had contact been made asking PB for a brief explanation as to why he put the comment in that particular manner.

8.60 On 27 July 2021 AM provided the claimant with the outcome of Grievance 1 informing him that it had not been upheld as AM had found no evidence to indicate PB had a malicious or defamatory intent, or to suggest he was intentionally looking to undermine the claimant's career but was PB's view as an assessor based on the assessment (notes of meeting at 895-6). The outcome was confirmed in writing on the same date with a copy of the grievance report included (897-901) and the claimant being provided with the right to appeal, which he did on 6 August 2021 (page 913).

8.61 On 4 August 2021 the claimant attended a meeting with BC to discuss Grievance 2, accompanied by MB. Ms N Takiar, the respondent's employment relations adviser was in attendance to take notes and her notes were shown at page 910-912. The claimant also took notes at this meeting which were shown at pages 902-909. The claimant and MB explained the concerns they had with the OH referral during that meeting. MB also raised that the claimant felt he had been treated less favourably due to ET Claim 1. MB explained that the claimant felt he had "*a target on his back since then*". The claimant also raised in this meeting that PC had asked him when he was retiring during a training session, with the

claimant commenting during this meeting with BC: "*what kind of question is that for your manager to ask you? So I suspect there's an age is an issue at play here as well*." The claimant said he was looking for a written apology from PC and a new line manager to be appointed, as well as injury to feelings compensation. The difference between the notes taken by N Takiar and the claimant's notes was brought up with BC in cross examination, but as BC did not dispute that this matter was raised during the meeting, we did not need to consider this further. The meeting was adjourned to enable BC to investigate.

8.62 On 28 September 2021 SC conducted a meeting with the claimant and MB to discuss the Grievance 1 appeal. The conclusion was that the claimant's appeal was dismissed (notes at page 924-930). However, SC made recommendations that the training assessment report completed by PB should be replaced by new assessment which would communicate areas for development and what training would support that. SC recommended that the report be completed by a trainer who was off route. On 29 November 2021 BC provided the claimant with the outcome to Grievance 2 during a meeting with the claimant and MB. He concluded that the claimant's grievance was unfounded. He acknowledged administrative errors were contained in the letter sent to the claimant on 14 June 2021 and recommended that a new OH referral be made to determine what support could be put into place. He also made a finding that as PC could not recall a conversation about retirement having taken place, and as no witnesses were present, BC was unable to uphold this allegation (notes, investigation report and outcome letter at page 992-1018).

8.63 On 7 December 2021 the claimant appealed BC's outcome for Grievance 2 (page 1021-9). KK was appointed as appeal manager and met with the claimant to discuss his appeal on 17 February 2022 (notes at page 1033-1054). During the appeal hearing for Grievance 2 the claimant raised that having spoken to his GP, she had recalled that the claimant had mentioned PC asking him a question about when he would be retiring at an earlier consultation. He explained that this information had not been available to BC during the earlier meeting as the claimant had forgotten he had even mentioned this. KK asked the claimant to provide this information after the hearing which he did. KK raise this with PC during a meeting held on 11 April 2022 during which PC stated he had never had a conversation with the claimant about retirement and age (page 1085). On 5 May 2022 KK concluded the Grievance 2 appeal by attending a meeting with the claimant on 5 May 2022 (notes at page 1088-1096). The claimant was informed that his appeal had been dismissed and this was confirmed in writing in a letter dated 6 May 2022 (page 1094-1096). In that letter KK recorded in relation to the retirement question allegation that:

"On balance of probability, I have to consider your record with the doctors

is evidence which suggest that the conversation may have happened; albeit there is no detail around the context/nature of the conversation."

He went on to include that he did not believe it was PC's intention to make the claimant feel that there was an underlying agenda.

8.64 Between June/July and November 2021, the claimant remained at home working on refreshing his rules. JP was his welfare line manager during this period. JP suggested that there had been weekly contact with the claimant by phone and email, but no records were provided. We find that there was only ad hoc informal contact between JP and the claimant, particularly at the start of this period but no structured plan for keeping in touch. The claimant was attending grievance and grievance appeal meetings during this time and had a period of absence from work from 26 August 2021 until 1 October 2021 following gastro intestinal surgery.

8.65 The claimant commenced early conciliation in these proceedings on 8 September 2021 and his early conciliation certificate was issued by ACAS on 20 October 2021. He presented his claim form on 7 November 2021.

The Relevant Law

9. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics
The following characteristics are protected characteristics: …
Age,…disability;"

13 Direct discrimination
(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".

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

26 Harassment
(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."

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."

