EMPLOYMENT TRIBUNALS

Claimant: Mr P A Perrins

Respondent: Blackpool City Council

Heard at: Manchester **On:** 4-11 March 2019
Inc. 8 March 2019 (pm) and
11 March 2019
(in Chambers)

Before: Employment Judge Ross
Mr D Wilson
Mr C S Williams

REPRESENTATION:

Claimant: Ms S Belgrave of Counsel
Respondent: Mr K McNerney of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims for direct discrimination are not well founded and do not succeed.

2. The claimant's claims for discrimination arising from disability are not well founded and do not succeed.

3. The claimant's claims for disability related harassment are not well founded and do not succeed

4. The claimant's claims for victimisation are not well founded and do not succeed

5. The claimant's claims for failure to make reasonable adjustments are not well founded and do not succeed

6. The claimant's claims that he suffered detriments for making public interest disclosures are not well founded and do not succeed.

REASONS

1. The claimant has been employed by the respondent as an electrician since 1987. He currently works in the Illuminations Department which is responsible for Blackpool lights.

2. The claimant brings claims to this Tribunal for disability discrimination and public interest disclosure detriment. The impairments for the purpose of the disability discrimination claim are:

(1) A heart condition; and

(2) Stress.

3. The claimant brings claims for direct disability discrimination, discrimination arising from disability, disability related harassment, victimisation and failure to make reasonable adjustments. These claims together with the claimant's public interest disclosure detriment claim were discussed at a case management hearing before Employment Judge Porter on 12 April 2018. At that time, it was conceded that the claimant was a disabled person by reason of his heart condition (see paragraph 5).

4. However, by the time the respondent filed an amended response on 17 August 2018 the concession in relation to the disability was withdrawn. This was confirmed at the outset of the final hearing.

5. At the outset of the hearing the parties did not have an agreed List of Issues and there was a lack of clarity about the precise nature of the unfavourable treatment for the purposes of the direct discrimination claim, the less favourable treatment for the purposes of the discrimination arising from disability claim, the unwanted conduct for the purposes of the disability related harassment claim, the protected acts and detriments for the purposes of the victimisation claim.

6. Therefore with the agreement and approval of the parties Employment Judge Ross produced a table which clearly identified those matters as drawn from the pleadings. So far as the public interest disclosure detriment claim was concerned, that was clearly identified in a table found at paragraphs 39A-C of the bundle.

7. The issues for the Tribunal were identified in the schedule document produced by the Employment Judge.

The Evidence

8. We heard from the claimant. For the respondent we heard from Mr Williams, the Illuminations Manager; Mr Taylor, the Electrical Supervisor and the claimant's immediate line manager; Mr Joyce, the Project Manager; Mrs Gee, an Employee Relations Manager; Mrs Roberts, a Senior Employee Relations Manager; Mr Sanderson, Senior Occupational Health Adviser; and Mr Ferguson, the Erections, Operations and Dismantling Supervisor.

The Facts

9. We find that the claimant had suffered blackouts over a period of approximately 25 years. We rely on the evidence of the claimant in his disability impact statement (pages 673-684) to find that these incidents were occasional over that period of time. His GP records at page 603 an entry for 28 February 2013 states the claimant is "prone to blackouts – had four episodes in 20 years with the last episode three years previously. The first episode was in 1992." When giving evidence the claimant said that he had suffered 13 episodes in 20 years. In any event there was no dispute that the episodes were not frequent.

10. There is no dispute that in 2015 after a blackout the claimant was referred to the Cardiology Department and in November 2015 had an "Insertable Loop Recorder ("ILR") implanted. An ILR is a cardiac monitor which is implanted under the skin to record the electrical signal from the heart.

11. In January 2017 when at home the claimant experienced another blackout. Following this, on 16 February 2017 the claimant had a right side dual chamber cardiac pacemaker implanted. The claimant was absent on sick leave from that date until 24 April 2017.

12. The claimant was advised not to drive at work (where he had a Heavy Goods Vehicle licence) or work at heights by his employer in January 2017. The claimant then contacted DVLA and they informed him they would contact his doctor after the pacemaker had been fitted. Accordingly during that period of time, the claimant was unable to drive.

