Case No: 2401510/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr D Hamill

Respondent: The Information Commissioner's Office

Heard at: Manchester **On:** **15 - 18 July 2024**
In chambers:
9 September 2024

Before: Employment Judge Barker
Ms A Booth
Dr B Tirohl

Representation
Claimant: in person
Respondent: Mr Wilkinson (counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claimant was not subjected to unlawful disability discrimination or unlawful victimisation. His claims fail and are dismissed.

REASONS

Background Matters and issues for the Tribunal to decide

1. The claimant began working for the respondent on 23 May 2016 and is still employed by the respondent. At the time to which these proceedings relate, he was employed as a Senior Insight and Compliance Officer.

2. He engaged in ACAS Early Conciliation from 9 November 2022 until 21 December 2022 and by a claim form lodged at the Tribunal on 16 January 2023, brought claims against the respondent for disability discrimination and victimisation. The respondent accepts that the claimant is a disabled person on account of the conditions of attention deficit hyperactivity disorder("ADHD") and anxiety/depression, within the definition of disability in section 6 of the Equality Act 2010 (hereafter "EQA") and was so disabled at the time to which these claims relate.

3. The claimant's disability discrimination claims are for discrimination arising from disability (s15 EQA), a failure to make reasonable adjustments (ss20-22 EQA) and harassment (s26).

4. There was a case management preliminary hearing on 25 May 2023 before Employment Judge Shotter at which the claimant's claims were discussed and clarified, and a draft list of issues was drawn up. At the start of this hearing, the Tribunal discussed the list of issues with the parties and some minor amendments were made which are reflected in the final version of the list of issues which is attached to this reserved judgment as an Annex.

5. The Tribunal had the benefit of a bundle of documents which ran to 571 pages and heard witness evidence from the claimant and also from the respondent's witnesses Mr Langley, the claimant's line manager, Mr Stevens, who was Mr Langley's manager, Mr Harvey the respondent's Head of Technology who investigated the claimant's grievance, and Ms Hunt who is the respondent's People Services Manager. We were also provided with a statement for the claimant from Ms MacDonald, who did not attend to give evidence as she was unwell. We explained to the claimant that we would consider the contents of her statement but could not give it the same weight as we could have done had she attended the hearing to give evidence under oath.

6. The claimant was offered adjustments to take account of his disabilities which included regular breaks and shorter sitting days, which he accepted when required.

7. The claimant had made an application to add another allegation to his claim, in an email dated 12 July 2024, which was the working day before the start of his hearing. He asked to add a complaint of harassment to these proceedings on the basis of comments made by Mr Langley to an investigator about him in a meeting on 8 September 2022. He accepted that he had only become aware that Mr Langley made these comments when the respondent disclosed an unredacted copy of previously redacted minutes on 13 June 2024, which was after the list of issues had been revised (21 May). The claimant accepted that he had only become aware of the comments on 13 June 2024.

8. The respondent relied on the authority of *Greasley-Adams v Royal Mail Group Limited [2023] EAT 86,* where it was confirmed that there can be no harassment if the claimant has no awareness of the conduct. The claimant accepted that the comments were never said to him but that he was affected by it indirectly because of its impact in the background and that it would have affected others' perception of him.

9. Taking the factors in the case of *Selkent Bus Company v Moore,* which includes the nature of the amendment, the timing and manner of the application and the balance of hardship and injustice in allowing the amendment against refusing it, the Tribunal noted that the allegation that this constituted harassment did not have any prospects of success as the claimant had no awareness of the conduct when the comments were said. The claimant's application to add a complaint of harassment on this basis is therefore refused and the balance of hardship and injustice is in favour of refusing it.

10. The parties have provided the Tribunal with extensive evidence about a wide range of issues, not all of which was relevant to the issues that we had to decide. Where this judgment and reasons is silent on some matters, it is not because these were not considered, but that they were not sufficiently relevant to the matters in the list of issues.

Findings of Fact

11. Having started work for the respondent in 2016, the claimant was promoted in July 2019 to the role of "Senior Insight and Compliance Officer". We accept Mr Langley's evidence that this role was a leadership role at the respondent. Mr Langley became the claimant's line manager in March 2021. Mr Langley had been a manager at the respondent since 2018. We accept Mr Langley's evidence that he met the claimant's previous line manager for a handover in March 2021. He was informed of the claimant's OH report from September 2019 and his ADHD. He was informed of the claimant's adjustments that arose from this, which was to work from home two days per week and to be given additional time to meet deadlines, and a reduced workload where possible, and to have weekly review meetings.

12. Mr Langley also told the Tribunal that he understood from the handover meeting that there were issues with the claimant's performance, in that he was thought to not be completing tasks to the required standard. We accept his evidence that shortly after becoming his manager, he met with the claimant, and they discussed his role and the adjustments in place. At the time in March 2021 the respondent's office buildings were closed and the whole team were working from home for the whole of the working week.

13. Mr Langley met the claimant in March 2021 for a meeting and Mr Langley told him that the team would have three weekly meetings so that they could collaborate and support one another with their work. The claimant told him that he did not think that weekly one-to-one review meetings were needed at the time, but they agreed that he could contact Mr Langley when he needed to and that they would hold formal one-to-one meetings approximately every six weeks.

14. They discussed the 2019 occupational health report which Mr Langley understood clarified that the claimant's issue with the presentation of information came from his issues with using spreadsheets. We accept Mr Langley's evidence that much of the respondent's work in that team involved the use of spreadsheets. They discussed, and we accept that the claimant agreed, that it might not be feasible for the claimant to be excluded from spreadsheet work altogether but that in any event he told Mr Langley that this would not be necessary. Mr Langley's evidence, which we accept, was that the claimant discussed recent work he had done on spreadsheets and the fact that he had attended Excel training recently which he had found useful.

15. We accept Mr Langley's evidence that over the months that followed, he became concerned as to the claimant's ability to perform to the standard expected of someone in his role. The examples given by Mr Langley in his witness statement indicate that Mr Langley was concerned that the claimant was not paying sufficient attention to his job, even after adjustments had been made to take account of his disabilities. Some examples were that in July 2021 the claimant was asked by Mr Langley to draft a presentation to an external stakeholder on a project proposal

that the claimant was responsible for. Mr Langley asked him to send the presentation on the Friday lunchtime before the meeting on the Monday morning. The claimant sent him the draft, but Mr Langley considered that it was well below the required standard and did not contain what it needed to.

16. Mr Langley's evidence, which we accept, was that he emailed the claimant with suggested changes and rang him several times during the afternoon but got no answer. Mr Langley therefore had to correct the presentation himself. After the meeting, Mr Langley asked the claimant what had happened and why he had been offline. The claimant told Mr Langley that he had been at his desk as normal all afternoon and that he must have missed his e-mail. Mr Langley's evidence, which we accept, was that this caused him concern, particularly because he had tried calling him multiple times on the Friday afternoon and the claimant had not answered.

17. Mr Langley began to notice more, he told us, that the claimant would be away from his desk for long periods of time. His evidence was that he would not answer calls and he would miss training sessions. For example, in July 2021 he left a 2-day training course after less than three hours. Mr Langley discussed this with the claimant and agreed that if the training had not suited him, he should read the textbook that came with the course and then it would be discussed in September. However, when they met in September, Mr Langley's evidence was that the claimant had not read any of the book nor had he even taken any steps to get hold of the book from the respondent's learning and development department.