123 Time limits

(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.

(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.

136 Burden of proof

(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.

10. The relevant authorities which we have considered on the direct discrimination and victimisation claims are as follows:

Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT is an example of the proposition that it is for the tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although the claimant's perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.
The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarrassy v Nomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … 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?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*"

11. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhaliwal [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A

respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Grant v HM Land Registry & EHRC [2011] IRLR 748 CA emphasised the importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).*

12. On whether the discrimination complaints are in time:

Section 33(3) of the Limitation Act 1980 (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

British Coal Corporation v Keeble [1997] IRLR 336, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] IRLR 220).

Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA - there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that

it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640 - the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent".

Conclusion

13. The issues between the parties which fell to be determined by the Tribunal were set out above. We also had to determine whether the allegations were presented within the time limits set out in 123(1)(a) & (b) of the EQA and if not whether time should be extended on a "just and equitable" basis. We have considered first the substance of the complaints, before returning to the issue of time limits and whether we have jurisdiction. We have approached some of the issues in a different order but set out our conclusions on each issue below:

Equality Act, section 27: victimisation

14. It is accepted that the claimant did a protected act when he issued Employment Tribunal proceedings against the respondent under case number 3300540/2019 on 19 January 2019 (paragraph 2.1 of the List of Issues).

15. The claimant makes 14 allegations of detrimental treatment (2 allegations having been withdrawn) which he says took place because he did a protected act. For each detriment relied upon we had to determine whether the respondent subjected the claimant to the detriment complained of (which is set out at paragraphs 2.2.1 to 2.2.16 of the List of Issues) and then go on to decide whether any of this was because of the protected act. The provisions on the two-stage burden of proof set out at Section 136 EQA apply in victimisation cases. Once a claimant establishes a prima facie case of victimisation, the burden of proof shifts to the respondent to show that the contravention did not occur. To discharge the burden of proof, there must be cogent evidence that the treatment was in "no sense whatsoever" because of the protected act. We set out below our conclusions on these matters for each allegation listed in the List of Issues with reference to each paragraph number whether the allegation is listed:

Paragraph 2.2.1 - Fail to provide the claimant with a transfer from Marston Vale from 17 *June 2019 (when the claimant says he requested a release date from JC of the respondent) until approximately January 2020.*

16. We refer to our findings of fact at paragraphs 8.15 to 8.18 above which deals with the specific period in question, but also paragraphs 8.6 to 8.14 as background to these events. The claimant's transfer to Marston Vale had been agreed since July 2018 (paragraph 8.6). However, it was initially delayed due to the events surrounding the operational irregularity and the claimant's sickness absence (paragraphs 8.8-8.11). The operational irregularity was not resolved until June 2019, and this is when the claimant made the request for his transfer to Rugby ROC to be put into effect. However, before the transfer could be effected the claimant was required to undertake site specific training (para 8.7) and the trainer that was due to carry this out at Rugby ROC was unavailable until October 2019 (paragraphs 8.15-8.16). The claimant did in fact transfer and start training on 21 October 2019 (paragraph 8.18) although there was then a further delay to training until January 2020 which we found was due largely to the claimant taking annual leave (and TD's availability). The allegation is made out only partly on the facts that there was some delay between June 2019 and October 2019, and we can accept that this was a detriment to the claimant.

17. However, we conclude that the claimant has not met the first stage of showing a prima facie case that any delay was because of him having raised a protected act. There is simply no evidence at all that the protected act played any part in the decision not to transfer the claimant between June and October 2019. Although the managers involved in the decision (JC, JP and GF) knew that the claimant had brought ET Claim 1, this knowledge of itself is insufficient for us to draw an inference that ET Claim 1 was the reason why the transfer was delayed. It is clear why the transfer was delayed over this period, and this was due to the unavailability of TD. Whilst it was suggested that the respondent could have taken different steps such as find a different trainer, or seek a transfer to a different location, we agreed with the conclusion of JP and GF that this delay of three months was not unreasonable. Even if burden had shifted it, the respondent would have discharged that burden. This treatment was not because of the protected act. This allegation of victimisation is dismissed.

