Case No: 2601449/2017

EMPLOYMENT TRIBUNALS

Claimant	**-v-**	**Respondent**
Mr P Tribe		British Telecommunications Plc

FINAL HEARING

Heard at: Leicester **On:** 2 to 5 July 2018

Before: Employment Judge Evans
Mrs Woodward
Mrs Tidd

Representation
For the Claimant: Mr D Tribe (son of Claimant)
For the Respondent: Mrs Umpelby

JUDGMENT

1. The Respondent did not victimise the Claimant in breach of section 39 of the Equality Act 2010.

2. The Respondent did not breach a duty under the Equality Act 2010 to make reasonable adjustments.

3. The Respondent did harass the Claimant in breach of section 40 of the Equality Act 2010.

REASONS

Background

1. The Claimant is an employee of the Respondent. On 21 September 2017 he presented a claim of disability discrimination against the Respondent ("the Claim").

2. The hearing of the Claim took placed between 2 and 5 July 2018. The Tribunal reserved its decision.

3. The Claimant was represented at the hearing by his son, Mr D Tribe. The Respondent was represented by Mrs Umpelby, a solicitor. Before the hearing the parties had agreed a bundle of documents running to 295 pages. During the course

of the hearing pages 296 to 306 were added to the bundle with the agreement of the parties. All page references in this judgment are to the bundle unless otherwise stated.

4. The Claimant gave evidence in support of the Claim. So too did Gary Hobson, an employee of the Respondent and colleague of the Claimant, Mr Jez Mitchell, a representative of the CWU trade union, and Mr Billie Martins, a colleague of the Claimant. The Claimant also provided a witness statement from his wife, Mrs Cheryl Tribe. Mrs Tribe did not attend the hearing to give evidence. The Tribunal explained to the Claimant at the beginning of the hearing that it would give very little weight indeed to the evidence of Mrs Tribe if she did not attend the hearing because the Respondent would not have the opportunity of testing her evidence in cross-examination. The Claimant indicated that he understood this.

5. The following witnesses gave evidence on behalf of the Respondent. Mr Wayne Read, Operations Manager in Openreach, Mr Peter Wright, Senior Operations Manager in Openreach, Mr Andrew Rickatson, General Manager for the North West, North East and Scotland, Mr Clive Glenton, Operations Manager for Ethernet Delivery Leicester East of Openreach, Mr Simon West, Senior Operations Manager for North West Wales and the West Midlands for FND (Fibre Network Delivery), and Mr Andy Jeffery, Field Engineering Profession Lead for Openreach.

The discussion at the beginning of the Hearing and the issues

6. As set out in more detail at paragraph 29 below, the Claimant had previously brought a claim against the Respondent. That claim had been successful. One of the members of the Tribunal which heard that claim had been Mrs Woodward. The Tribunal drew this to the attention of the parties at the beginning of the hearing and indicated that if the Respondent wished to make an application for Mrs Woodward to recuse herself then the Tribunal would hear it at that stage. There was then a brief adjournment for Mrs Umpelby to take instructions. After the adjournment, she indicated that the Respondent did not wish to make an application for Mrs Woodward to recuse herself and, accordingly, the Hearing proceeded with Mrs Woodward as a member of the Tribunal.

7. There had been a Closed Preliminary Hearing by telephone following the presentation of the Claim before Employment Judge Hutchinson. At that hearing the Claimant had clarified that his Claim was one of victimisation and he had been ordered to provide further information by completing a schedule detailing each detriment. He had done this initially by providing very limited information covering less than one page (page 32B). The Respondent had asked for further details and these had been provided, again very briefly, by two emails (pages 33 and 33A).

8. The Respondent had not prepared an amended Response in reply to the further information provided by the Claimant.

9. The Tribunal reviewed the further information provided to the Claimant at the beginning of the hearing on 2 July 2018. It was clear that, of the six specific matters raised by the Claimant, three were not in fact alleged to be acts of victimisation. After some discussion, the Claimant indicated that he wished to make an application to amend the Claim to include claims of harassment and of a failure to make reasonable adjustments. This was in effect an application to substantially reframe what until then had been allegations of victimisation as, instead, allegations of harassment and of a failure to make reasonable adjustments. The Respondent indicated that it would oppose any such application.

10. The Tribunal then spent some time discussing with the Claimant exactly what he wished to argue so that his application to amend could be precisely framed. As a

result of that discussion, the Claimant confirmed that if he were permitted to amend the Claim the case that he would advance would be as set out in the list of agreed issues below.

11. Once the Claimant's application to amend had been clarified in this way, the Respondent withdrew its objection to the Claimant amending the Claim. The Claim was therefore amended by the agreement of the parties to include claims of harassment and for a failure to make reasonable adjustments as set out below.

12. The Respondent was then given some time to formulate a Response to the Claim as amended. Once the Respondent had done this, the Tribunal provided both parties with a typed list of issues as set out below which the parties expressly agreed to be correct and to be all the issues that the Tribunal would need to determine.

Time/limitation/preliminary issues

1. *The claim form was presented on 21 September 2017 after C contacted ACAS on 9 August 2017 and the EC certificate issued on 22 August 2017. Accordingly, any act or omission which took place before 10 May 2017 is potentially out of time, so that the tribunal may not have jurisdiction.*

2. *Does C prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?*

3. *Was any complaint presented within such other period as the ET considers just and equitable?*

4. *Is Claimant precluded from pursuing his complaint that R failed to make reasonable adjustments because the event giving rise to such complaint post dated the Early Conciliation certificate?*

   Mrs Umpelby indicated in her closing submissions that this fourth point was not pursued by the Respondent. The Tribunal has therefore not considered it below.

Victimisation

It is agreed that C did a protected act for the purposes of section 27 of the Equality Act 2010 by bringing an employment tribunal claim in 2013 (case no. 1900505/2013) ("the Protected Act").

Issues to be determined:

1. *Did R subject C to a detriment because he had done the Protected Act by Mr Read making a near miss investigation report following an incident on 10 April 2014 which speculated that the incident had been caused or contributed to by C's disability?*

2. *Did R subject C to a detriment because he had done the Protected Act by giving C a written warning in a letter dated 27 June 2016?*

3. *Did R subject C to a detriment because he had done the Protected Act by carrying out a disciplinary investigation and conducting a disciplinary hearing after he had "furthered" a job on 16 February 2017?*

Reasonable adjustments

Did R discriminate against C by failing to comply with a duty to make reasonable adjustments when it applied the same performance matrix to him as to able bodied engineers. Specifically the issues to be decided are:

1. *Did R apply the following provision, criteria and/or practice ("the PCP") generally, namely: a performance management metric which identified how many man hours particular categories of jobs should take to complete?*

   Respondent: R accepts that productivity metrics were used previously. However engineers are no longer measured using percentage targets in the same way.