18. Mr Langley began to monitor the claimant's time sheets, which the respondent refers to as "flexisheets", to see if these periods of non-working time were reflected in his time recording. Mr Langley told the Tribunal that it was important that this was done accurately because employees at the claimant's grade were entitled to take surplus time worked as time off. He monitored the claimant's flexisheet recording against time when he did not appear to be working and online and noticed several discrepancies from July 2021 and raised this issue with him in their one-to-one meeting on 28 September 2021. The claimant told Mr Langley that he made sure he logged his time and Mr Langley told him that he was able to take breaks, but he needed to log his time accurately.

19. We accept that when they met again on 10 November 2021 for the next one-to-one, Mr Langley asked the claimant again about discrepancies in his time recording. The claimant told him that he was working the whole time and his flexisheets were accurate, but he could not explain why his laptop had reported that he was offline. We accept Mr Langley's evidence that they discussed the claimant's performance and that the claimant accepted that it had not been good enough for a few months. He told Mr Langley that this was because he felt demotivated as he had not been given any major projects to lead. Mr Langley told the Tribunal that he gave the claimant some tips on how to approach his work and that he may feel more motivated once he saw some results from his work.

20. During this meeting, the claimant also disclosed to Mr Langley some significant stressors that were occurring in his home and family life, which Mr Langley acknowledged and thanked him for his candour. The claimant accepted in cross-examination that he did not tell Mr Langley during this meeting that his work for the respondent was causing him stress and anxiety.

21. Mr Langley, we find, continued to have concerns about the claimant's work quantity and quality, even taking into account the adjustments made to lower his workload and provide him with more flexible deadlines. He continued, we find, to have concerns about the accuracy of his time recording on his flexisheet and his unavailability during the working day. He missed a training course on 29 March 2022 and failed to respond to calls from the respondent's learning and development team about this. We note his evidence from 30 March 2022 that he had sought to call the claimant on 30 March 2022 at 10.22, 10.49, 11.55 and 14.25 but the claimant was seemingly not at his desk and so did not answer the calls or call Mr Langley back. He had also not sent in his flexisheet for the last two periods.

22. Mr Langley spoke to him on 30 March and expressed his concerns, and we accept Mr Langley's evidence that the claimant provided no explanation for being offline. Mr Langley's evidence was that following this meeting he approached the respondent's HR department for advice as to how to deal with this issue. We accept Ms Hunt's evidence that Mr Langley first spoke to HR (Ms Welch) on 30 March 2022. Ms Hunt's evidence was that the respondent's IT team were able to produce a report showing when people log on and off, but that her permission was needed to do so, which she gave to Ms Welch and Mr Langley. Therefore, Mr Langley had obtained permission to ask IT to produce a report on the claimant's Microsoft Teams activity by the end of March/early April 2022 and obtained such a report in June 2022 for the claimant's activity in May and June 2022.

23. Around this time, the claimant had taken a period of sick leave due to anxiety from 17 February to 4 March 2022. On 20 April 2022 he told the respondent that he was experiencing poor mental health. He had requested a referral to Occupational Health the previous day. On 20 April he asked Mr Langley to postpone their meeting that day due to his poor mental health. Mr Langley telephoned him that day and told him that he should consider what would ease his anxiety and not wait to be seen by Occupational Health if he knew of something that could help which could be implemented sooner. We accept that in this meeting, the claimant told Mr Langley about the ongoing difficulties he was having in his home life and that this was causing his anxiety to rise. We also accept that the claimant told him that he was fit to work but was not performing at capacity because of his anxiety. We accept that the claimant did not tell Mr Langley that work was the source of his anxiety, but that Mr Langley understood that it was due to his home life.

24. The parties accept that Mr Langley emailed HR to ask for their advice on the claimant's request for an OH referral on 20 April 2022. Mr Langley reported to HR what the claimant had said to him in their phone call earlier that day. Mr Langley's evidence was that he had never had someone who he managed ask for a referral to OH before and he was not sure about what to do. It is alleged by the claimant that Mr Langley said to HR that he considered the claimant's OH referral request to be "insincere". There is no evidence before the Tribunal that demonstrates that Mr Langley either used this word or referred to the OH request in similar terms.

25. The claimant accepted that an email from Ms Hunt of 20 April 2022, sent only to another HR advisor who asked her for advice on behalf of Mr Langley, was the basis for this allegation. In this email, Ms Hunt said "*OH is not for self-referral but used to support management as you have indicated below. I suspect now the issue*

of the flexi has been raised again this might all come into play." The claimant accepted in cross-examination that he did not become aware that this email had been sent by Ms Hunt until after his Subject Access Request had been complied with, which he recalled was in early 2023. He was therefore not aware that these comments had been made until some months afterwards.

26. Mr Langley's evidence, as described above, was that he had approached HR for advice on 30 March 2022 on the issue of the claimant's seemingly inaccurate flexisheets after he missed the training course on 29 March and provided no explanation for having been offline. During his cross-examination, the claimant said that he took exception to the evidence that Mr Langley and HR had discussed his situation without him being present. It was put to him that the issue of his flexisheets had been raised with him on at least three occasions. The claimant said that he considered this to be a lack of candour on Mr Langley's part, as he had not "*formally discussed this with me*".

27. Mr Langley did refer the claimant to occupational health on 5 May 2022. The appointment was on 19 May 2022 and the recommendations made included that the claimant should continue to be allowed to work from home as much as possible and that periodic stress risk assessments should be carried out. On 6 July 2022 Mr Langley contacted the claimant to send him the respondent's Accessibility and Reasonable Adjustments at Work policy and asked him to consider completing a Workplace Adjustment Passport, which would be a single formal record of his needs at work. The Tribunal understands that the claimant took no action to complete this document with Mr Langley. We accept that he subsequently said in an investigation meeting in December 2022 that he did not consider this to be his responsibility, which we find it was.

28. The claimant put it to Mr Langley's during his cross-examination that his workload had been reduced but perhaps needed to be reduced further. It was Mr Langley's evidence that the claimant never told him, during their many conversations about workload, that his workload was too high even though he was repeatedly asked. Mr Langley's evidence, which we accept, was that if he'd said his workload was too high, Mr Langley would have reduced it. He said that he repeatedly asked the claimant if work was causing him stress and he said no.

29. Mr Langley was challenged in cross-examination by the claimant on why a stress risk assessment was not carried out immediately after the claimant returned to work in June 2022, and was not raised again for a further 7 weeks. Mr Langley's evidence was that the claimant had said repeatedly that his issues at home were the main problems and that they had conversations about stress. They discussed the adjustments passport in May 2021 and again in a meeting on 14 June 2022 Mr Langley asked the claimant to fill it in. The claimant's evidence was that he should have been provided with a stress risk assessment by the respondent and that the completion of the Passport was not his responsibility. Mr Langley's evidence was also that the claimant refused to accept the terms of the May 2022 OH report and asked for corrections, on the basis that it said that he was anxious about returning to the office and he wanted it to reflect that he was not.

30. It is the respondent's evidence that the claimant attended a staff meeting on 24 May 2022 at which he shared his personal experience of asking the respondent for reasonable adjustments. He is cited in the meeting minutes as having said *"a*

blog about reasonable adjustments would be useful, to ensure that all staff were aware of the process and understood that management was very supportive of the process and aware of their legal obligation to accommodate reasonable adjustments."