Paragraph 2.2.2- Fail to provide the claimant with signaller conversion training at Rugby work *station from 10 September 2019 (when the claimant says he requested such training from GF of the respondent) until January 2020.*

18. We refer to our conclusions at paragraphs 16 and 17 above on the parallel allegation about failure to provide the transfer. This allegation is not made out fully on the facts in that the claimant's training did in fact

start on 21 October 2019. For the same reasons as set out above, any delay between 10 September and 21 October 2019 was because of the unavailability of TD, not the fact that the claimant did a protected act. The subsequent delay which meant that the training was stop/start in nature was caused in the main by the claimant having to take considerable periods of accrued annual leave (see paragraph 8.18). Moreover, we did not consider this to be to the claimant's detriment. He was on annual leave at the time (as he was entitled to be). The protected act was not the reason why there was any delay here. The allegation of victimisation is dismissed.

Paragraph 2.2.3 - PC refused the claimant's request to be issued Key Worker status on 11 November 2020 (preventing the claimant from continuing with training)

19. We refer to our findings of fact at paragraph 8.23 above. This allegation is not made out on the facts as no request was made by the claimant for key worker status. It is clear that the claimant was informed that he was unable to return to work in November 2020. We were satisfied that as per our findings of fact at paragraph 8.20 that the claimant as a trainee was not allocated key worker status. We cannot see anything in our fact finding either directly or by inference which suggests that there was any other reason why the claimant was not a key worker. The claimant has not satisfied the evidential burden of proof to require the respondent to explain the reason for the treatment. We also note that as at November 2020, PC who made this decision, was unaware of the claimant having brought a Tribunal claim, as he only became aware in January 2021 (see paragraph 8.24). This allegation of victimisation fails.

Paragraph 2.2.4 - Require the claimant on or around 5 January 2021 to restart his training with a new and inexperienced trainer, GM. The claimant contends that GM had just *completed his own training and the claimant was the first person he had trained.*

20. We refer to our findings of fact at paragraph 8.25 above. The claimant did restart his training on 5 January 2021 and GM who was allocated to train him was a new trainer and as such inexperienced at training (although a very experienced signaller). However, we did not accept that this was detrimental treatment as such (every new trainer has to have someone who is their first trainee) as we did not conclude that the claimant was disadvantaged by this. In any event, the reason why GM was selected at all was because the previous trainer TD had left the respondent's employment. We also accepted the explanation of PC that the reason why the training was started afresh (rather than continuing from where the previous training in March 2020 left off) was due to the time lapse between March 2020 and January 2021. The claimant has not adduced any evidence to suggest that any decision in relation to the allocation of GM by PC was because of the protected act. At the time of this decision being taken, PC was unaware of the protected act. This allegation fails

as the treatment in question was not a detriment and it was not because of the protected act.

Paragraph 2.2.5 – PB assessed the claimant in a negative manner during an assessment test held on 25 March 2021 where the claimant was assessed as not competent to work on the work station and that no training could resolve the issue.

21. We refer to our findings of fact at paragraph 8.41. This allegation is made out on the facts, and we were satisfied that this was detrimental treatment. However, we conclude that the claimant has not met the first stage of showing a prima facie case that this was victimisation. We conclude this for the following reasons:

    21.1.1 There is no evidence that PB who carried out the assessment and included the comment in his report had any knowledge of the protected act. He was appointed by PC who was aware of it by this time, but he was a manager from outside the region where the claimant worked, and even if he was aware, there is no reason suggested as to why he would have a particular issue with the claimant having brought a Tribunal claim.

    21.1.2 There is no evidence that PC or any other manager who was aware of the protected act influenced the actions of PB in carrying out the assessment or writing his report.

    21.1.3 The report of PB sets out in detail what took place during the assessment, details the claimant's performance and the fact that a number of serious were made. The claimant failed all four scenarios undertaken. The claimant himself acknowledged at the time that his assessment had not gone well and suggested some reasons for this to PB. We were satisfied that the reason why the claimant was assessed as Not Competent was because he performed poorly in the assessment.

    21.1.4 The claimant's performance in the training having started well appeared to be deteriorating by the fourth week (paragraph 8.29). He did not perform well when being observed by PC in week 5 (para 8.31). His training was extended beyond the initial six week anticipated period (para 8.29) and difficulties were then observed by both GM and PC in their weekly review notes. The claimant was also experiencing mental health symptoms at the time which may have affected his ability to perform in the assessment.

    21.1.5 Whilst the comment made by PB was very ill advised and insensitive, we can find no evidence that this was in any way linked to the protected act. This was also examined during the grievance and appeal process by AM (para 8.59-8.60) and SC

(para 8.62). The claimant complains about the failure to interview PB to get his explanation for the comment and we agreed it would have been better to have at least asked for a brief comment. However, we cannot infer from this or anything else that the reason why the comment was made by PB was linked to the protected act.

22. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the detriment was because of the protected act, we do not find that this shifts the burden of proof to explain the reason for it. This treatment was not because of the protected act. This allegation of victimisation is dismissed.

Paragraph 2.2.6 - Fail to take action to resolve the claimant's complaints raised on 29 March 2021 about this assessment.

23. We refer to our findings of fact at paragraph 8.44 where we note that the claimant raised some concerns about the assessment that had been carried out. There was some discussion about this during the meeting itself and a further meeting was arranged to take place for 6 April 2021 (see paragraph 8.48). This was unable to take place because the claimant required the attendance of MB. The claimant subsequently raised a grievance about the assessment on 14 April 2021. This grievance was then considered by AM and grievance and SC at appeal stage (para 8.59-8.60 and 8.62) and outcomes provided. Therefore, we do not conclude that the respondent failed to take action to resolve these matters. This allegation is not made out on the facts and is dismissed.

Paragraph 2.2.7 - Provide the claimant with unsigned and fabricated training reports said to have *been prepared by GM, shortly after the meeting on 29 March 2021*

24. This allegation is dismissed upon withdrawal by the claimant.

Paragraph 2.2.8 - PC informed the claimant in April 2021 that he was required to attend signalling school (which was something that an ab initio trainer would be required to do, not something a trainer with 15 years experience such as the claimant was required to do)

25. We refer to our findings of fact at paragraphs 8.33 and 8.44 above. PC suggested to the claimant on 12 February 2021 and on 29 March 2021 that he may wish to attend Signalling School, not April 2021. However, we did not find that the claimant was ever informed he was required to attend. This was a suggestion made by PC as a way of assisting the claimant to refresh himself on the Rule Book. Whilst the claimant took offence at this suggestion given he was an experienced signaller, we do not consider that this being made as a suggestion was detrimental treatment at all. This could have provided an opportunity for the claimant to relearn some of the basics of the role which inevitably he had lost day to day knowledge of as he had not worked as a signaller for over 2 ½

years at this point. However, it was not a requirement in any event. Furthermore, we do not find that the claimant has adduced any evidence to support the contention that this suggestion was made to him because of the protected act. We accepted that PC made this suggestion as a way of assisting the claimant (paragraph 8.34.4.) and indeed the claimant himself acknowledged that the reason it was offered to him was because of PC's view that this would help him refresh his rules. The protected act was not the reason why the claimant was given the option to attend Signalling School and this allegation of victimisation is dismissed.

Paragraph 2.2.9 - PC refer the claimant for an occupational health assessment against his wishes on 15 March 2021.

26. We refer to our findings of fact at paragraph 8.39 and 8.40 above. The claimant was informed as required by the respondent's OH guidance that an OH referral would be made on 11 March 2021. He did not object at this stage and whilst no written consent was provided, we cannot conclude that the referral was made against the claimant's wishes. In any event we were satisfied that this referral was made as a result of the claimant informing PC of his mental health condition and the change in medication. This allegation fails and is dismissed.

Paragraph 2.2.10 – PC ignored the recommendation of the occupational health assessor (which indicated *the claimant was fit to return to work and no further action was required) and refer the claimant for a further occupational health assessment on or after 26 March 2021*

27. We refer to our findings of fact at paragraph 8.43 above as to the recommendations of the OH report which was that the claimant was fit to return to training and that a further review would be held with an OH physician to assess him and answer the questions posted by PC. PC did not ignore the recommendations of the OH report as although the claimant was not returned to training immediately, this was not a recommendation at all, but simply what had been observed in the interim report. It was abundantly clear from this OH report that a further assessment was required with an OH physician to answer the questions posed by the respondent (set out at our findings of fact at para 8.40). These questions were about the need for information about medication changes, what additional support was needed and whether the claimant was fit for his substantive role. Therefore, this part of the allegation is not made out on the facts as no recommendations were ignored.

28. The claimant was referred for a further OH assessment on 26 April 2021 (see paragraph 8.53). However, in no sense could this be seen as an act of detrimental treatment as it was part of a process to try and assist the claimant in providing support with his disclosed mental health condition. A follow up appointment had been advised by the initial OH adviser and this further OH referral on 26 April 2021 was putting into place that recommendation. Moreover, that was in fact the reason for the second

referral, namely that it had been recommended by OH itself. This was not because of the protected act at all. The claimant's allegation of victimisation therefore fails.

Paragraph 2.2.11 - PC made *a further occupational health referral in May 2021*

29. It does not appear that a further OH referral was made in May 2021, but we have taken this to refer to the OH referral made on 26 April 2021. For the same reasons as set out in paragraph 28 above, this allegation of victimisation is dismissed.