13. On 6 April 2017 the claimant was invited to a welfare visit (informal meeting) under stage one of the respondent's attendance management procedure (long-term). At this point the claimant had been absent from work for 49 days due to his heart condition i.e. his absence to have the pacemaker fitted (see page 111). The respondent's absence management procedure is found at pages 63-85. At the welfare meeting on 6 April 2017 the claimant was informed that he had been referred to Occupational Health and there was an appointment due on 19 April 2017. It was noted that the claimant would keep in touch with Mr Taylor, his manager who conducted the meeting (see page 117).

14. The claimant attended the Occupational Health Department on 19 April 2017. Dr Nightingale considered the claimant was fit for work and noted he had not had any blackouts since the pacemaker was inserted in February 2017. Given that he denied any symptoms she stated it is "inappropriate for him to be signed off on sick leave given that he is not currently sick". She stated that she believed he needed to be "medically suspended with immediate effect in order for the safety of the workplace to be established given the nature of his role, namely electrician, working in electrical substations dealing with AC and/or DC electrical currents, etc". She stated that a "risk assessment of the electromagnetic fields at each and every location and undertaking each and every one of his potential tasks needs to be undertaken as a matter of priority".

15. The claimant's suspension from work on medical grounds was issued by Mr Williams and is dated 21 April 2017 (see page 122). The letter states that he will be on medical suspension "with effect from 24 April 2017 and until further notice. This is not a punitive measure against you but a decision taken out of a duty of care towards your health and safety. During this period, you will continue to receive your normal pay and may still keep in contact with the office and your colleagues and we will be in regular contact with you".

16. We find the claimant felt anxious about the security of his job. We rely on the evidence of Mr Williams that the claimant contacted him and told him he really wanted to return to work. We rely on Mr Williams' evidence that he had spoken to John Hawkin, Head of Service, who had said that as Occupational Health had only ruled the claimant out of his own role until the EMF testing had been done, if he really wanted to return to work there was nothing stopping him doing light duties in another department. Mr Hawkins, according to Mr Williams, informed Mr Williams he would speak to Paul Latham, the Head of Parks, and look at a position for him there temporarily doing light duties. We rely on Mr Williams' evidence at paragraph 7 of his statement that the claimant called a few days later and he told him that Mr Hawkins had said he could work in the parks temporarily.

17. We rely on the email exchange (page 150) in relation to Mr Williams speaking to the claimant. We rely on Mr Williams' evidence that he then went on annual leave and left the matter with Mr Joyce. We rely on the emails at pages 149B and 149C which show that Mr Latham, Head of Parks, and Diane Farley, Senior Manager in Parks, were liaising to agree light duties for the claimant in the Parks Department which included lights jobs such as painting, tidying, etc.

18. The claimant was asked to attend the Parks Department on 2 May 2017.

19. The claimant reported to the Parks Department at 8.00am but unfortunately the Department Supervisor, Roy Addy, was not present.

20. We rely on the claimant's evidence that no-one in the department seemed to be aware that he would be attending work that day, and he was therefore given basic tasks to do by Simon (a colleague). After completing these tasks, he was given a petrol lawnmower and instructed to mow the grass verges on a roundabout situated at a junction. Later in the day the claimant was given a leaf blower by Simon to clear leaves from the pathways. The claimant found wearing a leaf blower strapped to his back was uncomfortable as it was strapped over his shoulders and the strap was across the position where the pacemaker was implanted. This irritation caused swelling on his chest around the area of the pacemaker. The claimant became fearful of the damage that could be done to his health and was concerning about setting his recovery back. He went home and did not attend the following day.

21. We find that on the following day the claimant rang Mr Ferguson. He told him he had been trying to contact Mr Addy, the Park Supervisor, and then Mr Taylor, his own supervisor, but could not get hold of either of them. He asked Mr Ferguson to pass on a message to Parks to let them know that he would not be going in that day as he was unwell.

22. During the course of the conversation Mr Perrins told Mr Ferguson that he had been working down in the parks mowing lawns in the morning and in the afternoon he had been using a leaf blower strapped to his back. The claimant said Mr Ferguson said he must have looked like a ghostbuster. Mr Ferguson said he could not recall exactly who made the remark but agreed that one of them had mentioned he must have "felt that a bloody ghostbuster".