31. In July 2022, the claimant returned a piece of work to Mr Langley that the claimant had been working on for approximately nine months. He was given the work in October 2021 and it had been due at the end of 2021, but Mr Langley had extended the deadline twice at the claimant's request, to March 2022, and the work was eventually handed in by the claimant on 29 July 2022. Mr Langley's evidence, which we accept, was that when he discovered that the report produced was only five pages long, he decided that he needed to take some kind of action to ensure that the claimant's performance was improved. Mr Langley's evidence in cross-examination was that the amount of work produced by the claimant was so small that he had begun to think that the claimant was withholding work from him so that he could not be judged on its quality. He said "*the work was so substandard and so infrequent, and outstanding for so many months, I wondered if you had got to a point in August 2022 that your trust issues meant you had started to withhold it*".

32. Mr Langley's evidence, which we accept, was that it would have been open to the respondent to start a disciplinary investigation regarding the flexitime discrepancies, but it was his view that this would not have helped the claimant improve and would have caused him more stress. He therefore proposed an informal performance improvement plan ("PIP"), which was approved by HR and Mr Stevens.

33. The claimant put to Mr Langley that a PIP was wholly inappropriate, as when he raised in April 2022 that his anxiety levels had increased considerably, that Mr Langley chose to ignore this. Mr Langley disagreed and said that when they were due to meet on 20 April 2022 to do the claimant's performance and development review (PDR), the claimant said that he hadn't been able to prepare for that meeting. Mr Langley said that the PDR form was given to him a month later, and that the claimant was referred to OH as he had requested, and the OH report was discussed by them both in June 2022. Mr Langley repeated that he had asked the claimant if he had any suggestions for what might help him other than what was in the OH report, and suggested the completion of a Passport, but the claimant never came back to him about this. Mr Langley said that as there had been 18 months of performance issues, back to March 2021, that the performance issues were before anxiety became an issue for the claimant. Mr Langley told the Tribunal that he believed that an informal PIP would allow them to focus on the claimant's performance and engagement but in a supportive environment.

34. On 2 August 2022, Ms Ackers of HR informed Mr Langley and Mr Stevens that a female member of staff had made complaint against the claimant about having been sent what were described as inappropriate messages by him. It was agreed at that meeting that the claimant would not be told of the complaint until after the informal PIP had been instigated.

35. Mr Langley met the claimant on 4 August 2022 to instigate the informal PIP. He recorded the outcome of that meeting in an email of the same date that was before the Tribunal. The claimant alleges that Mr Langley threatened him during that meeting, saying that he could check on his laptop activity and remove

homeworking. We accept that Mr Langley told the claimant that the respondent's policy was that it could require full time office attendance if it had concerns that work could not be done effectively from home, and also that a report of the claimant's log-ins could be produced. The claimant was, we accept, asked by Mr Langley what such a report might produce, and the claimant indicated that he did not think it would show anything of concern.

36. The claimant accepted in cross-examination that Mr Langley did not ever say to him that he believed the claimant to be falsifying his flexitime records. In the email of 4 August 2022, in which Mr Langley recorded the concerns he had discussed in the meeting of the same day, the claimant accepted that this was not something recorded in the email or in their conversation, but he said that it was implied.

37. By email at 17.35 on 4 August 2022, the claimant notified Mr Langley that he was "unable to agree" to an informal PIP. He wrote "*whilst I have already made it clear that I am committed to recovering my performance I do not believe this is an appropriate, fair or reasonable way to do it*." Three minutes later, at 17.38, Dean Owens Cooper from the respondent's Inclusion and Wellbeing Team contacted Mr Langley and Mr Stevens to say that the claimant had been in touch with his team for advice and during the meeting he became concerned for the claimant's wellbeing and could they speak about him. By this point Mr Langley had begun a period of annual leave and so Mr Stevens took over the management of the claimant during this period. Over the days that followed, Mr Stevens and Ms Akers spoke with Mr Owens Cooper about the claimant. Mr Owens Cooper confirmed that the claimant had contacted him about three issues but he only had permission to share one issue, which was about the claimant's wellbeing.

38. In a conversation with Mr Stevens and Ms Ackers on 8 August 2022, Mr Owens Cooper informed them that the claimant had, when speaking to him, "*said he was being brought down the performance management route, he kept coming back to that…. He kept forcefully coming back to performance management*". It is the claimant's case that during conversations with Mr Owens Cooper, he did a protected act for the purposes of his victimisation complaint, by telling Mr Owens Cooper that the respondent had not provided him with the reasonable adjustments needed and that it was inappropriate for the respondent to be taking performance management steps against him because the performance issues arose from a lack of reasonable adjustments.

39. The claimant's allegation is that he said to Mr Owens Cooper words to the effect that "*I did not believe the ICO provided me with the reasonable adjustments that were required, that was the source of the difficulties I was having and I felt it was inappropriate for the ISO to be taking the steps that it did against me because the performance difficulties I was experiencing resulted significantly from ICO's failure to implement reasonable adjustments*" in their conversations on 4 and 5 August 2022 and that Mr Owens Cooper made Mr Langley and Mr Stevens aware that he had said this to him.

40. Mr Langley's evidence was that he was never aware that the claimant raised with Mr Owens Cooper that reasonable adjustments had not been implemented. This is also not recorded in the minutes of the discussion on 8 August 2022 in those terms, although Mr Stevens' evidence is that Mr Owens Cooper told them

on 5 August 2022 that the claimant "*clearly had concerns about the support he had been offered"* and that it was important that reasonable adjustments that were available were properly documented. On return from Mr Langley's leave he was updated by Mr Stevens, including being given the notes of his conversations with Mr Owens Cooper. Therefore, we find that Mr Owens Cooper did not tell Mr Stevens what the claimant had said to him, other than to say that the claimant had concerns about the support he was being offered and that he objected to his performance being managed, and Mr Owens Cooper did not speak to Mr Langley about this at all. Mr Langley found out about the claimant's concerns about the support he was being offered and that it was properly documented, via Mr Stevens. The claimant himself had already told Mr Langley on 4 August 2022 that he objected to the PIP.

41. On 10 August 2022, the claimant was informed of the complaint against him and went off sick. Investigations began into the complaint, and Mr Langley was interviewed about this on 8 September 2022. It is a complaint by the claimant that during this interview, Mr Langley "assassinated" his character and portrayed the claimant as a problematic member of staff, exploiting the issue to discredit him and "tip" the Dignity at Work complaint towards a dismissal. The claimant is particularly unhappy about the respondent's conduct in this regard as he was originally sent a redacted set of meeting minutes with the relevant comments redacted altogether.

42. The comments made by Mr Langley are in the context of the Dignity at Work complaint raised against the claimant by a female member of staff. Mr Langley was asked by the investigator, Mr Angell, at the end of the meeting, whether in addition to the inappropriate messages that were discussed, whether anything else was relevant. Mr Langley replied that "*What I'm finding is I wanted to provide a clean slate but 18 months in I am beginning to wonder if I can trust him. And the issue will come up, for example his attention in team meetings and he will say it's ADHD. OK, we can put adjustments in place to make him more engaged, but you will see if there are directors present he's engaged so he has a successful tactic to deploy when he wants he just chooses not to in team meetings. In his recent work, he's taken nine months to complete one piece of work. I've given him the benefit of doubt but it shouldn't have taken so long. He has breaks of 40 to 50 minutes from his desk without saying so on flexi sheet so I'm losing trust and that's why I'm worried. When this complaint arrives I think what else is happening that we don't know.*"

43. The claimant alleges that this was a detriment that was motivated by his protected act, by his conversation with Mr Owens Cooper on 4 and 5 August 2022, in which he alleged that his reasonable adjustments were not implemented and that this had caused his performance difficulties. Mr Langley gave evidence to the Tribunal that during team meetings on MS Teams, the claimant would get up and leave his desk and walk off, leaving the rest of his team to look at his empty chair on video for 40 minutes or so. He also told the Tribunal that the claimant would be clearly using his mobile phone during team meetings on Teams, as the light from the phone screen would be reflected in his glasses and was therefore visible to the rest of the team. We find that Mr Langley found this behaviour, combined with the claimant's lack of transparency about what he was doing with his working time, to be disrespectful and problematic, and resulted in Mr Langley's concerns about whether or not he could trust him. As the investigation meeting on 8 September was about the claimant having sent an extremely high number of messages to two

female colleagues and the possible motivation behind such behaviour, issues of the claimant's credibility could have reasonably been said to be relevant to the investigation.