Paragraph 2.2.12 PC failed to seek the claimant's consent for occupational health referrals after 26 *March 2021*

30. We heard much of this allegation during the hearing. It is clear to the Tribunal that there was some confusion within the respondent's management and misunderstanding on the claimant's behalf as to what was required to be done and what was in fact done. We refer to our findings of fact at paragraphs 8.49 that the claimant was informed on 6 April 2021 that an OH referral would be made, and this would be needed as the previous PH referral had ended. This was in fact all that was required, and we accept that the claimant's consent was neither sought or at this stage refused. The claimant decided that he did not wish to participate in the OH appointment booked for him on 21 May 2021 and did not attend this appointment or provide his consent. In any event, the claimant has adduced no evidence which would suggest (and we can find no facts from which we could infer) that anything the respondent did in respect to OH referrals was in any way related to or influenced by the protected act. This was not the reason why the OH referral was made or for anything the respondent did or did not do in relation to seeking consent. This allegation of victimisation does not succeed.

Paragraph 2.2.13 - PC threatened *the claimant disciplinary action in a letter dated 14 June 2021*

31. We refer to our findings of fact at paragraph 8.56 above. We did not find that the letter sent to the claimant on 14 June 2021 threatened him with disciplinary action. The letter did make reference to disciplinary action, but we conclude that this was a template type letter which is often sent to an employee who does not wish to or fails to attend a medical appointment arranged by his or her employer. PC at this stage was taking detailed advice from HR on each step he took in relation to the claimant and was perhaps advised that this was an appropriate letter to send. However, there is simply no evidence by inference or otherwise to suggest that there was any connection with the protected act. This was a reaction to the claimant's failure to participate in the OH process and this was clearly the reason why it was sent. The allegation of victimisation fails.

Paragraph 2.2.14 - Amend the occupational health referral (date unknown, as claimant discovered this had *been done as part of a subject access request)*

32. This allegation is dismissed upon withdrawal by the claimant.

Paragraph 2.2.15 - PC, ask the claimant when he was being observed on a training simulator when he intended to retire.

33. We refer to our finding of fact at paragraph 8.34 above that the claimant was asked by PC when he was intending to retire, although this took place after the observation had taken place. We have gone on to consider whether PC made that comment because of the protected act. The claimant clearly believed that this was the case as we note in our findings of fact at para 8.47 that he mentioned this to his GP during the consultation on 31 March 2017. The claimant at this stage was clearly linking the question with his suspicion that the managers at the respondent "*had an underlying agenda*" because he had brought a Tribunal claim. However, for us to reach the conclusion that the claimant has been subjected to victimisation, there must be evidence, although it is possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination or victimisation, however strongly held is not enough. In this instance, the claimant has not adduced any evidence to support the contention that the question was asked because he had done the protected act. We found that this was an innocuous question made in the context of PC having just observed the claimant. There had been a discussion about the claimant having been away from the workstation for some time. He was struggling with his training. This was the context in which the question was asked and there did not appear to us to be any connection at all to the protected act. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the question was asked because of the protected act, we do not find that this shifts the burden of proof to explain the reason for it. This allegation of victimisation fails.

Paragraph 2.2.16 - Fail to provide the claimant with any support between 19 January 2019 and 7 November 2021

34. This allegation covers a significant time period when various events were taking place. Between January and March 2021, the claimant was undergoing his second period of training (see findings of fact at paragraphs 8.25-8.45). We conclude that the claimant was supported during this period by PC as his line manager and by GM in the delivery of a structured training programme with weekly feedback from both. The claimant raised an issue about his mental health during this period to which PC responded promptly to by making an OH referral and offering support to assist the claimant (see paragraph 8.39 for example when a return to work interview was held after a brief period of sickness absence). Following the failed assessment on 25 March 2021, a training

review meeting was held on 29 March 2021 which was due to continue on 6 April 2021. The claimant was further referred to OH and in all the correspondence between the claimant and PC once he started to work from home at his request on 6 April 2021, the claimant was reminded of PC's availability and of the counselling service through Validium (paragraph 8.52). The claimant was asked for any suggestion he had for assistance on 13 May 2021 and again reminded of PC's availability on 24 May 2021 (paragraphs 8.53 and 8.54). The letter sent to the claimant regarding his failure to attend the OH appointment once again gave details of the OH assist counselling service (paragraph 8.56). Once the claimant raised a grievance against PC on 27 June 2021, PC stepped away from line management duties, but JP was then appointed as the claimant's welfare manager (paragraph 8.58). The contact between the claimant and JP during this period was less structured but there was still ad hoc contact between the two (paragraph 8.64). Moreover, the claimant was reminded during communications that took place during the grievance and appeal process for Grievance 1 and Grievance 2 of the availability of the respondent's counselling service (see paragraph 8.52). Overall, we conclude that the respondent did not fail to support the claimant during this period so this allegation fails on the facts and the victimisation complaint is dismissed.