2. *Did the application of any such PCP put C at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that C worked more slowly and this resulted in his team's performance being discussed in adverse terms at General Manager level?*

   Respondent: R denies C discussed in adverse terms. R denies any disadvantage as a result of C working more slowly (which R accepts he does).

3. *Did R take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on C but the adjustments asserted as required are identified as follows: C's team should have been allowed 20% longer to complete any given job but it was not from around the end of 2016.*

   Respondent: R does not accept this would be a reasonable adjustment because the PCP was not applied from around the end of 2016. R contends other adjustments were made including but not limited to the fact that C is in a 2 man team.

<u>Harassment</u>

1. *Did R engage in unwanted conduct in that:*

   a. *On or around 26 May 2016 Mr Read had a conversation with other employees of the Respondent in which Mr Read described C as a "bull shitter" and said that if a job which C and his partner had been unable to complete had been assigned to an able bodied team then the job would have been completed. C overhead this conversation because Mr Read "pocket dialled" him.*

      Respondent: R denies (1) that Mr Read had any such conversation; (2) that Mr Read "pocket dialled" C.

   b. *On or around 27 January 2017 Mr Glenton had a conversation with C in which C explained the restrictions caused by his disability. After C's explanation was complete, Mr Glenton said "so you are not a complete hand bag then".*

      Respondent: R accepts Mr Glenton said these or similar words to C on that date.

2. *Was the conduct related to C's protected characteristic of disability?*

3. *Did the conduct have the effect of violating the C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?*

   In considering whether the conduct had that effect, the Tribunal will take into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Remedy

Remedy will (if relevant) be dealt with separately after issues relating to liability have been determined.

The Law

Time limits

13. Section 123 of the Equality Act 2010 ("the 2010 Act") provides where relevant as follows:

> ***123 Time limits***
>
> *(1) Subject to section 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.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--*
>
> > *(a) when P does an act inconsistent with doing it, or*
> > *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

14. There is a "continuing act" when the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686). The focus of the Tribunal should be on the substance of the complaint not on whether there was a discriminatory policy, rule, practice, scheme or regime – these are just examples given in the authorities of when an act extends over a period of time.

15. The discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. It entitles the Tribunal to take into account anything which it judges to be relevant.

16. The discretion given to the Tribunal is as wide as that under section 33 of Limitation Act 1980: a court is required to consider 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:

    16.1. the length of and reasons for the delay;

    16.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

16.3. the extent to which the party sued had co-operated with any requests for information;

16.4. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

16.5. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

(See British Coal Corpn v Keeble [1997] IRLR 336, at para 8).

17. However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case.

18. Overall, although the discretion is wide there is no presumption that discretion should be used to extend time – time limits are exercised strictly.

The substantive claims

19. Section 39 of the 2010 Act ("Employees and Applicants") provides where relevant

(2) An employer (A) must not discriminate against an employee of A's (B)--

…

(d) by subjecting B to any other detriment…

... (4) An employer (A) must not victimise an employee of A's (B)--

…

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

20. Section 26 ("Harassment") of the 2010 Act provides where relevant:

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

… (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--

…

disability;

21. Section 27 ("Victimisation") of the 2010 Act provides where relevant:

(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.

22. Section 20 ("Duty to make adjustments") of the 2010 Act provides where relevant:

(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.

23. Section 40 ("Employees and applicants: harassment") of the 2010 Act provides where relevant:

(1) An employer (A) must not, in relation to employment by A, harass a person (b) –
(a) Who is an employees of A's;…

24. Section 136 ("Burden of proof") of the 2010 Act provides where relevant:

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;

25. In Hewage v Grampion Health Board [2012] UKSC 37 the principles set out in Barton v Investec Securities Ltd [2003] ICR in relation to the correct approach to the so-called "shifting burden of proof", now set out in section 136 of the 2010 Act, as endorsed by the Court of Appeal in Igen Ltd v Wong [2005] ICR 931, were approved by the Supreme Court.

Findings of Fact

26. The Tribunal is bound to be selective in its references to the evidence when explaining the reasons for its findings of fact. However, it wishes to emphasise that it considered all the evidence in the round when reaching its conclusions.

27. The Claimant suffers from muscular dystrophy. The Respondent accepts that this is the case and that consequently the Claimant had a disability for the purposes of the 2010 Act at all relevant times.

28. The Claimant has been employed by the Respondent since 1988. He is a fibre optic jointer. This is a skilled job.

29. The Claimant previously brought a claim of disability discrimination against the Respondent. This was heard in the Leicester Employment Tribunal on 3 and 4 December 2013. The Claimant was successful in this claim ("the 2013 Claim") with the Tribunal's decision being announced at the end of the hearing. The written reasons sent to the parties on 6 February 2014 following the hearing of that claim recorded that one of the key issues in that claim was "whether or not the Respondent's decision to remove him from a field-based role was a proportionate means of achieving a legitimate aim" (page 35). The Tribunal hearing that claim concluded that it was not.

30. The Claimant had been removed from his field based role in November 2012 and this had been the background to the 2013 Claim. Until the hearing of that claim he was given a role as a storeman but in fact spent much of 2013 "off sick" with a depressive illness suffered "as a consequence of his removal from the field" (para 3.23 of the written reasons given following the hearing of the 2013 Claim).

<u>The 2014 trip incident</u>

31. Following the success of the 2013 Claim, the Claimant subsequently returned to work in a field-based role as a fibre optic jointer. However, he did not return to work immediately. His return took place following a process managed by Mr Read involving "Rehabworks" which involved a review of the Claimant's physical capabilities as mapped against the individual tasks that the Claimant's role involved. It is plain that Mr Read took the view that the Claimant could not perform much of his role. He commented in his witness statement that "the report showed that Paul would have physical difficulty with a large proportion of the tasks that his role involved" (paragraph 6 of his witness statement) and, also "My rough estimate would be that Paul was able to complete approximately 50% of the work that the other engineers were doing on a daily basis" (paragraph 8).

32. The Claimant returned to work on the basis that he would be part of a two man team with Mr Hobson. Mr Hobson would perform the aspects of the jobs which they did together which the Claimant was unable to perform. This was the arrangement which had existed prior to the Claimant being removed from his field-based role at the end of 2012.

33. Shortly following his return to a field based role the Claimant tripped whilst attending a job. It was common ground between the Claimant and the Respondent at the hearing that this incident meant that it was necessary for a "near miss investigation report" to be completed. Such a report was completed by Mr Read (pages 78-80). There was nothing inappropriate about Mr Read being the person who completed the "near miss investigation report". He was the Claimant's manager and had been present when the near miss had occurred (albeit he had not seen it: the Claimant had been walking behind him when he stumbled).