44. We find that Mr Langley was frustrated with the claimant's behaviour at this stage, and the difficulties he was having over a long period of time in managing the claimant and in reaching an agreement as to how the claimant's work quality and work output could be improved. He spoke frankly during the meeting about those frustrations and about what he perceived to be a lack of respect and engagement in his work, compared with an increased level of respect and engagement when directors were present in meetings. We do not find that Mr Langley's comments lacked any basis in fact. They were a reflection of his experiences managing the claimant. We also do not find that they were exaggerated. We find that Mr Langley did portray the claimant as a problematic member of staff, because his experience was that he was problematic.

45. We accept that these comments subjected the claimant to a detriment, albeit that he did not know that these comments had been made until disclosure was complied with by the respondent in these proceedings. The claimant said in his evidence during this hearing that he found the comment that he chose not to engage in team meetings and yet had a "successful tactic" to use when directors were present to be very offensive. We note that many of the comments made by Mr Langley to Mr Angell had already been raised by Mr Langley to the claimant in the meeting and follow-up email of 4 August, which was before the claimant spoke to Mr Owens Cooper.

46. However, we have not accepted the claimant's allegation that Mr Langley knew what was said by the claimant to Mr Owens Cooper in the terms that the claimant alleges. We do not accept that Mr Langley knew sufficient information to believe that the claimant had done a protected act. Mr Owens Cooper kept confidential from Mr Stevens and Ms Ackers most of the information provided by the claimant to him and therefore this was not passed on to Mr Langley. We are not, on the balance of probabilities, persuaded that Mr Langley knew, or believed that the claimant had done or might to a protected act. Mr Langley's comments to Mr Angell on 8 September 2022 were not because of this. They were because Mr Langley had concerns about the claimant's wider conduct at this stage and considered this to be relevant to Mr Angell's investigation.

47. When it was put to the claimant that the implementation of an informal performance improvement plan ("PIP") in August 2022 was the opportunity for them to discuss this properly, the claimant then said that this was too late and there should have been a "*proper discussion*" with him before that. We note that the claimant's case is contradictory on this point in that he alleges that the move to put him on an informal PIP was an act of harassment and indicated that Mr Langley considered that he was falsifying his flexitime, yet he also alleged in his answers to cross-examination that it was a failure of the respondent not to have formally raised the issue of his flexisheets with him.

48. The claimant also alleges that both in April 2022 and also in August 2022 Mr Langley alleged that he was falsifying his flexitime, in conversation and by email. The claimant accepted in cross-examination that there was no email before the Tribunal where this was said by Mr Langley. He also accepted that, had Mr Langley

considered that he was falsifying his flexitime, that Mr Langley could have instituted disciplinary proceedings. He said that he thought Mr Langley's "*behaviour was completely inconsistent here...it's very strange. If these were genuine concerns, why not move to a disciplinary?*"

49. It was put to him that the informal PIP, which was instigated in early August 2022, was an opportunity for him to demonstrate that he was accurately recording his time and having done so, that would have been the end of the matter without the respondent starting a disciplinary process. The claimant replied that he considered the PIP to be disproportionate and that it "*never developed towards an opportunity for me to discuss those concerns*" even though we note that the claimant had been given indications that Mr Langley had such concerns in a number of previous meetings (such as in September and November 2021, and March 2022) but had not taken these opportunities to discuss them properly at the time. Having in effect brushed off the concerns when Mr Langley raised them, we accept that the PIP was a more structured opportunity, short of a formal process, for them both to discuss those concerns.

50. The claimant raised a grievance on 9 November 2022, while he was on sick leave. He attended a fact-finding meeting on 1 December 2022 with Jack Harvey, who was the investigating manager, and the claimant's trade union representative. The claimant's grievance was extensive and was four pages long and contained a number of headings. These were related to disability discrimination, including a failure to make reasonable adjustments, harassment, victimisation, discrimination by association, "*further inappropriate disclosure of confidential information*" and "*mishandling of the DAW complaint*". The grievance also identifies that the claimant had recently made a subject access request (SAR). A further investigation meeting took place on 8 December 2022 as not everything had been covered in the earlier meeting. Mr Harvey interviewed Mr Langley, Mr Stevens, Ms Clark and Ms Ackers. He delivered the findings of his investigation to the claimant and his union representative in a meeting on 27 January 2023.

51. The claimant's grievance was partially upheld in relation to one of the issues he asks the Tribunal to address, which is that Mr Langley failed to carry out a stress risk assessment and also did not do a formal return to work meeting after the claimant's stress-related absence in February 2022. The claimant appealed against the outcome of the grievance in a 40-page document on 15 February 2023. The appeal was investigated by Paula Hothersall, Director of International Regulatory Cooperation. Her decision was that the appeal was not upheld.

52. Both the grievance decision and the appeal decision are, we find, thorough and balanced and provide substantial supporting evidence for their conclusions. The claimant's complaints before this Tribunal (which were also a ground of appeal in his appeal to Ms Hothersall) relate to a comment made by Mr Harvey in his investigation report that the claimant had not shown the leadership that could be expected of him in that he did not engage with offers of help to recover his performance. The claimant said in his appeal to Ms Hothersall that this was "*a disgraceful statement that should never have been made and I consider it a further deeply inappropriate act.*" He says to this Tribunal that it is an act of unlawful harassment due to his disability.

53. Mr Harvey's evidence to the Tribunal was that in his view, based on his investigation, the claimant had failed to engage with management when help was offered. He gave examples of the claimant cancelling meetings with Mr Langley and said that as the claimant was in a leadership role, this involved taking account of learning and development opportunities oneself. He said that it had a particular meaning in the performance framework at the respondent that referred to personal responsibility and that the individual was accountable for learning and development in their role.

Stress Risk Assessment

54. It was Mr Stevens' evidence to the Tribunal that he had been a line manager for a long time and had never undertaken a stress risk assessment before. His view was that they were not automatically undertaken at the respondent. However, Hunt said that the respondent did carry out individual stress risk assessments for employees at times. The claimant alleges that the respondent had a policy of not carrying out individual stress risk assessments, or not carrying them out at all. We do not accept that this was the case. Indeed, Mr Harvey concluded in relation to the claimant's grievance that one should have been carried out on his return to work in 2022.

Sick pay entitlement

55. The claimant was absent from work from 10 August 2022. As set out above, he had been absent due to sickness for other periods in 2021 and 2022. Ms Hunt explained that the respondent's policy is that in any 4-year period, members of staff are paid at full rates of pay for the first six months of a period of absence and half pay for the following six months, and after a year the entitlement to sick pay is exhausted and an employee would go to nil pay. Her evidence was that she had never known this policy not to apply, even in cases of terminal illness.