23. We accept the evidence of Mr Ferguson and the claimant that they had known each other for a very long time and in the past had been friends who socialised outside of work together.

24. On the same day (see page 153A) the claimant emailed Mr Joyce to state that:

> "I'm unwell following (in my opinion) the inappropriate redeployment and allocation of heavy manual work in Parks Department yesterday, and as a result have been advised to attend the Pacemaker Clinic on Friday of this week for a check-up. I am waiting to hear back from the Occupational Health doctor also and I will take your lead but I would imagine that a return to work of any type is inappropriate until the doctor has advised."

He also stated:

> "If you would keep me posted as to how the enquiries progress regarding the tests so that I can allay the concerns you raised regarding my job security."

25. Mr Joyce disputed that he had raised concerns with the claimant about his job security.

26. In cross examination Mr Joyce told us that he complained verbally with the Parks Department about what had happened to the claimant on 2 May. He said he was led to believe they would do an internal investigation but he never got anything in writing and did not chase it up. He said he was disgruntled himself how it had ended up there. He said he had acted in good faith. He also stated that he always said the claimant's job was not in jeopardy

27. We find on 9 May HR asked OH if there were any safe duties for the claimant whilst he was medically suspended because he was eager to return to work (pages 174-5). On 26 May the claimant was seen by Dr Ahmed in OH who suggested the claimant could work from home if that was possible.p178.

28. Meanwhile the respondent had been trying to find someone to carry out the appropriate testing. On 24 April 2017 Mr Williams enquired of Occupational Health if they could recommend anyone to undertake the EMF survey (page 130).

29. We find that the respondent made efforts to find a suitable organisation to conduct the test. We rely on the evidence of Carol Gee and her email at page 161 where she explained, "we have contacted Boston Scientific who have not been very helpful at all". She also explained that the Occupational Health doctor, Dr Nightingale was unable to assist as she had commenced maternity leave.

30. Mr Joyce explained, and this is confirmed by an email at page 162, that he had telephoned various organisations including the British Heart Foundation and Boston Scientific MHRA in an attempt to access a surveyor to carry out the test but without success.

31. On 3 May 2017 Carol Gee asked the claimant if he would take his job description and report from Dr Nightingale to his appointment with the Consultant Cardiologist and ask him to recommend the name of someone who could carry out these tests. She also asked the claimant to identify the name, model number and serial number of his device.

32. We find that Carol Gee (HR) did an internet search and discovered a company called EMF who were willing to carry out the testing. Mr Joyce contacted them and a quotation was received on 9 May. This was approved and the company sent an inspector on 24 May 2017 to test the illumination route substation and the Light Works Department (see Mr Joyce' statement at paragraph 17). A copy of the report is at page 180-194 of the bundle and is dated 1 June 2017. The report confirms the date of the site assessment completion was 24 May 2017 and the date of delivery of the report was 1 June 2017.

33. We find that on 1 June 2017 Ms Gee from HR asked Mr Sanderson at OH if the test report should go to OH doctor or whether an OH colleague could say the claimant was fit to return to work. P198. She received a reply saying it was best if the OH doctor saw it.p198.

34. Meanwhile the respondent asked further questions of the testing company (see pages 196-197). This information was supplied to Occupational Health prior to a telephone conference on 15 June (see the further information on pages 196-197 and the evidence of Carol Gee at paragraph 12 of her statement).

35. We find that a teleconference was held on 15 June 2017 between the Occupational Health doctor, Dr Nightingale, the OH Administrator, Annie Rimmer, the Health and Safety Office, Mr Peak, and the Senior Occupational Health Adviser, Mr Sanderson. The report is dated 21 June 2017. The outcome of the telephone conference was that:

> "It was unanimously concluded that the measured exposures within the role are well within the limits permissible given the individual's equipment exposure maximums."

They concluded:

> "Given the above a unanimous decision was reached that the individual is fit to return to work." (Page 201)

36. There is no dispute there was a telephone conversation between Mr Joyce and the claimant on 20 June 2018. Although at that stage Occupational Health had not written the report dated 21 June 2017, it is clear they either they had contacted Mr Joyce following the telephone conference on 15 June 2017 indicating the

claimant was able to return to work or Mr Joyce had drawn that conclusion from the test results.