34. The Claimant did, however, take exception to the contents of part 4 of the near miss report which read as follows (page 78):

    4. What were the immediate and root causes of the incident?
    Not picking his foot up high enough to navigate over a raised curb edge, thus tripping over said item. Paul has Musculor Distrophy [sic] which weakens his leg muscles and could have been a factor in not raising his legs high enough.

35. The Claimant took the view that by referring to his muscular dystrophy Mr Read was speculating impermissibly. The Claimant noted that the notes concerning how the "near miss investigation report" should be completed (page 79) read as follows:

1. Describe what happened
This should contain a description of the incident based on your enquiries taking into account weather and ground conditions. It should be factual and avoid comment.

36. However the Tribunal notes that section 4 of the same notes states:

4. What were the immediate and root causes of the incident
You should concentrate on identifying the underlying cause(s) of the incident so that any organisational or procedural deficiencies can be remedied.

37. The Tribunal notes that section 1 of the near miss investigation report ("Describe what happened") (page 78) "should be factual and avoid comment". The Tribunal also notes that the written reasons given following the hearing of the 2013 Claim find that the muscles in the upper parts of his legs are affected by the muscular dystrophy from which he suffers.

The disciplinary warning in June 2016

38. Mr Rickatson gave evidence which the Tribunal accepted as true that during the first half of 2015 he and other General Managers were considering how the number of jobs completed per week in the part of the Respondent's business in which the Claimant worked could be increased. One issue relevant to such consideration was this. If an engineer was unable to complete a job on a particular day they would "further" it, i.e. return it to "Control" to be done by someone else at a later date. The Respondent took the view that the way in which performance was measured encouraged engineers to "further" jobs rather than to retain them and to try and sort out the problem that had arisen. The Respondent therefore changed its operating methods so that engineers were encouraged not to "further" jobs. This resulted in an increase in the number of weekly jobs completed per week. The Tribunal finds that this change was briefed out to engineers including the Claimant by October 2015 and that he was aware of it.

39. As part of this change the Respondent encouraged real-time communication about problems that had arisen on a particular job between managers and engineers and also established a "Mission Control" that engineers could make contact with. In both cases the purpose of the real-time communication was to see if it was possible to resolve the problem that had arisen so that the job could be completed and not "furthered".

40. In October 2015 Mr Read raised the need for the Claimant and Mr Hobson to make contact with him if they believed a job would be furthered so that options could be discussed. Following this, Mr Read had concerns about the Claimant's rate of "furthers". On 28 January 2016 he emailed him stating (page 82):

> *Paul*
> *As discussed at your 1-1 yesterday, please find attached you [sic] 1-1 notes and the actions below to focus on for the coming month?*
> - *Paul has the highest further rate in the Team for the last 4 week period. We agreed a way of working to get these to under 45% in 4 week time.*

41. The Tribunal finds that Mr Read had a genuine and well-founded concern about the Claimant's rate of "furthers". There was then an incident on 18 February 2016 when Mr Read considered that the Claimant and Mr Hobson had furthered a job without calling him. Following this, on 22 February 2016 Mr Read emailed the Claimant and Mr Hobson (page 86) as follows:

Paul/Gary

With regard to the discussion we had earlier this afternoon;

In your 4 week plan back in October 2015 around furthers, I made comment about the need for you to ring me straight away, if you believe that a job will be furthered /completed, so we can discuss the options available to us. On the bunker day on Thursday the 18th Feb last week, you had a job that could not complete due to the Tie Cable missing and you had not rang me in real time to discuss this with me. Although you rang control to update them, I need a call also in real time to discuss the Further/Issue. This is a reasonable request and failure to do this in future, may result in formal disciplinary action.

Please make sure you do this on every job that you expect to further/incomplete in real time, in future?

42. There was then a further incident relating to "Furthers" on 18 April 2016. On that date the Claimant and Mr Hobson had "furthered" two jobs in the morning without first speaking to Mr Read.

43. It is important to note that in his witness statement and oral evidence the Claimant's argument in relation to this issue was essentially as follows. The Claimant said that he had tried to telephone Mr Read on several occasions and had been unable to get through. The Claimant said he had then contacted Jimmy Fullan, who worked in "Control" (i.e. he was the person who allocated jobs on the day in question, but he was not involved in the resolution of problems that were preventing jobs from being completed – "Control" and "Mission Control" were two different things). The Claimant said that Mr Fullan had said that he would inform Mr Read about what had happened as he was due to speak to him shortly. The Claimant argued that Mr Read and Mr Wright had never contacted Mr Fullan to see whether what the Claimant was saying was true and that, if they had, the disciplinary case against him would not have proceeded.

44. The Tribunal finds, however, that the Claimant did not raise the issue of him having tried but failed to telephone Mr Read during the internal proceedings. This is for the following reasons:

    44.1. There is no record of him having raised this issue when he was interviewed by Mr Read at the investigative meeting (pages 92 to 93);
    44.2. There is no record of him having raised the issue when he was interviewed by Mr Wright at the disciplinary hearing (pages 107A to 107F);
    44.3. In the appeal hearing with Mr Rickatson (pages 116A to 116N), the Claimant is recorded in the transcript as saying "… like I've said all along, I'll hold my hand up yeah I didn't ring Wayne…".

45. The Tribunal finds that this significant inconsistency in the Claimant's evidence in relation to whether or not he raised the fact that he had <u>tried</u> to call Mr Read as being a matter which does some damage to his credibility.

46. Following the incident on 18 April 2016 Mr Read commenced a disciplinary investigation. In the summary of the report which he prepared (page 95), Mr Read found that on 18th April the Claimant had furthered a job without first calling Mr Read and despite what had been said to him in the email of 22 February 2016 and recommended that the case be passed to his manager for consideration under the Respondent's misconduct procedure. The same action was taken in relation to Mr Hobson.

47. The Claimant attended a disciplinary hearing with Mr Wright on 21 June 2016. Following that hearing Mr Wright issued the Claimant with a written warning (page 108) on the grounds that he had failed "to follow the correct company procedure" and had failed "to follow a reasonable request" by furthering jobs on 18 April 2016 "without contacting your manager in real time, despite being requested to follow this process, on a number of previous occasions".