56. It is the claimant's case to this Tribunal that this is unlawful disability discrimination by reason of a failure to make reasonable adjustments. The claimant's case is that a reasonable adjustment would have been to pay him full pay for an indefinite period, or for longer than the policy allowed for. This is on the basis that it was inherently unreasonable for the respondent to refuse to vary this policy in any circumstances and to refuse his request in his circumstances, because the employer caused his absence by failing to make reasonable adjustments. It is the claimant's case that he should not have been expected to return to work until the grievance process was concluded, which was about disability discrimination and reasonable adjustments.

The Claimant's need to work on paper and the lack of a printer and screen

57. It is the claimant's evidence that due to his disabilities, he struggled to work with spreadsheets. He would therefore manually transcribe information from the spreadsheets onto paper so that he could analyse and report on that information. This was the reason why, he said, he appeared to be offline during the working day, because he was working from paper sources.

58. It is Mr Langley's evidence that at no point during his management of the claimant, from March 2021 onwards, did he ever alert him to his need to transcribe

data from spreadsheets onto paper. Mr Langley's evidence was that he knew that the claimant found working with Excel to be challenging, but that he had attended an Excel training course which he found to be helpful. Mr Langley's evidence, which we accept, was that much of the team's work was done on spreadsheets and so although he tried to minimise the claimant's use of them, it was not always possible.

59. We accept, and indeed find no evidence, that the claimant ever told Mr Langley of the need to manually transcribe information during the time to which these proceedings relate. They had a significant number of conversations about the claimant's work output and his periods of time during the working day when he was uncontactable and/or offline, and the claimant never mentioned this to him. Even when the informal PIP was proposed, this was not mentioned. Furthermore, the claimant never asked for auxiliary aids such as a printer and/or an additional screen to be provided. When Mr Langley suggested that the claimant complete a Passport documenting his reasonable adjustments and requirements for assistance, the claimant did not do so and now says that this was the respondent's responsibility. However, it is not entirely clear how Mr Langley was supposed to be aware of the claimant's need for additional IT equipment if the claimant never made him aware of this and was not prepared to document it as part of the Passport process.

The Law

60. <u>Discrimination arising from disability (s15 Equality Act 2010 – "EQA")</u>

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

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

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

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

61. <u>Harassment (s26 EQA)</u>

(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.

62. Victimisation (s27 EQA)

(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.

63. Duty to make adjustments (s20 EQA)

1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

[……………………………..]

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons

who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

The duty to make reasonable adjustments - knowledge of disadvantage

64. Paragraph 20(1) of Schedule 8 EqA provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know:

   a. in the case of an applicant or potential applicant for work, that an interested disabled person is or may be an applicant for the work in question — para 20(1)(a)
   b. in any other case referred to in Part 2 of the Schedule, that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's provision, criterion or practice (PCP), the physical features of the workplace, or a failure to provide an auxiliary aid — para 20(1)(b).

65. In *Glasson v Insolvency Service 2024 EAT 5*, the EAT upheld an employment tribunal's decision that while the employer was aware of the claimant's disability, it did not have knowledge, actual or constructive, of the particular disadvantage upon which the claimant relied.

Reasonableness of pay preservation measures

66. A more generous provision as to pay of a disabled employee is unlikely to be a reasonable adjustment (*O'Hanlon v Comrs for HM Revenue & Customs [2007] EWCA Civ 283, and Meikle v Nottingham County Council [2004] EWCA Civ 859*). While extending sick pay for a disabled employee is not precluded, it would be a "rare and exceptional case" that it would amount to a reasonable adjustment. In *O'Hanlon,* it was said that the purpose of the legislation was to assist the disabled to obtain employment and to integrate them into the workforce and it was not simply to put more money into the wage packet of the disabled. The legislation was designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, rather than to treat them as objects of charity which might in fact sometimes and for some people tend to act as a positive disincentive to return to work.

A duty to consult on adjustments?

67. It is no part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made. (*Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT*) Mr Justice Elias held that, while it will always be good practice for the employer to consult, and it will potentially jeopardise the employer's legal position if it does not do so, there is no separate and distinct duty on an employer to consult with a disabled worker. The only question is, objectively, whether the employer has complied with its obligation to make reasonable adjustments. If the employer does what is required of it, then the fact that it failed to consult about the duty or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance, but that is enough. Conversely, if the employer fails to do what is reasonably required, it avails the employer nothing that it has consulted the

employee. If there were a preliminary obligation to consult, it would have been spelt out in the legislation.

The Equality and Human Rights Commission's Code of Practice on Employment (2011)

68. The Code states at 6.20 that the respondent must do all they can reasonably be expected to do to find out whether the claimant is placed at a disadvantage by the PCP or the failure to provide the auxiliary aid.

69. At 6.20, the Code states that if the claimant expects the respondent to make an adjustment, they will need to provide the respondent with sufficient information to carry out that adjustment.

70. Time limits (s123 EQA)

(1) Subject to section 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.

Application of the Law to the Facts Found:

Harassment (s26 EQA):

I) "In April 2022, and repeated in or around early August 2022, Danny Langley informed HR the Claimant's request for an occupational health report was "insincere," He alleged the Claimant was falsifying flexi-time which resulted in action to be taken against the Claimant being approved on or around the 4 August 2022 by HR, Adam Stevens and Danny Langley."

71. We note that the claimant was not aware of the content of any of these conversations until he received the results of his subject access request, which was in 2023. We also note that a considerable element of the claimant's objection to these conversations was that they were had without him knowing about them. We find that, leaving aside whether the conversations took place as the claimant alleges, these were conversations between a line manager, his manager and his HR advisor. Management and HR are, we find, entitled to discuss employees without their knowledge. This is a routine part of corporate management practices

and there is nothing of itself that is inherently objectionable in this having happened.

72. Turning to the specific allegations, we do not accept that the claimant has established on the balance of probabilities that Mr Langley told HR that the claimant's OH request was "*insincere*". He also did not allege that the claimant was falsifying flexi time. He had concerns about how the flexi time was being recorded, and why the claimant appeared to be offline for significant periods of time, but he sought information from the claimant about this. Had he alleged that the claimant was falsifying flexi time, we find that he would have instigated disciplinary proceedings, and he did not do so. We accept that in many organisations, and in the respondent also, the recording of flexitime is open to abuse and so it was reasonable for the respondent to consider this worthy of further investigation.

73. In any event, the comment that caused the claimant concern when his SAR was complied with, was made by Ms Hunt, who was aware of the issue of the claimant's flexitime issues. In terms of any alleged harassment of the claimant, Ms Hunt's comment was in an email only sent to Ms Welch.

74. Mr Langley's involvement on this occasion, we find, was limited to asking whether he was allowed to refer the claimant to OH at the claimant's request. He was given the option to refer to OH or not by Ms Welch, being told that referral would be appropriate if he believed that it would assist him in managing the claimant. Mr Langley took the decision to refer the claimant and we find that this was because he was keeping an open mind about the claimant's situation, despite any misgivings he may have had about the claimant's performance, activity during the working day and his flexitime recording.

75. The claimant's allegation is repeated in relation to the events of early August 2022. The sincerity or otherwise of a request for an OH referral was not mentioned at this time, we find. Flexi issues were mentioned, however. The claimant says in his witness statement at paragraph 25 that he was given no opportunity to correct these "*misconceptions*" because of the "*secretive nature of the discussions*". We do not accept that this was the case, as he had meetings with Mr Langley where the issue of his flexi recording was raised in September 2021 and again April 2022 and at the meeting on 4 August 2022. In fact, at the meeting on 4 August 2022 he was asked about what he thought a laptop activity report might show. The claimant did not raise at this point the issue of being offline for manual transcribing, which was, we find, when it would have been appropriate and necessary to raise that issue, as on the claimants' case, it was a mitigating factor in the issue of the problems with his performance. The claimant did not raise this issue until after he had gone on sickness absence in relation to his grievance and he has never provided any supporting evidence of this, such as the notes that he manually transcribed.