35. Accordingly, all the claimant's complaints of victimisation made against the respondent under section 27 EQA are dismissed.

EQA, section 13: direct discrimination because of disability

36. It was not disputed that the claimant was a disabled person within the meaning of section 6 EQA at the relevant times. In order to decide the complaints of direct disability discrimination, we had to determine whether the respondent subjected the claimant to the treatment complained of (which is set out at paragraphs 3.2.1 to 3.2.7 of the List of Issues above and then go on to decide whether any of this was "less favourable treatment", (i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We had to decide whether any such less favourable treatment was because of the claimant's disability or because of disability more generally.

37. We applied the two-stage burden of proof referred to above. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of disability. The next stage was to consider whether the respondent had proved that the treatment was in no sense whatsoever because of disability. Much was made in the hearing of the respondent's knowledge of the claimant's disability and when this occurred. Although knowledge that someone is disabled is almost certainly likely to be required for direct disability discrimination, as the treatment has to be because of the disability, it is not a requirement of the statutory wording. We have

therefore not focused on this particular issue but the issue of less favourable treatment and what was the reason for the treatment in question. We set out below our conclusions on these matters for each allegation listed in the List of Issues above with reference to each paragraph number where the allegation is listed:

Paragraph 3.2.1 - PC refer the claimant for an occupational health assessment against his wishes on 15 March 2021

38. We refer to our findings of fact at paragraph 8.39 and 8.40 above. The claimant was informed as required by the respondent's OH guidance that an OH referral would be made on 11 March 2021. He did not object at this stage and whilst no written consent was provided, we cannot conclude that the referral was made against the claimant's wishes. This referral was clearly made as a result of the claimant informing PC of his mental health condition and the change in medication and was an attempt to support the claimant in the workplace which is not in any event not detrimental treatment. The claimant has not adduced any evidence whatsoever that any other person in a similar situation but who was not disabled would not have been treated in the same manner. This allegation fails and is dismissed.

Paragraph 3.2.2 - PC ignore the recommendation of the occupational health assessor (which indicated *the claimant was fit to return to work and no further action was required) and refer the claimant for a further occupational health assessment on or after 26 March 2021*

39. We refer to our findings of fact at paragraph 8.43 and conclusions at paragraph 27, and for the same reasons we concluded that PC did not ignore the recommendations of the OH report and so this part of the allegation is not made out on the facts.

40. We also refer to our findings of fact at paragraph 8.53 and conclusions at paragraph 28. Referring the claimant for a further OH assessment on 26 April 2021 was not detrimental treatment as it was part of a process to try and assist the claimant in providing support with his disclosed mental health condition. This had been advised by the initial OH adviser and this further OH referral on 26 April 2021 was putting into place that recommendation. Moreover, that was in fact the reason for the second referral, namely that it had been recommended by OH itself. The claimant has not shown that any other individual who had disclosed a health condition and change in medication in the claimant's role who was not disabled would have been treated any differently. We conclude that a comparator would not have been treated differently. There is no less favourable treatment at all. This allegation of direct disability discrimination fails.

Paragraph 3.2.3 - PC make a further occupational health referral on in May 2021

41. For the same reasons as set out in paragraph 40 above, this allegation of direct disability discrimination is dismissed.

Paragraph 3.2.4 – PC fails to seek the claimant's consent for occupational health referrals after 26 March 2021

42. We refer to our findings of fact at paragraphs 8.49 and our conclusions at paragraph 30 above. The claimant has adduced no evidence to suggest that any other individual in the same circumstances as the claimant but who did not have his disability would have been treated any differently. The fact that the claimant was a disabled person was not the reason why the OH referral was made or for anything the respondent did or did not do in relation to seeking consent. The referral was made to provide the claimant with support and to provide the respondent with information to support him in the workplace. This allegation of direct disability discrimination does not succeed.