48. The Claimant appealed the written warning and Mr Rickatson heard the appeal. His decision was to remove the written warning (page 133). In his conclusion he found that the Claimant had indeed failed to follow the appropriate procedure before furthering a job. He considered matters raised by the Claimant and stated:

> *Whilst I still would have expected [the Claimant] to contact [Mr Read], as per the standard process, I have decided in this instance to draw a line in the sand and remove the warning. I expect moving forward that the standard process is adhered to at all times, and suggest that a local discussion is the appropriate action following the removal of the warning.*

49. In his witness statement and oral evidence Mr Rickatson gave evidence to the effect that he had removed the warning because he could not be sure that the rationale for the requirement to call managers or "Mission Control" in live time had been adequately explained. The Tribunal found Mr Rickatson to be a credible witness: his evidence was measured and consistent throughout. The Tribunal accepted Mr Rickatson's explanation for why he had acted as he did as true.

50. The Claimant argued that he had been treated inconsistently with other employees. Although Mr Hobson had also received a warning in June 2016, he said other employees had behaved similarly and not been subjected to written warnings. The Tribunal finds:

    50.1. The Claimant's evidence in relation to this issue to the Tribunal was vague. He referred to "other engineers" in paragraph 10 of his witness statement without naming them or providing details and his oral evidence was the same. The Claim Form was similarly lacking in detail.

    50.2. The Claimant was vague in the same way when interviewed by Mr Wright referring to when "other people do it" but provided no further details.

    50.3. The Claimant did provide a name to Mr Rickatson – John Simpson – but not a date. Mr Rickatson was provided with a date by Mr Hobson. The Tribunal finds that Mr Rickatson did as he said in his evidence seek to investigate but was unable to identify an occasion when Mr Simpson had done what the Claimant alleged.

51. In light of these findings, the Tribunal finds that the Claimant was not treated less favourably than other comparable employees by being given the warning in June 2016.

52. The Tribunal did, however, have some concerns about the evidence of Mr Wright. At a number of points in his witness statement Mr Wright sought to paint a negative picture of the Claimant's character by reference to matters which were not relevant or were at best only marginally relevant to the Claim. Examples of this can be found in paragraphs 5, 6 and 10 of his witness statement. Then, in paragraph 16, when describing the disciplinary hearing on 21 June 2016, he stated:

> *I would comment that, at the meeting, Paul was very angry and aggressive. He seemed very confrontational and I would say he was trying to be overpowering.*

53. The Claimant contested this description of his behaviour and asked the Tribunal to listen to the relevant recording. Normally, the Tribunal would have only agreed to listen to the recording if it was argued that the transcript of it was inaccurate, and this was not argued. However the Tribunal accepted the Claimant's argument that the transcript could not convey fully whether the Claimant had acted aggressively or angrily. Further, having read the transcript, the Tribunal could not see how the words that the Claimant had spoken could be said to be angry, aggressive or confrontational. The Tribunal therefore decided to listen to the recording of the disciplinary hearing, which was in any event short.

54. The recording did not suggest that the Claimant had been aggressive, angry or confrontational (although he did sound slightly frustrated at one or two points during the recording). When how the Claimant sounded during the meeting was taken together with the words used, the Tribunal could see no basis for him being described as "very angry and aggressive" or confrontational. Indeed at one point he had apologised for interrupting Mr Wright. Mr Wright suggested in his evidence that this had been conveyed by the Claimant gesticulating in the meeting. However, the Tribunal did not accept that it was plausible that the Claimant's body language could be so divorced both from the language that he used or the way in which he spoke. Consequently the Tribunal finds that the Claimant was not aggressive, angry or confrontational in the disciplinary hearing with Mr Wright and the fact that Mr Wright described him as such does some damage to his credibility.

The "Pocket Dial" incident on 26 May 2016

55. On 26 May 2016 the Claimant and Mr Hobson attended a job at a police station. At 4pm the Claimant telephoned Mr Read to inform him that they would be unable to complete the job because the desk sergeant had told them that he was finishing work at 4pm and nobody else could give them access to the compound where they were working.

56. The Claimant alleges that, just after he had spoken to Mr Read, he received a phone call from Mr Read. Mr Read did not speak to the Claimant when he answered the phone. Rather the Claimant heard Mr Read speaking to a third person. It became clear to the Claimant that Mr Read had not intended to call him. The Claimant alleges that he heard Mr Read describing the Claimant as a "bull shitter" and stating that if he rang the police station he would be able to gain access. The Claimant states that Mr Read also said that if it had been an "able-bodied" team carrying out the job it would have been completed. The Claimant contended that after sending Mr Read a photograph of the opening hours of the police station (to prove that it closed at 4pm) he phoned Mr Read because he felt angry. Mr Read stated that he was sorry that the Claimant had heard what he had heard and that if Mr Read pocket dialed him again he should hang up.

57. Mr Read denied that he had pocket dialed the Claimant or that he had said what the Claimant alleged he had said about him.

58. The Tribunal preferred the evidence of the Claimant to that of Mr Read. The Tribunal finds that Mr Read did "pocket dial" the Claimant and that the Claimant did then hear Mr Read making the comments set out in paragraph 56 above. The reasons for the Tribunal preferring the evidence of the Claimant to that of Mr Read are as follows:

    58.1. Mr Read accepted that the Claimant had sent him a photograph of the police station's opening hours. There was no requirement for the Claimant to send such a photograph. The most likely explanation for the Claimant sending the photograph was that he was angry about what he had heard Mr Read say and wanted to send him proof that he had not lied to him about the reason for it not being possible to complete the job;

58.2. The Claimant's account was supported by Mr Hobson. He gave evidence in his witness statement and in his oral evidence that he had been able to hear what had been said because the Claimant had put the call on "loud speaker". The Tribunal considered Mr Hobson to be a credible witness for the following reasons:

58.2.1. Mr Hobson remains an employee of the Respondent. In the Tribunal's collective experience, employees in Mr Hobson's position are unlikely to fabricate an account of this nature;

58.2.2. Mr Hobson was a measured witness when cross-examined who accepted the possible limitations of his memory. When pressed about whether the Claimant had indeed called Mr Read on 18 April 2016 he conceded that although he thought he had it went back "a long time" and was "hard to remember". By contrast, he was in no doubt whatsoever about the "pocket dial" call;

58.2.3. Mr Hobson made clear that he had only been prepared to give evidence in his witness statement about matters that he had personally witnessed. The impression he gave was that of an employee who would far rather not be giving evidence against his employer.

58.3. The Respondent did not call as witnesses the other employees who were present when Mr Read was alleged to have pocket dialed the Claimant, notwithstanding that they had been interviewed when a grievance he had subsequently raised about the "pocket dial" had been investigated.

<u>The "hand bag" comment on 27 January 2017</u>

59. The Respondent accepted that on 27 January 2017 Mr Glenton had said to the Claimant that "he was not a complete handbag then".