37. We turn to the conversation between John Joyce and the claimant on 20 June 2017. The claimant stated in his document (39A):

> "During a phone call the claimant was told by John Joyce that he should now return to work as the tests had been carried out. The claimant stated that he was concerned about the treatment by the council of him, being forced to return whilst medically suspended and putting his health and safety at risk. The claimant also stated that no health and safety risk assessments had taken place and that no-one had made contact to enquire about his health and wellbeing."

38. It was unclear whether that conversation was started by the claimant ringing Mr Joyce or vice versa.

39. Mr Joyce agreed in cross examination that the gist of the conversation was as described by the claimant. The claimant was asked in cross examination specifically what he was talking about in relation to the treatment of him and being forced to return whilst medically suspended. The claimant said he was talking about the incident in the Parks Department. Mr Joyce told us that he did not realise the claimant was talking about parks when he said he was forced to return to work.

40. The Tribunal is not satisfied that there was any detailed information given to Mr Joyce in that telephone call. Both men agreed that the call took place and the content of the call was as described at box 1 on paragraph 39A. The Tribunal is not satisfied that as the claimant now says in cross examination there was a specific discussion about the parks incident. It is missing from the claimant's witness statement.

41. On 25 June 2017, Sunday evening at 23:20, the claimant sent an email to Carol Gee stating that he had not received communication or correspondence regarding his return to work. We find that is not strictly accurate because, as he explains in the next sentence, he had been informally advised that he may now return to work. We find this is a reference to his conversation with Mr Joyce. He explained that he was expecting a formal conversation from HR which is consistent with the conversation as listed at 39A (Mr Joyce finished the call saying Carol Gee would contact the claimant about returning to work). The claimant made the assumption that:

> "I assume my return to work will follow an appointment with the Occupational Health doctor to discuss the test results as appropriate. I would be grateful if you would let me know the arrangements that have been made for this to happen."

42. We find the following day, Monday 26 June 2017, Carol Gee responded promptly to the claimant. She informed him at 9:09 that she had spoken to Occupational Health and "they are getting in touch with you today to discuss the way forward. The report in regard to the assessment carried out will be sent out today.

John is now aware of this and will contact you once he has the report from Occupational Health to discuss your return to work". P202.

43. We find Carol Gee then contacted Mr Williams (who had taken over responsibility for the claimant from Mr Joyce once he had returned from his annual leave – see page 204) asking him to send the EMF report to the claimant. Mr Williams in fact had just done this (see page 205 where he sent the claimant a copy of the EMF report).

44. Meanwhile Carol Gee had arranged for the claimant to have a copy of Dr Nightingale's report of 21 June 2017 confirming he was fit to return to work. Page 201). We find that the claimant was also sent the EMF report on 26 June 2017.We find the medical suspension ended when it was communicated clearly to the claimant on 26 June via Dr Nightingale's report of 21.6.17 and the EMF report.

45. The Tribunal finds the administrator at Occupational Health Annie Rimmer noted at page 162(3) :" Mr Perrins had informed Ms Rimmer that he requested to review the report before it was released to manager/HR." She states, "therefore report email to Mr Perrins with five working days to respond".

46. We find Annie Rimmer on 26 June 2017 recorded at 11.00am was that Mr Perrins had rung to say he had received a voicemail message from Richard Williams to say Mr Perrins would be returning to work the following day. Mr Perrins informed Annie Rimmer he had not had time to digest the information within the occupational health report and read the EMF report. He also asked for an appointment to be made for him at Occupational Health to discuss the report. Ms Rimmer, a PA, arranged the appointment for Monday 3 July 2017.

47. We find the claimant had made an assumption illustrated in his earlier email that he needed to attend Occupational Health before returning to work following his medical suspension. The Tribunal finds there was no evidence for this approach. We were not taken to any policy or procedure which suggested it.

48. The Tribunal accepted the evidence of Mr Williams that the usual procedure was for management to refer an employee to Occupational Health if that was necessary.

49. The Tribunal finds it likely that the claimant perhaps did not appreciate the distinction between a medical suspension and someone absent on long-term sick leave.

50. Meanwhile, we find that Mr Williams had indeed tried to contact the claimant on 26 June 2017. We rely on his note at page 221, completed close in time to those events (see email of 13 July).