76. In conclusion we find on the balance of probabilities that Mr Langley did not inform HR that the claimant's request for an OH report was insincere. The facts before us do not support such an assertion. The facts also do not support the claimant's assertion that he was alleged by Mr Langley to have been "falsifying" flexitime as opposed to recording it inaccurately.

77. Furthermore, the claimant was not aware of any of the emails between Mr Langley and HR until he received the results of his SAR, which was made shortly before his grievance was lodged in November 2022. He could therefore not have seen any of these emails until at least November 2022 at the very earliest.

78. We accept that "action" as alleged was taken in the form of the informal PIP, which was not "approved" by HR and Mr Stevens but was a decision of Mr Langley alone after discussion with HR and Mr Stevens.

II) In early August 2022, in conversation and email, Danny Langley placed the Claimant on an informal performance management programme.

and

IV) In early August 2022 Danny Langley told the Claimant the Respondent had the capacity to check on his laptop activity and remove homeworking.

79. In the meeting on 4 August 2022, the parties agree that Mr Langley asked the claimant what would happen if he obtained an IT report *"seeking gaps on your laptop activity*" and the claimant replied that he did not believe a report would show anything problematic. It is also agreed that Mr Langley wrote in his email to the claimant on 4 August 2022, which recorded their conversation the same day *"I explained that although it is possible to require 5 days a week office attendance if there are concerns that work cannot be conducted effectively when working from home, such a requirement could be avoided with improved performance*".

80. We find that the PIP was proposed as an informal measure. We find that Mr Langley could have put the claimant on a disciplinary investigation as a legitimate alternative course of action but chose not to, because he was hoping to provide the opportunity for the claimant to work through whatever issues he had that were limiting his performance and to encourage him to be more open about what these issues were. Indeed, the claimant accepted that his performance was below par in his email on 4 August 2022 where he rejected the introduction of the PIP.

81. We note that the PIP was also relatively limited in scope. It required the claimant to have a weekly one to one with Mr Langley about his work output and update him daily on the times when he was at work the previous day and provide him with work he had done the previous day and what he was doing that day. Mr Langley linked this with the claimant's problems with prioritisation which had been an issue for him for some time.

82. We accept that the PIP was unwanted conduct for the claimant. We also accept that Mr Langley's comments on 4 August about the laptop activity and homeworking were conduct that was unwanted by the claimant. We accept that it was partly related to his disability in that his ADHD and anxiety affected his performance at work. We accept that the claimant found the PIP to be an act of harassment, in that he considered that it created a humiliating, degrading and offensive environment for him at the time. He told Mr Langley on 4 August that he did not consider a PIP a "*appropriate, fair or reasonable*" way to address the issues of his performance.

83. However, we do not consider in the circumstances that it was reasonable for the PIP or the comments to have that effect. This is because the terms of the PIP were informal and supportive. It was raised with the claimant during the hearing that had he engaged with the PIP successfully, that would have been the end of the matter. The claimant told the Tribunal that even the suggestion of a PIP was a significant problem for him, but we find that in the circumstances of the claimant's case, where significant adjustments had already been made to his workload and deadlines but where performance was still significantly below what was expected, the respondent is entitled to investigate the situation and we consider that a PIP in such terms was a reasonable and supportive method of doing so. It was not reasonable in all the circumstances of the case for the PIP or the comments to have the effect complained of by the claimant. These two allegations fail and are dismissed.

III) In early August 2022 in an oral conversation with the Claimant and email Danny Langley made allegations that the Claimant was falsifying flexi-time, when the Claimant had not received support. There is a reference to Danny Langley making "thinly veiled" allegations in the Grounds of Complaint. The allegation remains but not that it was "thinly veiled."

84. Mr Langley did not, we find, allege that the claimant was falsifying his flexitime records. He noted on 4 August 2022 that they had first discussed this issue in September 2021 and the claimant had told him that he could rely on his flexisheet being accurate, but that nevertheless "*I have continued to find regular occasions when you have been unavailable with spells away from your laptop that on some occasions are in excess of an hour and which are not subsequently accounted for in your timesheet.*" We do not accept the claimant's evidence that this is an allegation of falsification. Mr Langley raised a query with the claimant in the context of an informal PIP which allowed the claimant the opportunity to demonstrate that his time recording was accurate, which was what the PIP gave him the opportunity to do. This allegation fails and is dismissed.

V) In a meeting to deliver the findings of the claimant's grievance on 27 January 2023, Jack Harvey of the ICO stated that he felt the claimant had shown a lack of leadership in not engaging with the claimed offers of help to recover his performance

85. Having considered the evidence to do with the investigation into the claimant's grievance by Mr Harvey, we find that the reason for his comments was that the lack of engagement with the offers of training and Mr Langley's suggestions for ways to address the performance issue was a problem because of his seniority and the need for a more senior and more experienced member of staff to take a more proactive approach to issues to do with their own performance. Therefore, the claimant has not established on the balance of probabilities that this was conduct that was related to his disability. This allegation fails and is dismissed.

Discrimination arising from disability (s15 Equality Act 2010)

I) Did the respondent treat the claimant unfavourably in or around April 2022 when Danny Langley (line manager) informed HR that the claimant's request for an occupational health report was "insincere"

86. For the reasons identified above, we do not accept the allegation that Mr Langley made this comment to HR in April 2022. This allegation fails and is dismissed.

II) At the same conversation held in April 2022 Danny Langley also alleged the claimant was falsifying flexitime without first asking the claimant for an explanation

87. For the reasons identified above, we do not accept the allegation that Mr Langley made this comment to HR in April 2022. This allegation fails and is dismissed.

III) The April 2022 allegations led to action against the claimant for deceiving the respondent (i.e. the falsifying flexitime allegation) in early August 2022 when the claimant was put on an informal management plan by Danny Langley with the approval of higher management and HR and without them checking the factual basis

88. For the reasons identified above, we do not accept the allegation that Mr Langley made these comments to HR in April 2022 and therefore this cannot (and did not) lead to the PIP being instigated. This allegation fails and is dismissed.

Reasonable Adjustments (ss20-22 Equality Act 2010)

I) Did the respondent have a PCP (provision, criterion or practice) which was that workplace stress assessments are conducted on a collective basis and individuals do not receive an individual assessment, or in the alternative they are not done at all?

89. We do not accept that there is a PCP that stress risk assessments are collectively carried out (as opposed to individually), or not carried out at all. We noted the evidence of Ms Hunt that if an employee's sick note mentioned stress, a stress risk assessment could be done on the individual's return to work. A copy of a stress risk assessment used at the respondent was in evidence before the Tribunal. We accept that they were not necessarily a common HR practice at the respondent, as Mr Stevens' evidence indicated he had never done one himself during his time at the respondent.

90. We accept that stress was mentioned in the claimant's OH report from May 2022. However, we accept Mr Langley's evidence that the claimant disputed the findings in that OH report about his anxiety and whether he could return to the office. Mr Langley's evidence was that the claimant consistently told him in the first half of 2022 that work was not causing him stress, that it was his home circumstances that were stressful. We accept that Mr Langley was not unreasonable to conclude that a workplace stress risk assessment was not necessarily going to be helpful in that regard.