60. The Tribunal makes the following findings of fact about the circumstances in which the comment was made. The conversation between Mr Glenton and the Claimant in which this comment was made took place around the time Mr Glenton became the manager of the Claimant. The conversation was an informal one: Mr Glenton had turned up at a particular place of work in the area he was to manage in the hope of speaking to some of the engineers.

61. Mr Glenton introduced himself to the Claimant. The Claimant explained to him that he had a physical disability and that he had been badly treated by previous managers. The Claimant explained that he worked with Mr Hobson who would do the more manual parts of the role that the Claimant was unable to do. There was also some discussion of the parts of the role that the Claimant could do.

62. This was the context for the "handbag" comment: Mr Glenton was expressing in an ill-judged manner that from what the Claimant was saying it was clear that there were substantial parts of the role that the Claimant could perform notwithstanding his disability.

63. The Claimant did not raise this incident in the grievance he began in May 2017 (page 205). The first time he raised the issue was at the hearing of that grievance on 1 September 2017 (page 229Q) when he said:

…on the initial meeting I had with Clive Glenson [sic] at Lulworth [sic] Exchange when I sat explain to him my restrictions and his reply to me was well you're not a complete handbag then. Which to be quite honest, when he said it I took it as a

bit of a, well I found it a little bit light hearted for want of a better expression, I found it a little bit wrong for a manager to come out with that to a person with a disability but when I actually told my wife what he'd said she was actually appalled, that a manager could actually say that to somebody with a disability and sort of wrap it up in that context that you're not a complete handbag.

64. The Tribunal finds that the comment did not immediately upset the Claimant: he thought it was a slightly unfortunate way of summarising the conversation that he and Mr Glenton had just had, and he was also inclined to give the new manager the benefit of the doubt. He did not wish to immediately become involved in conflict with him. However the Tribunal finds that when the Claimant reflected on the comment and discussed it with his wife he was aggrieved by it but that this was above all because he was dissatisfied with other aspects of the Respondent's treatment of him.

The 2017 disciplinary investigation

65. On 16 February 2017 the Claimant and Mr Hobson attended a job. After spending 9 minutes on site, the Claimant "furthered" the job because they could not find the cable that they were meant to work on.

66. The Claimant spoke to Mr Glenton who told them to move on to the next job. He said he would speak to Mission Control and investigate the problem that had arisen in relation to the first job. The Claimant and Mr Hobson moved on to the second job. Having investigated, Mr Glenton concluded that the cable that the Claimant and Mr Hobson had been unable to find was present at the site of the first job. He asked the Claimant and Mr Glenton to return to it. He also travelled to the site of the first job himself.

67. Mr Glenton's evidence (to which we return below) was that when he arrived at the site of the first job various factors made him suspect that the Claimant and Mr Hobson had not in fact carried out a proper search to find the cable before furthering the job.

68. Mr Glenton therefore carried out investigative interviews in relation to that issue with the Claimant (page 186A) and Mr Hobson (page 298) on 21 February 2017. At the end of his investigation he stated that "a proper search/investigation was not undertaken prior to furthering the job".

69. Mr West conducted a disciplinary hearing in relation to this allegation on 8 May 2017 (page 202A). He reached a decision sent to the Claimant on 10 May 2017 (page 203) in which he said "I cannot be satisfied that the charge is proven and, therefore, I have decided not to take any formal disciplinary action against you".

70. The Claimant's allegation is that the disciplinary process beginning with the investigation and ending with the disciplinary decision was carried out at the instigation of Mr Wright because the Claimant had brought the 2013 Claim. The Tribunal makes the following findings of fact relevant to that issue.

71. The Tribunal finds that when Mr Glenton arrived at the site of the first job on 16 February 2017 there were various matters which raised a genuine suspicion in his mind that the Claimant and Mr Hobson had not carried out an adequate investigation when they had first attended the site. The Tribunal finds that when Mr Glenton had called the Claimant and Mr Hobson to ask them to return to the first site both they and he were around two miles away from it. Mr Glenton then drove two miles and walked a short distance to the first site, arriving perhaps 20 minutes or so after he had made the call. Mr Glenton found the Claimant and Mr Hobson to have already found the cable and to be working on it. The Tribunal finds that, in light of his

professional experience, it genuinely appeared to Mr Glenton at the time that the Claimant and Mr Hobson could not have properly investigated the job the first time they had attended: if it had been possible for them to find the cable so quickly on the second visit, why had they been unable to find it on the first visit?

72. The Tribunal finds that in light of this Mr Glenton decided to investigate. He sought tracker data. This data heightened his suspicions because it (wrongly as it turned out) suggested that Mr Hobson had not attended the site at all when the Claimant had first been there.

73. The investigative meetings then took place. In his meeting, the Claimant explained that they had not been able to find the relevant cable the first time they had visited the site because a car had been parked on top of the box where the cable was located. Mr Hobson, on the other hand, made no reference to a car being parked on top of the box containing the cable.

74. Mr Glenton, after obtaining advice from HR, sought to deal with a gap in the tracker data which meant that Mr Hobson's whereabouts during the relevant period were still not clear by having the Gas Detection Unit ("GDU") of the Claimant and of Mr Hobson examined. This showed that Mr Hobson had operated his GDU in the period that he and the Claimant had attended the site for the first time.

75. The Tribunal finds that, taking the evidence in the round, Mr Glenton had an honest belief when he recommended that the matter be dealt with as a disciplinary matter that there was a case to answer in relation to whether the Claimant and Mr Hobson had conducted a sufficient search when they had attended the site for the first time. That had been his honest impression when he had first attended the site and that impression had been compounded by the tracking data and the fact that Mr Hobson had not raised the matter of a car being parked over the cable they were meant to be working on.

76. The Claimant alleges that Mr Glenton told him that the matter would never have progressed but for the fact that Mr Wright had been in "Mission Control" on the date of the incident. Mr Glenton denied that he had made this comment. The Tribunal prefers the evidence of Mr Glenton in this respect and finds that the comment was not made for the following reasons:

    76.1. Having had the benefit of hearing Mr Glenton give evidence over several hours, the Tribunal found him to be a largely consistent and credible witness. A good example of this was the fact that he did not seek to deny the "handbag" comment and readily accepted that he should not have made it;

    76.2. On the other hand the Claimant had for the reasons set out in paragraph 45 above damaged his credibility by inconsistencies in his evidence.

77. Mr West decided that the case was "weak on the evidence" (paragraph 11 of his witness statement) and so did not uphold the charge against the Claimant or Mr Hobson.

78. One comment was attributed to Mr West in relation to which the Tribunal should make specific findings. This was that at the end of the disciplinary hearing, after the recording device had been turned off, he said "you know where you need to take this, don't you?". Mr West accepted in his oral evidence that he had said this. The Tribunal finds that this was a reference to various allegations which were not directly related to the disciplinary charge which the Claimant had raised during the disciplinary hearing. The Tribunal finds that Mr West was indicating that if the Claimant wished to pursue those issues then he should do so by raising a grievance (which is indeed what he did).