Paragraph 3.2.5 – PC threaten the claimant disciplinary action in a letter date 14 June 2021

43. We refer to our findings of fact at paragraph 8.56 and conclusions that the letter sent to the claimant on 14 June 2021 did not threaten him with disciplinary action. There is simply no evidence to suggest that another individual who had failed to attend a medical appointment but who did not have the claimant's disability would not have been sent this letter as well. This was a reaction to the claimant's failure to participate in the OH process and this was clearly the reason why the letter was sent, not the claimant's disability. The allegation of direct disability discrimination is dismissed.

Paragraph 3.2.6 - Amend *the occupational health referral (date unknown, as claimant discovered this had been done as part of a subject access request)*

44. This allegation is dismissed upon withdrawal by the claimant.

Paragraph 3.2.7 - Fail to provide the claimant with any support between 19 January 2019 and 7 November *2021*

45. For the same reasons as are set out in paragraph 34 above this allegation does not succeed. The respondent did not fail to support the claimant during this period. The claimant has been unable to show that the support that was offered or what was done in this period was any less favourable or indeed different to what would have been done to a comparator employee in the same circumstances who was not disabled. The complaint is dismissed.

EQA, section 26: Harassment related to disability.

46. The claimant also makes complaints of harassment relating to the exact same allegations that are said to be direct disability discrimination as set out above. We have already found that none of the conduct was direct disability discrimination, but whether it is harassment is a different test, In order to determine these complaints, we need to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to disability. We are then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. We set out our conclusions on each matter below:

Paragraph 4.1.1 - PC refer *the claimant for an occupational health assessment against his wishes on 15 March 2021*

47. We refer to our findings of fact at paragraph 8.39 and 8.40 above that the OH referral was not made against the claimant's wishes. However, we have considered whether the referral of itself was unwanted conduct which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. As the claimant had been informed of the referral and had not objected to it, it was not unwanted conduct. This allegation fails on this ground alone.

Paragraph 4.1.2 - PC ignore the recommendation of the occupational health assessor (which indicated the claimant was fit to return to work and no further action was required) and *refer the claimant for a further occupational health assessment on or after 26 March 2021*

48. We refer to our findings of fact at paragraph 8.43 and conclusions at paragraph 39, and for the same reasons we concluded that PC did not ignore the recommendations of the OH report and so this part of the allegation is not made out on the facts.

49. We also refer to our findings of fact at paragraph 8.53 and conclusions at paragraph 40. Referring the claimant for a further OH assessment on 26 April 2021 was for similar reasons not unwanted conduct at this stage. The claimant had been advised by the initial OH adviser that a further referral was required (and did not object) and this further OH referral on 26 April 2021 was putting into place that recommendation, given that there had been a failure to arrange that appointment. We found as a fact at paragraph 8.46 that had the claimant been told by the OH adviser on the phone that they were arranging that follow up appointment, he would have accepted it. Whilst there is a connection here to the claimant's

disability namely his mental health condition that had been disclosed, we are unable to conclude that making a referral in these circumstances either had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. Quite the opposite was the case certainly in terms of the purpose of the referral. We had no evidence at all that the referral itself had this effect on the claimant and we do not consider even if it did that this would be reasonable having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. This allegation of disability related harassment fails.

Paragraph 4.1.3 - PC make *a further occupational health referral on in May 2021*

50. For the same reasons as set out in paragraph 49 above, this allegation of disability related harassment is dismissed.

Paragraph 4.1.4 – PC fails to seek the claimant's consent for occupational health referrals after 26 March 2021

51. We refer to our findings of fact at paragraphs 8.49 and our conclusions at paragraph 42 above. In any event, the claimant has adduced no evidence to suggest that anything done or not done about this referral had the purpose that is required and we doubt that given the findings of fact and the evidence of the claimant even at its highest, any of the allegations could even have said to have had this effect. The referral was made to provide the claimant with support and to provide the respondent with information to support him in the workplace. This allegation of disability related harassment does not succeed.

Paragraph 4.1.5 – PC threaten *the claimant disciplinary action in a letter dated 14 June 2021*

52. We refer to our findings of fact at paragraph 8.56 and conclusions at paragraph 31 that the letter sent to the claimant on 14 June 2021 did not as a matter of fact threaten him with disciplinary action. The fact of sending this letter was not either related to disability but about the failure to attend an OH appointment and so comply with the respondent's procedural requirements. It is a key component of harassment under section 26 EQA that it has to relate to the protected characteristic. Our findings of fact above and conclusions on the direct discrimination claim make it clear that this letter was not related to the claimant's disability. Therefore the harassment claim of the claimant must fail on this ground alone. The intention of sending the letter was not to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment. It was to encourage his compliance with the OH process to enable the correct information to be obtained to support the claimant at work. We accept that the claimant did feel

threatened by the letter (see our findings of fact at paragraph 8.57 above) but in our conclusion, given all the circumstances, it was not reasonable for the sending of the letter to have had the effect it is required. This was a standard or template letter of the type that is sent by HR departments if there is a failure to attend appointments. The allegation of disability related harassment is dismissed.