51. There is no dispute that Mr Williams had told the claimant he should return to work. From Mr Williams' perspective, there was a clear and unequivocal letter from Occupational Health dated 21 June 2017 which the claimant had in his possession requiring him to return to work because the medical suspension had no reason to continue.

52. From the claimant's perspective he was anxious about his health and unhappy about the incident in the park on 2 May 2017.

53. However, we note that Mr Williams produced a contemporaneous email dated 26 June 2017 at pages 207-208 where he indicated to Carol Gee that the claimant had told him that he needed to book "the rest of this week off on leave for various reasons, including appointments". Mr Williams had understood that part of the reason was the claimant's son was ill which he asked him to confirm by email. The claimant said at the Tribunal that he had not mentioned his son's illness. In any event there was no email, except an email of 2 July where the claimant complained to Carol Gee about the lack of response of an investigation into the redeployment in Parks Department. Other than that, the claimant only mentioned his appointment with Occupational Health on 3 July 2017.

54. We find Mr Williams understood the claimant would return to work on Monday 3 July when there would be an appointment at OH (page 208).

55. We find the claimant wished to contact Tony Bird who produced the report from EMF regarding the results, particularly because one of his queries was as the tests were tested against the guidelines of S-ICD and his implant was a right pectoral pacemaker, did that make a difference to the outcome. (see email to Mr Williams at page 212A). The claimant told Mr Williams on 4 July at 14.43 that he had sent all the information to Mr Bird and awaited his response, "possibly tomorrow". P212A

56. The Tribunal finds that the claimant emailed Mr Bird on the same day, Tuesday 4 July 2017, shortly before he contacted Mr Williams at 2.25pm (see page 212).

57. Mr Bird responded very promptly on the same day, 4 July, at 15:42, reassuring the claimant that he had reviewed the details and there was no change to the report status. The Tribunal therefore finds that by 15:45 on 4 July 2017 the claimant knew that he was safe to return to work so far as Mr Bird and Occupational Health were concerned, even taking the claimant's additional concerns into account.

58. There is no dispute the claimant appears never to have forwarded that information from Mr Bird to his managers or HR or Occupational Health.

59. The Tribunal notes that when the claimant's trade union representative wrote on his behalf on 5 July 2017 to Janet Roberts he gave an account of the conversation on 26 June that Mr Perrins had informed Mr Williams that "he had a hospital appointment and was unable to return". P212B

60. There is no dispute that Mr Williams tried to speak to the claimant again on the dates as set out at page 221 by three contacts on 30 June, one on 4 July and two on 5 July.

61. We find that an Occupational Health professional was unable to see the claimant on 3 July (see note of Annie Rimmer at page 162(11)). The Tribunal notes the record of the Occupational Health Administrator at 162(13) of 6 July states Mr Perrins is "happy to return to work on Monday and consented to the release of the

OH report dated 21/6/17. Mr Perrins happy for OH to inform Mr Williams of his return and explain that it would be beneficial for Mr Perrins to have a phased return and explain the delay in Mr Perrins returning. OH to send Mr Perrins a copy of this at the same time".

62. The Employment Tribunal finds it unusual for an employee to be contacting Occupational Health direct in this way.

63. The Tribunal finds that the claimant agreed to return to work on 10 July 2017. The Tribunal finds, and it was not disputed at the Tribunal, that no deductions were ever made from the claimant's salary and he did not have to take holiday or unpaid leave for this period from 27 June-10 July 2017 although clear communication was never given to the claimant at the time to explain this.

64. The Tribunal relies on the note of Annie Rimmer at page 162(15). She notes that on 11 July she received a phone call from Mr Perrins "informing me he had returned to work today and that he had been informed by Richard Williams that they were not going to implement a phased return". She informed him that their advice was a recommendation and that the manager did not have to follow this. She advised him to contact HR.

65. Annie Rimmer than received a phone call from Christine Smith in HR to say that she had just received a phone call from Mr Perrins to say that he was going to leave at 12.00pm "as I had informed him he could. Christine just wanted to check the information. I informed Christine I did not say that and informed her of the conversation above".

66. The Tribunal finds that this suggests the claimant was at best misunderstanding the advice given to him by HR.

67. The Tribunal had regard to Mr Sanderson's report of 6/7 July at page 213. It says:

> "I would recommend a phased return over 2-4 weeks. I feel al phased return will help him to re-adjust to the routine of working gradually increasing duties and hours back to his usual contracted hours."