91. The claimant's report from his October 2022 referral to occupational health recommended that a stress risk assessment should be done. However, the claimant was off work sick at this point.

92. Mr Harvey upheld part of the claimant's grievance complaint in that he accepted that a stress risk assessment should have been completed on the claimant's return to work in March 2022. We find that he would not have done so had the respondent's policy been that such risk assessments were not carried out for individuals or not at all.

93. Therefore, taking all of these factors into account the claimant has not established that the respondent has a PCP of not doing individual stress risk assessments for its staff, or not doing them at all. This complaint fails and is dismissed.

II) Did the respondent have a PCP (provision, criterion or practice) which was that people at the claimant's role and grade are expected to carry out a certain workload which cannot be reduced and complete tasks within certain time parameters.

94. We do not accept that the respondent had a PCP that those at the claimant's grade could not work to a reduced workload. The claimant himself had a significant reduction in workload. He had been given extra time to complete tasks and adjustments to training requirements. We note that in a meeting in May 2022 he praised the respondent's attitude to adjustments and offered to contribute to a blog on the subject. The respondent operates a Workplace passport to document adjustments made to employees' duties and working time and this was also offered to the claimant. There is no evidence from which we could conclude that those at his grade were not provided with workload adjustments.

95. The respondent did require of the claimant that some work be done within some timescales, which were extended several times as Mr Langley's evidence indicated. We do not accept that the setting of deadlines of itself was something that the claimant has established was only applied to those at his grade.

96. There was, we find, no such PCP in operation at the respondent and this allegation fails and is dismissed.

III) Did the respondent have a PCP (provision, criterion or practice) of reducing employees' entitlement to sick pay by fifty percent and then nil in accordance with his contract.

97. We accept that the respondent had such a PCP in operation. The evidence of the respondent's witnesses was that they accepted that this was a policy the respondent operated. Ms Hunt knew of no exceptions to it.

98. The claimant says that this PCP put him at a substantial disadvantage compared to someone without his disability, in that he was unable to carry out the workload or tasks. However, we find that the claimant has not demonstrated that the non-payment of salary in full caused him to be unable to carry out his workload or tasks. He objects to being placed at a financial disadvantage and especially because it is his submission to this Tribunal that the respondent caused his absence by his actions. However, in the context of a reasonable adjustment claim, the Tribunal must look at the disadvantage the claimant alleges the PCP caused him, which is being unable to carry out his workload or tasks.

99. Even if the List of Issues for the claim had contained the substantial disadvantage that the claimant complained of in his cross-examination, which is that of financial disadvantage, the claim would still not succeed. A non-disabled person who was off sick and whose pay was reduced in accordance with the absence policy would also be financially disadvantaged. The claimant has not established that the policy puts those people with his disability at a substantial disadvantage when compared with those who are not disabled.

100. In any event, we note that the adjustment recommended by the claimant would not have facilitated him in carrying out the workload or tasks, which was the disadvantage he says this PCP caused to him. Allowing him to be paid full salary for longer, or indefinitely, would not have facilitated a return to work. On the contrary, it is likely that it would have prolonged his absence.

101. We do not accept that adjusting the policy in this way was a reasonable step for the respondent to take, taking into account the factors listed in the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') at paragraph 6.28. We also note the principles stated in *O'Hanlon v Comrs for HM Revenue & Customs [2007] EWCA Civ 283, and Meikle v Nottingham County Council [2004] EWCA Civ 859* which is that it is not likely to be a reasonable adjustment to provide a disabled employee with more favourable terms as to pay than non-disabled employees. This is not the purpose of the disability provisions of the Equality Act 2010 which are designed to facilitate disabled workers being in the workplace, as opposed to facilitating their ongoing absence.

102. For all of these reasons, this allegation fails and is dismissed.

Reasonable adjustments auxiliary aids

103. We find that the respondent did not know and could not reasonably have been expected to know that the claimant had a requirement for a printer or a second screen (as per paragraph 20(1) of Schedule 8 EQA, which provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know of the requirement for an auxiliary aid). There is no evidence that he ever asked for either of these items to be provided to him. During the course of his evidence, the claimant disclosed that, in fact, he had always had a second screen at home but did not know (and did not ever ask the respondent for assistance) how to connect it to his laptop or which cables were required.

104. Given the frequency and extent of the respondent's discussions with the claimant about his issues with his productivity, we find that the claimant had ample opportunity to raise the issue of auxiliary aids with them and he did not. For example, the claimant's issues with spreadsheets were discussed with Mr Langley in March 2021, they discussed his online presence on 10 November 2021 and in April 2022 and August 2022, but this issue was not mentioned. The claimant was given extra time to complete his report but did not say that this was in whole or in part a reason why he was struggling with his productivity.

105. For all of these reasons, this allegation fails and is dismissed.

Victimisation, s27 Equality Act 2010

106. It is the claimant's case that he told Mr Owens Cooper words to the effect that "*I did not believe the ICO provided me with the reasonable adjustments that were required, that was the source of the difficulties I was having and I felt it was inappropriate for the ISO to be taking the steps that it did against me because the performance difficulties I was experiencing resulted significantly from ICO's failure to implement reasonable adjustments*" and that this was a protected act for the purposes of the Equality Act 2010. We accept that such words are potentially capable of being a protected act for the purposes of a victimisation complaint. However, other than the claimant's own pleaded case, there is no contemporaneous evidence that the claimant made these comments to Mr Owens Cooper.

I) On 8 August 2022, Deans Owen-Cooper then made Danny Langley and Adam Stevens aware of what had been said by the Claimant.

107. If we take the claimant's case at its highest and accept that this was said by him to Mr Owens Cooper, there is no evidence that Mr Owens Cooper said to Mr Stevens and Ms Ackers on 5 August 2022 any more than that the claimant "*clearly had concerns about the support he had been offered"* and that it was important that reasonable adjustments that were available were properly documented. Mr Owens Cooper confirmed that the claimant had contacted him about three issues but he only had permission to share one issue, which was about the claimant's wellbeing. In a conversation with Mr Stevens and Ms Ackers on 8 August 2022, Mr Owens Cooper informed them that the claimant had, when speaking to him, "*said he was being brought down the performance management route, he kept coming back to that…. He kept forcefully coming back to performance management*".

108. Therefore we do not accept that Mr Owens Cooper reported any more than that to anyone else involved in the claimant's management. We do not accept that he said anything more than what the claimant had authorised him to say. We do not accept that following the claimant's instructions as to what he was allowed to disclose could reasonably amount to a detriment for the purposes of section 27.

II) 8 September 2022 - the manner in which Danny Langley responded to the Dignity at Work complaint, portraying the Claimant as a problematic member of staff, exploiting the issue to discredit him and "tip" the Dignity at Work complaint towards a dismissal. Danny Langley "assassinated" the Claimant's character during the investigation.

109. In terms of the Dignity At Work interview, we find that Mr Langley did not know what the claimant had said to Dean Owens Cooper while he was on leave in August, other than the limited amount of information passed on by Mr Stevens on his return to the office. We find that Mr Langley already knew that the claimant was unhappy by that point because he had objected to the informal PIP. We do not accept that anything Mr Langley said on 8 September was because of the claimant's conversation with Dean Owens Cooper. There was no evidence before us that Mr Langley considered the conversation with Mr Owens Cooper to be problematic.