Paragraph 4.1.6 - Amend the occupational health referral (date unknown, as claimant discovered this had been *done as part of a subject access request)*

53. This allegation is dismissed upon withdrawal by the claimant.

Paragraph 3.2.7 - Fail to provide *the claimant with any support between 19 January 2019 and 7 November 2021*

54. For the same reasons as are set out in paragraph 34 above this allegation does not succeed. The respondent did not fail to support the claimant during this period and so the complaint is dismissed.

EQA section 13- Direct age discrimination

55. The claimant makes just one allegation of direct age discrimination relating to being asked by PC when he intended to retire which we have found as a fact at paragraph 8.34 occurred after the observation had taken place. We have gone on to consider whether there was "less favourable treatment", (i.e., did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We went on to consider whether what was done amounted to a detriment and then done because of age.

Was asking this question less favourable treatment?

56. We refer to our findings of fact at paragraph 8.35 above that the claimant was not offended or upset by being asked the question at went on to answer the question as part of general conversation. Neither the claimant nor the respondent regarded it as a significant event. The claimant recalled being asked it and mentioned it first to his GP on 31 March 2021 (see paragraph 8.47 above). However the claimant at this stage regarded this not as less favourable treatment, but as evidence of his growing view by this time of some sort of underlying agenda targeting him because of his previous Tribunal claim. We have though already concluded that this was not made because of the protected act (see paragraph 33). For all these reasons, we do not regard this question being asked of the claimant in the context in which it was asked as being less favourable treatment at all. Given this conclusion, it is not necessary to consider whether the question was asked because of age. We also conclude that the question was not in any event a detriment (on the basis of not being

less favourable treatment). The claimant's complaint of direct age discrimination is dismissed.

EQA, section 26: Age related harassment

57. The claimant also makes complaints of harassment relating to the same allegation. In order to determine this, we had to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to age. We are then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

Was this unwanted conduct?

58. We refer to our findings of fact at paragraph 8.34 and 8.35. The context in which this question was asked is important as we found it was an innocuous question asked during the context of a general conversation. The claimant answered the question and the conversation continued. The claimant did not at the time indicate that he had any issue with the question being asked. The question in this context is not we conclude to be "inherently unwanted conduct" within the meaning of the Stedman case above. However, on balance we conclude, given that this comment was remembered and noted by the claimant that it was "unwanted" in the sense of unwelcome or uninvited.

Did it relate to age?

59. As the question related to retirement and matters of retirement is generally confined to those in the claimant's age group, we are satisfied that the question had a sufficient relationship to the claimant's age group, i.e., over 60.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

60. We refer to our findings of fact at paragraph 8.34 and are entirely satisfied that by asking the question, PC's purpose was not to violate dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was almost the opposite. The discussion was in the context of a general and open conversation about difficulties the claimant was having and possible ways of providing assistance.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

61. Following the Pemberton decision, to decide whether any conduct falling within section 26(1)(a) has either of the proscribed effects under section 26(1)(b), a tribunal must consider both (by reason of section 26(4)(a)) whether the putative victim perceives themselves to have suffered the effect (the subjective question) and (by reason of section 26(4)(c)) whether it was reasonable for the conduct to be regarded as having had that effect (the objective question). It must also consider all the other circumstances under section 26(4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated etc the conduct should not be found to have had that effect. The objective question is then relevant and if it was not reasonable for the conduct to be regarded as violating the claimant's dignity etc, then it should not be found to have done so. Our findings of fact at paragraph 8.35 above were that the claimant was not offended or upset by the question at all. Therefore, we cannot conclude that it had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant recalled the question and mentioned it to his GP. He subsequently complained about it. However, this was in the context of his growing view that the respondent's management were victimising him because of his Tribunal claim. Given this conclusion, the complaint of disability related harassment fails.

62. Given that none of the complaints for direct discrimination, harassment or victimisation have succeeded, we do not need to go on to consider whether there was conduct extending over a period and if not, whether the claims were made within a further period that the Tribunal thinks is just and equitable. All the claims failed having been considered fully on their merits.

Employment Judge Flood

Date: 15 June 2023