68. In cross examination Mr Sanderson confirmed that the claimant had been declared fit in April and the only reason he had not returned to work then was because he was medically suspended. He agreed that no adjustments had been suggested at that time, nor a phased return. He agreed the claimant had been medically suspended. He said he had recommended a phased return because from a "human point of view" it may be beneficial to the claimant to have a phased return of this nature given his length of absence from the workplace, not because of any disability related reason. He also reiterated that it was ultimately at the management's discretion.

69. Mr Williams decided that the claimant should return on a phased return but with light duties over two weeks. He saw no necessity for shortened hours given the fact the claimant was regarded as being fully fit.

70. Mr Taylor told us he gave the claimant the lightest duties he had available, namely working on “festoons” and “snowflakes”.

71. Mr Taylor told us “festoons” are the lights which are strung up on the promenade for the Blackpool Illuminations, and “snowflakes” are large illuminations 3 metres x 3 metres.

72. We find that the claimant was working in an area that was partially obscured by a wall. However, we accept the evidence of Mr Taylor that it was the area where these items, i.e. the “festoons” and the “snowflakes”, were deposited. We accepted his evidence that if they had been in a different area i.e. on the mezzanine level then the claimant would have worked there. Furthermore, we find that the claimant was only a few feet from other work colleagues.

73. Mr Taylor conducted the return to work interview (see his statement, paragraph 13). Mr Taylor explained that there were three electricians in the department, therefore a small department, plus one other employee, Michael, who was not a qualified electrician but did similar sort of work.

74. Mr Taylor said he was keen to have the claimant back because they had been very short-staffed in his absence.

75. There is no dispute that on the return to work interview there was a discussion between the claimant and Mr Taylor about the nature of the phased return. The claimant had believed that the respondent would be following the suggestion of Mr Sanderson that he would be on a phased return over 2-4 weeks on short hours. Mr Taylor told him that he was not on short hours but that he was on lighter duties, and that it was a final management decision.

76. On returning to the workplace on 10 July 2017 the claimant alleged in his statement that he was approached by Mr Ferguson who questioned him about his time off, stating that he took too long and comparing him with another individual who supposedly had the same issue. He alleged he was told by Mr Ferguson that “I should expect office banter regarding my time off and queried why I was asking for a phased return to work following just one afternoon of cutting grass”.

77. The Tribunal finds that Mr Ferguson did ask the claimant about his time off but only in the context of asking how he was feeling (see Mr Ferguson’s statement, paragraph 11). We entirely accept Mr Ferguson’s evidence that he did not mention anything about comparing the claimant to anyone else’s recovery. In fact, there seemed to be some confusion on the claimant's part as to who made this comment. His counsel put this comment to Mr Ferguson who stated that he did not know anyone else with the same condition and denied making the remark. It was also put to Mr Taylor who said he did know someone else with the same condition but he never said anything about it to the claimant, and that person was a 71 year old woman living in Spain.

78. We find there was a discussion about the phased return to work. We find that the claimant told Mr Ferguson that he had a phased return but was unhappy about it, particularly because of not finishing early. This is consistent with the emails we have

seen which show the claimant telephoned Occupational Health as be believed he was entitled to finish early based on the report of Mr Sanderson.

79. We find on 11 July 2017 the claimant was working on the task of testing and repairing the illumination features. We rely on the evidence of the claimant that Mr Taylor approached him and told him to "do one". We rely on the evidence of Mr Taylor, whom we found to be a direct, frank and honest witness, that he did indeed make such a comment. However, we rely on the context of the comment. Mr Taylor told us that Radio 2 plays in the workshop and at 10.30am everyday there is a pop quiz to which the employees like to listen. We rely on the evidence of Mr Taylor that the claimant had been standing at another employee's workbench (Michael) for eight or nine minutes listening to the quiz. We find that it was in that context that Mr Taylor approached the claimant and asked him to "do one", i.e. return to his own workstation. We find it is likely that Mr Taylor did say that they were under pressure to get the job done.