The reasonable adjustment issue

79. The Claimant argued that the Respondent applied a PCP comprising a performance management metric which identified how many man hours particular categories of jobs should take. The Claimant argued that this PCP put him at a substantial disadvantage and that a reasonable adjustment was to allow him 20% longer to complete any given job. The Claimant argued that such an adjustment had been in place but was discontinued from the end of 2016.

80. The Tribunal finds that such a PCP had been in place until sometime in late 2015. However the Tribunal finds that such a PCP was discontinued as part of the changes in relation to which Mr Rickatson gave evidence (see paragraph 38 above). As such there was no such PCP by the end of 2016.

The grievances and other matters

81. The Claimant presented two grievances during the period 2014 to 2017 and it is necessary to make brief findings in relation to them.

82. The first grievance was presented on 22 August 2016 (page 117). It related to the "pocket dial" phone call, the 2014 trip incident, an incident at a team meeting and the Claimant's 2016 annual review. There was a grievance hearing on 1 November 2016. Maria Fletcher rejected the grievance by a letter dated 21 December 2016 (page 164).

83. The second grievance was presented on 26 May 2017 (page 205). It related to the disciplinary warning in 2016 and the disciplinary investigation in 2017. There was a grievance hearing on 1 September 2017 during the course of which the "handbag" comment was also raised. Mr Jeffrey rejected the grievance by a letter dated 25 September 2017.

84. The Tribunals finds that the Claimant did not appeal the outcome of either grievance because he had little faith in the willingness of the Respondent to uphold grievances against managers.

85. The Claim was not presented within three months of most of the events complained of. The Tribunal makes the following findings in relation to the reasons for this. The Claimant is committed to remaining in active employment as a field engineer with the Respondent. This is because he obtains satisfaction from that role and, most importantly, he believes that keeping it assists him in fighting the effects on him of muscular dystrophy because it requires him to be active. As such, whilst the Claimant is very willing to assert the rights that he as a disabled person has under the 2010 Act, by raising matters with managers, appealing disciplinary warnings and bringing grievances, he is reluctant to pursue Employment Tribunal proceedings because of the importance he gives to his own continuing employment. This is unsurprising: self-evidently, bringing an Employment Tribunal claim against one's employer complicates the working relationship in a negative way and often results in its terminating even when the employer acts entirely properly. In light of these matters, the Claimant was a reluctant litigant, prioritising the maintenance of the employment relationship, and only deciding to go down the Tribunal path again as a result of the 2017 disciplinary process which he regarded as the culmination of a series of incidents which he believed related either to his disability (the harassment and reasonable adjustment claims) or to the fact of the 2013 Claim (the victimisation claims).

86. The Tribunal notes that disabled people are at a substantial disadvantage when seeking new employment. Whatever the protections offered by the 2010 Act, the

Claimant's disability would inevitably prejudice him very substantially in the labour market. It is therefore all the more understandable that he would prioritise maintaining the employment relationship over pursuing Employment Tribunal claims against the Respondent. His position was very different to that of an employee whose employment had terminated.

Submissions

87. Mrs Umpelby provided written submissions running to 67 paragraphs which she supplemented with brief oral submissions. The Tribunal does not set out her submissions in detail here but they included the following points.

88. So far as the issue of time was concerned, Mrs Umpelby submitted that:

    88.1. All the allegations in the Claim were out of time except for the victimisation allegation arising from the furthering of a job on 16 February 2017;
    88.2. There was no "continuing act". The various allegations were made against a variety of managers over a prolonged period of time with long gaps between them;
    88.3. Taking into account the factors set out in British Coal Corporation v Keeble it would not be just and equitable to extend time.

89. So far as the substantive issues were concerned, Mrs Umpelby submitted that:

    89.1. The near miss investigation report was a factually accurate report required by the Respondent's procedures. There was no detriment to the Claimant and, in any event, the making of the report was unrelated to the Claimant's previous tribunal claim;
    89.2. The written warning resulted from appropriate application of the Respondent's disciplinary procedure and was unrelated to the Claimant's previous tribunal claim. This was reflected in the fact that the Claimant's appeal against it was successful;
    89.3. The second disciplinary investigation was appropriate in all the circumstances and, again, was unrelated to the Claimant's previous tribunal claim. There was in any event no detriment as the manager who heard the disciplinary charges against the Claimant imposed no penalty;
    89.4. The PCP which the Claimant alleged was applied to him was not in fact applied. Further, if it was, it did not disadvantage him. The reality was that the Respondent made a variety of adjustments to enable the Claimant to continue in his job;
    89.5. The "pocket dial" incident had simply not occurred;
    89.6. The "handbag" comment had occurred. However all that had happened was that Mr Glenton had used "a clumsy expression in an attempt to agree with the Claimant that he was a valuable and fully contributing member of the team". The Claimant's reaction to the comments at that time and subsequently made it clear that in fact the conduct was not "unwanted".

90. Mr D Tribe provided brief written submissions on behalf of his father, the Claimant. He produced these only at the beginning of his oral submissions on the fourth day of the hearing, and not at the beginning of the day. The Tribunal has no doubt that this was simply an oversight on his part. However, because the Tribunal had ordered that he provide them to Mrs Umpelby at the beginning of the day, given that he had received her written submissions, the Tribunal did give Mrs Umpelby an opportunity to read and make brief further oral submissions in relation to the Claimant's written submissions before Mr D Tribe made his oral submissions on behalf of the Claimant.

91. The Tribunal does not set out Mr D Tribe's written submissions in detail here but they included the following points:

91.1. So far as the issue of time limits was concerned, there was a continuing act: events had been driven by Mr Peter Wright and his "clear distaste" for the Claimant;

91.2. The near miss investigation report speculated impermissibly about the effects of the Claimant's disability which Mr Read did not understand;

91.3. The written warning was given without Mr Fullan's account being obtained and the Claimant was held to a higher standard than his peers. It was motivated by Mr Wright's distaste for the Claimant;

91.4. The disciplinary investigation was unnecessary. There was an obvious explanation for why the Claimant and Mr Hobson had been unable to find the cable when they first attended the site. Mr Glenton seemed set on escalating the matter notwithstanding this and the investigation itself evolved to focus on matters other than those initially considered. The involvement of Mr Wright in the case was suspect and the Claimant was cleared of all charges once the matter left Mr Wright's sphere of influence and was heard by Mr West;

91.5. The pocket dial incident had happened and was a clear act of harassment;

91.6. The handbag comment was not denied. The Claimant had been upset by it but had not raised the matter immediately because he was keen to foster a good relationship with his new manager, Mr Glenton, who had made the comment.