110. What was said by Mr Langley on 8 September was because of a breakdown in trust between him and the claimant, and because of the claimant's refusal to engage with his efforts to increase the claimant's work quality and effectiveness. We find it had nothing to do with any protected act. The claimant's submissions were that Mr Langley "*was aware he had not implemented reasonable adjustments properly and that this would come to light*". We do not accept that this was the case and do not accept that Mr Langley thought this or was worried, and we find that it was difficult to see what else Mr Langley could have done for the claimant in the circumstances.

111. Therefore the allegations of victimisation fail and are dismissed.

Time Limits

112. We accept that, given the date that the claim form was presented and the effect of early conciliation, any complaint about something that happened before 10 August 2022 may not have been made in time, unless it could be said that events before that date were part of a continuing course of conduct. However, we find that there was a continuing course of conduct of related events, such that the earlier complaints in the claimant's list of issues can be considered by the Tribunal.

____

Employment Judge Barker

Date: 30 October 2024

JUDGMENT SENT TO THE PARTIES ON

31 October 2024

FOR THE TRIBUNAL OFFICE

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:
https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX – AGREED LIST OF ISSUES

1. Time limits

1.1. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 10 August 2022 may not have been brought in time.

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

1.2.1. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2. If not, was there conduct extending over a period?

1.2.3. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

1.2.4. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1. Why were the complaints not made to the Tribunal in time?

1.2.4.2. In any event, is it just and equitable in all the circumstances to extend time?

2. Disability

2.1. The Respondent accepts that the Claimant's medical condition of Attention Deficit Hyperactivity Disorder ("ADHD") and Anxiety/Depression are medical conditions that come within the definition of disability within section 6 of the Equality Act 2010.

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

3.1. Did the Respondent do the following alleged things:

3.1.1. In April 2022, and repeated in or around early August 2022, Danny Langley informed HR the Claimant's request for an occupational health report was "insincere," He alleged the Claimant was falsifying flexi-time which resulted in action to be taken against the Claimant being approved on or around the 4 August 2022 by HR, Adam Stevens and Danny Langley.

3.1.2. In early August 2022, in conversation and email, Danny Langley placed the Claimant on an informal performance management programme.

3.1.3. In early August 2022 in an oral conversation with the Claimant and email Danny Langley made allegations that the Claimant was falsifying flexi-time, when the Claimant had not received support. There is a reference to Danny Langley making "thinly veiled" allegations in the Grounds of Complaint. The allegation remains but not that it was "thinly veiled."

3.1.4. In early August 2022 Danny Langley told the Claimant the Respondent had the capacity to check on his laptop activity and remove homeworking.

3.1.5. In a meeting to deliver the findings of the Claimant's grievance on 27 January 2023, Jack Harvey of the ICO stated that he felt the Claimant had shown a lack of leadership in not engaging with the claimed offers of help to recover his performance.

3.2. If so, was that unwanted conduct?

3.3. Was it related to disability?

3.4. 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?

3.5. 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.

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1. Did the Respondent treat the Claimant unfavourably in any of the following alleged respects:

4.1.1. In or around April 2022 - Danny Langley (line manager) informed HR the Claimant's request for an occupational health report was "insincere.

4.1.2. At the same conversation held in April 2022 (see above) Danny Langley also alleged the Claimant was falsifying flexi-time without first asking the Claimant for an explanation.

4.1.3. The April 2022 allegations led to action against the Claimant for deceiving the Respondent (i.e. the falsifying flexi-time allegation) in early August 2022 when the Claimant was put on informal management plan by Danny Langley with the approval of higher management and HR without them checking the factual basis.

4.2. Did the following things arise in consequence of the Claimant's disability:

4.2.1. because of his disability he worked from paper sources. The Claimant maintains the fact he needed to work from paper led to a baseless allegation that absence of working online meant he was not performing his duty and this in turn resulted in performance management, the step taken to monitor and manage what was perceived to be his dishonesty.

4.3. Has the Claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

4.4. If so, can the Respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

4.5. If not, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says the following:

4.5.1. In relation to 4.2.1, the legitimate aim was the Respondent has to manage employee relations, including managing requests from employees, effectively; a proportionate means of achieving this is discussing requests from employees with HR to ensure appropriate management actions are taken.

4.5.2. In relation to 4.2.2, the legitimate aim was ensuring all employees are fairly managed and appropriate standards of performance and attendance at work are maintained. These aims were achieved in a proportionate manner through the discussion of the concerns about flexi-time and the fair management of the Claimant's performance.

4.5.3. In relation to 4.2.3, the legitimate aim was ensuring all employees are fairly protected through internal policies and also that appropriate standards of performance are

maintained. These aims were achieved in a proportionate manner through the fair management of the Claimant's performance.

4.6. The Tribunal will decide in particular:

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

4.6.2. could something less discriminatory have been done instead;

4.6.3. how should the needs of the Claimant and the Respondent be balanced?

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

5.1. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

5.1.1. workplace stress assessments are conducted on a collective basis and individuals do not receive an individual assessment.

5.1.2. the Respondent's practice that people at the Claimant's role and grade are expected to carry out a certain workload which cannot be reduced and complete tasks within certain time parameters.

5.1.3. Reducing employees entitlement to sick pay by fifty percent and then nil in accordance with his contract.

5.2. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was unable to carry out the workload or tasks?

5.3. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

5.4. Did the Respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The Claimant says that the following adjustments to the PCP would have been reasonable:

5.4.1. workplace stress assessment as recommended by OH to assist the Claimant in the workplace manage the consequences ADHD and mental health issues with recommendations to manage those conditions.

5.4.2. Reduced workload

5.4.3. extended time/extra time to complete tasks

5.4.4. to pay to the Claimant full salary and not sick pay until a certain date/indefinitely?

5.5. Did the lack of an auxiliary aid, namely home printer and additional screens at home, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that his performance would be impacted by working off one screen and paper?

5.6. By what date should the Respondent reasonably have taken those steps? Was it on some date in 2019 and/or May 2022?

6. Victimisation (Equality Act 2010 section 27)

6.1. Did the Claimant do a protected act as follows:

6.1.1. On 4 / 5 August 2022, the Claimant had a conversation with Deans Owen-Cooper. The gist of the words used by the Claimant was; "I did not believe the ICO provided me with the reasonable adjustments that were required, that was the source of the difficulties I was having and I felt it was inappropriate for the ISO to be taking the steps that it did against me because the performance difficulties I was experiencing resulted significantly from ICO's failure to implement reasonable adjustments."

6.2. Did the Respondent believe that the Claimant had done or might do a protected act?

6.3. Did the Respondent do the following things:

6.3.1. On 8 August 2022, Deans Owen-Cooper then made Danny Langley and Adam Stevens aware of what had been said by the Claimant.

6.3.2. 8 September 2022 - the manner in which Danny Langley responded to the Dignity at Work complaint, portraying the Claimant as a problematic member of staff, exploiting the issue to discredit him and "tip" the Dignity at Work complaint towards a dismissal. Danny Langley "assassinated" the Claimant's character during the investigation.

6.4. By doing so, did it subject the Claimant to detriment?

6.5. If so, has the Claimant proven facts from which the Tribunal could conclude that it was because the Claimant did a protected act or because the Respondent believed the Claimant had done, or might do, a protected act?

6.6. If so, has the Respondent shown that there was no contravention of section 27?

7. Remedy for discrimination or victimisation

7.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

7.2. What financial losses has the discrimination caused the Claimant?

7.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4. If not, for what period of loss should the Claimant be compensated?

7.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?