Conclusions

92. The Tribunal has unanimously reached the following conclusions in relation to the list of issues agreed at the beginning of the hearing.

Time Limit issues

The claim form was presented on 21 September 2017 after C contacted ACAS on 9 August 2017 and the EC certificate issued on 22 August 2017. Accordingly, any act or omission which took place before 10 May 2017 is potentially out of time, so that the tribunal may not have jurisdiction.

Does C prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

93. The Tribunal has concluded that the various matters complained of were not conduct extending over a period of time which accordingly is to be treated as done at the end of that period.

94. The Tribunal has so concluded because it finds that the various alleged incidents of discrimination were not linked to one another so as to be evidence of a continuing discriminatory state of affairs. In short, there was no ongoing situation or continuing state of affairs in which the Claimant was treated unfavourably or less favourably.

95. In reaching this conclusion, the Tribunal has taken into account its analysis of the facts relevant to the various claims as set out above but, also, the fact that different employees of the Respondent have been involved in ways which point in different directions: Mr Wright awarded a disciplinary penalty, Mr Rickatson, a more senior employee, removed it. Mr Glenton pursued a disciplinary investigation, Mr West, a more senior employee, decided that no disciplinary sanction should be imposed.

Was any complaint presented within such other period as the ET considers just and equitable?

96. So far as the Claim related to any cause of action arising before 10 May 2017, it was presented outside the primary time limit. The 2017 disciplinary proceedings did not

conclude until 10 May 2017 so the victimisation claim relating to those proceedings was presented in time. So far as the other claims were concerned:

96.1. The 2014 trip incident took place on 10 April 2014 and so the claim relating to it was presented 3 years and 1 month out of time;
96.2. The "pocket dial call" took place on 26 May 2016 and so the claim relating to it was presented 11.5 months out of time;
96.3. The 2016 written warning was given on 28 June 2016 and so the claim relating to it was presented 10.5 months out of time;
96.4. The "handbag" comment was made on 27 January 2017 and so the claim relating to it was presented 3.5 months out of time;
96.5. The cause of action for the reasonable adjustment claim would have arisen sometime in early 2016 and so was more than a year out of time.

97. Considering the other factors identified by section 33 of the Limitation Act 1980, the Tribunal has already set out at paragraph 85 and 86 above the Claimant's reasons for delaying in presenting the Claim. So far as the extent to which the cogency of the evidence was likely to have been affected by the delay, the Tribunal concludes that it was not affected to any significant extent in relation to the events that took place in 2016 and 2017. However the Tribunal finds that the 3 year period between the 2014 trip incident and the presentation of the Claim is likely to have affected recollections substantially.

98. The extent to which the party sued cooperated with any request for information is not a relevant factor in this case. The Claimant was aware of his rights throughout the period in question and his knowledge of the facts giving rise to each of the causes of action was contemporaneous. This is a factor which counts against him. The question of steps taken to obtain professional advice is not relevant given that he was aware of his legal rights and acted for himself. However he had experience of the Tribunal process as a result of the 2013 Claim. He had also had the benefit of trade union representation during the internal processes. These are factors which count against him.

99. Turning to the issue of prejudice, the Tribunal concludes that beyond having to defend the Claim the Respondent will suffer no prejudice in relation to the causes of action arising in 2016 and 2017. The Respondent put forward no case that relevant documentary evidence had not been retained or that memories had dimmed to the extent that it was prejudiced. However the Tribunal concludes that the passage of time does lead to some prejudice in relation to the cause of action arising two years earlier in 2014. The Claimant, on the other hand, will suffer some prejudice in particular if the Tribunal finds that it has no jurisdiction to hear his complaints given that he has no other remedy.

100. Overall, notwithstanding the Claimant's awareness at all relevant times of his legal rights and the relevant time limits, the Tribunal concludes that he had a good reason as set out in paragraph 85 and 86 for not presenting the claims arising in 2016 and 2017 before the expiry of the relevant three month time limits and for delaying presenting them until when he did in 2017. Further, the Respondent suffers no prejudice in having to defend those claims. In these circumstances the Tribunal has concluded that it is just and equitable to extend time and so it has jurisdiction to hear all the Claimant's claims except that relating to the 2014 trip incident. In relation to that claim the Tribunal has concluded that the Respondent has suffered prejudice by virtue of the length of the period of time involved. That is why it has concluded it would not be just and equitable to extend time in relation to it.

Victimisation

It is agreed that C did a protected act for the purposes of section 27 of the Equality Act 2010 by bringing an employment tribunal claim in 2013 (case no. 1900505/2013) ("the Protected Act").

Issues to be determined:

1. **Did R subject C to a detriment because he had done the Protected Act by Mr Read making a near miss investigation report following an incident on 10 April 2014 which speculated that the incident had been caused or contributed to by C's disability?**

2. **Did R subject C to a detriment because he had done the Protected Act by giving C a written warning in a letter dated 27 June 2016?**

3. **Did R subject C to a detriment because he had done the Protected Act by carrying out a disciplinary investigation and conducting a disciplinary hearing after he had "furthered" a job on 16 February 2017?**

101. The Tribunal concluded that the Claimant had proved on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had subjected him to detriments because he had done the Protected Act.

102. Such facts included:

102.1. The reference to the Claimant's disability in the near miss investigation report;
102.2. The way that Mr Wright had sought to blacken the Claimant's name when he gave evidence;
102.3. The fact that the written warning given in June 2016 had been removed on appeal;
102.4. The fact that the disciplinary investigation, though prolonged, had resulted in no disciplinary sanction being awarded against the Claimant.

103. However the Tribunal has also concluded that the Respondent has proved on the balance of probabilities that the treatment was in no sense whatsoever on the grounds that the Claimant had carried out the Protected Act. The Tribunal reached this conclusion for the following reasons in relation to each of the alleged acts of victimisation.

The 2014 trip incident

104. The Tribunal has concluded that it has no jurisdiction to hear this claim. However, if it had concluded that it had jurisdiction, it would have reached the following conclusions.

105. The Tribunal has found above that it was common ground that it was necessary for the "near miss investigation report" to be completed following the trip incident in April 2014. There is as such no suggestion by the Claimant that completing the "near miss investigation report" was an act of victimisation. The question is whether the way in which section 4 was completed amounted to an act of victimisation.

106. The Tribunal rejects the Claimant's contention that the way in which the Respondent (i.e. Mr Read) completed section 4 of the report was inconsistent with the notes attached to it. The notes say that comment should be avoided when completing section 1 ("Describe what happened") not when completing section 4 ("What were the immediate and root causes of the incident?").

107. The question for the Tribunal would have been why Mr Read referred to the Claimant's muscular dystrophy in section 4. The Tribunal notes that any description of the immediate and root causes of an incident will involve a degree of theorising after relevant facts have been identified. In these circumstances, the Tribunal would have therefore concluded that the reason Mr Read completed the "near miss investigation report" as he did was that he honestly believed as a result of the document produced following the Rehabworks review and his own observation of the Claimant at work that the Claimant's muscular dystrophy might have been a factor in the Claimant tripping. The Tribunal would have concluded that the fact that the Claimant had previously brought the 2013 Claim played no part in the way Mr Read completed the "near miss investigation report".

The written warning in June 2016

108. In light of its findings of fact above, the Tribunal concludes that the reason that Mr Read commenced disciplinary proceedings against the Claimant (and Mr Hobson) in April 2016 was that he considered that they had furthered two jobs without following the procedure that they were meant to follow. This was against a background of Mr Read having outlined the need to follow the procedure on several occasions, including in writing. It was also against a background of the Respondent generally trying to reduce the number of jobs that were furthered.

109. The Tribunal concludes that Mr Wright gave the Claimant a written warning because he formed the view that the Claimant had indeed failed to follow the procedure he was meant to follow. The Tribunal concludes that Mr Wright was clearly entitled to reach that view – indeed, it would have been strange if he had not, given that at the time the Claimant did not argue that he had tried to contact Mr Read before furthering the jobs.

110. The Tribunal concludes in light of its findings above that when the Claimant and Mr Hobson were given their written warnings they were not treated more harshly than other employees.

111. The Tribunal concludes that when Mr Rickatson upheld the appeal he was really giving the Claimant (and Mr Hobson) the benefit of the doubt. He was not correcting a decision which he believed to be obviously wrong on the facts.

112. The Tribunal concludes that the fact that the Claimant had previously brought the 2013 Claim played no part in Mr Read pursuing disciplinary proceedings against the Claimant and Mr Wright awarding a written warning. The Tribunal has reached this conclusion notwithstanding the damage that Mr Wright did to his own credibility as detailed in paragraph 54 above because of the clear evidence that the Claimant and Mr Hobson had failed to follow the correct procedure despite previous warnings.

The disciplinary investigation in 2017

113. In light of its findings of fact above, the Tribunal concludes that the reason Mr Glenton undertook a disciplinary investigation in 2017 was that he had an honest belief that there was a case to answer in relation to whether the Claimant and Mr Hobson had conducted a sufficient search when they had attended the site for the first time.

114. The Tribunal has reached this conclusion taking full account of the fact that Mr West subsequently decided that no disciplinary action should be taken. It will of course often be the case that a disciplinary charge brought in good faith will not result in a disciplinary penalty. A disciplinary charge will be brought when the

investigator concludes that there is a case to answer. The question to be answered by the person hearing the disciplinary charge is different.

115. The Tribunal concludes that the fact that the Claimant had previously brought the 2013 Claim played no part in Mr Glenton's decision to undertake a disciplinary investigation. It also concludes in light of its findings of fact above that Mr Glenton did not undertake the disciplinary investigation as a result of pressure brought to bear on him by Mr Wright.

116. In reaching its conclusions in relation to each of the acts of victimisation the Tribunal has borne in mind the views of in particular Mr Read which suggested that he believed the Claimant was unable to do large parts of his job (see paragraph 31). However the Tribunal has concluded that those views were honestly held and not related to the fact of the 2013 Claim.

Reasonable adjustments

Did R discriminate against C by failing to comply with a duty to make reasonable adjustments when it applied the same performance matrix to him as to able bodied engineers. Specifically the issues to be decided are:

1. **Did R apply the following provision, criteria and/or practice ("the PCP") generally, namely: a performance management metric which identified how many man hours particular categories of jobs should take to complete?**

117. In light of the factual findings set out above, the Tribunal concludes that the Respondent did not at the relevant time apply any such PCP. As such the Claimant's claim that the Respondent failed to make reasonable adjustments fails at the first hurdle.

118. The Tribunal has not therefore considered the second and third issues arising in the Claimant's reasonable adjustment claim. Indeed, such issues cannot be considered in the absence of a PCP.

Harassment

1. **Did R engage in unwanted conduct in that:**

    a. **On or around 26 May 2016 Mr Read had a conversation with other employees of the Respondent in which Mr Read described C as a "bull shitter" and said that if a job which C and his partner had been unable to complete had been assigned to an able bodied team then the job would have been completed. C overhead this conversation because Mr Read "pocket dialled" him.**

        Respondent: R denies (1) that Mr Read had any such conversation; (2) that Mr Read "pocket dialled" C.

    b. **On or around 27 January 2017 Mr Glenton had a conversation with C in which C explained the restrictions caused by his disability. After C's explanation was complete, Mr Glenton said "so you are not a complete hand bag then".**

        Respondent: R accepts Mr Glenton said these or similar words to C on that date.

119. In light of its findings of fact above, the Tribunal concludes that the Respondent did engage in unwanted conduct on both 26 May 2016 and 27 January 2017 as alleged.

2. Was the conduct related to C's protected characteristic of disability?

120. In light of its findings of fact above, the Tribunal concludes that in each case the unwanted conduct quite clearly related to the Claimant's protected characteristic of disability.

3. Did the conduct have the effect of violating the C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

In considering whether the conduct had that effect, the Tribunal will take into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

121. Turning first to the "pocket dial" incident, the Tribunal concludes that the effect of the Claimant hearing himself (1) accused of being a "bull shitter" who had (in effect) lied about being unable to complete a job; and consequently (2) compared unfavourably to an "able bodied" team member was both to violate his dignity and to create a degrading or humiliating environment for him. The Claimant's perception was clearly that this was the case and, given the nature of the comments, it would have been strange if it had not been. The claim of harassment in relation to this incident therefore succeeds.

122. Turning to the handbag comment, the Tribunal concludes that what Mr Glenton meant by the comment was "so although as you have explained to me your disability limits what you can do, there are many aspect of the job that you can still do". Clearly the words were (as Mr Glenton accepted when giving evidence) ill-judged, but in light of the Claimant's initial reaction to them ("a little bit light hearted… a little bit wrong"), the Tribunal concludes that the Claimant understood the words as Mr Glenton had meant them. Consequently the Tribunal concludes that they did not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Tribunal has concluded that this was the case notwithstanding that the Claimant *subsequently* took a different view of them after he had discussed them with his wife. The claim of harassment in relation to this incident therefore fails.

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Employment Judge Evans

Date: 26 July 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 28 July 2018

FOR EMPLOYMENT TRIBUNALS