80. We find the claimant attended work on 12 July 2017. We rely on the evidence of Mr Taylor that on attending work that day the claimant seemed in an angry mood. He recalled it was one of the hottest days of the year and the claimant was wearing a jumper. He said one of the reasons he thought the claimant seemed angry was because he was actively hurling items into storage containers rather than placing them gently.

81. There is no dispute that at approximately 9.30am the claimant began to feel unwell. He felt sweaty and short of breath.

82. We find Mr Taylor suggested to the claimant he remove his sweater and sit outside in the fresh air. We find during this time the claimant phoned his partner. The claimant's partner suggested an ambulance was called. There is no dispute that Mr Taylor stated that he thought the claimant was alright and when he had calmed down he would be ok. We find there was nothing pejorative in this remark by Mr Taylor. Mr Taylor explained to us that he had trained as a first aider and in his experience the claimant seemed to be suffering a panic attack.

83. We find Steve Shaw, a first aider, attended upon the claimant and arranged for an ambulance to be called. We find the claimant is incorrect in the suggestion that Mr Taylor was reluctant to call an ambulance.

84. We find Mr Ferguson was concerned for the claimant's wellbeing. We find he ensured the paramedics could find where the claimant was sitting and directed them to him.

85. We find the paramedic arrived and carried out tests on the claimant. We rely on the evidence of Mr Ferguson that the paramedic was struggling to put electrodes on the claimant to check his heart rate because of the hairs on his chest. We find the paramedic told the claimant to "lift up your shirt a bit more". We rely on Mr Ferguson's evidence that the claimant jokingly replied, "as long as you're not a lord". We accept the evidence of Mr Ferguson that the claimant was referring to "gaylord" from Game of Thrones, inferring so long as the paramedic was not gay. We find this is illustrative of the humour which occurred in the workshop.

86. We find that Mr Ferguson was chatting to the paramedic to relieve the tension.

87. The Tribunal relies on its experience of medical health professionals that if the ambulance paramedic had felt Mr Ferguson had been interfering or distracting him he would have asked him to go away. We find the paramedic suggested that the claimant go home, which he did, and that the claimant drove himself home.

The Law

88. The relevant law for the disability discrimination claim is found at sections 6, 13, 15, 20, 26 and 27 of the Equality Act 2010. We also had regard to section 136 (burden of proof provisions) and the long established principles set out of **Igen v Wong** and **Madarassy v Nomura International.**

89. We also had regard to **Boyle v SCA Packaging Limited [2009] ICR**; **Gallop v Newport City Council [2014] IRLR 11;** and **Donelien v Liberata UK Limited [2018] IRLR 535**.

90. So far as the public interest disclosure detriment claim is concerned, we had regard to sections 43A, 43B, 43C and 47B. We had regard to **Cavendish Munro v Geduld** and also **Kilraine v London Borough of Wandsworth [2018] EVCA Civ 1436**.

Applying the Law to the Facts

Disability Discrimination

91. The Tribunal turned to disability discrimination. The first issue was: was the claimant a disabled person within the meaning of section 6 of the Equality Act 2010 at the relevant time by reason of:

(a) a heart condition; and/or

(b) stress.

92. The Tribunal finds that the claimant was a disabled person at the relevant time by reason of a heart condition. There was no dispute that the claimant had suffered from blackouts over a period of 20 years. The claimant told us in evidence that he thought he had suffered approximately 13 such episodes. It appears possible he minimised the number of episodes when being examined by his GP for the purposes of renewal of his driving licence because the GP record refer to four recent episodes. The claimant was fitted with a device to monitor his heart from 2015. In 2017 when he suffered a blackout at home the device recorded the length of time he had been affected and arrangements were made for a pacemaker to be fitted.

93. We remind ourselves that the impairment must have a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

94. Given that the blackouts had lasted for a period of over 20 years we are satisfied it was a long-term condition.

95. We are satisfied the impairment had a substantial effect on the claimant. In January 2017 we find that once the claimant had advised Mr Ferguson of the most recent blackout, Mr Ferguson prevented him from driving the heavy goods vehicle which he drove in the course of his employment. (There was some discrepancy about the precise date this occurred but we accept Mr Ferguson's evidence that once the claimant drew it to his attention he acted quickly).

96. We note the claimant, over the years, had minimised the effect of the blackouts on his driving. He continued to apply for driving licences and continued to drive a personal car. He reassured himself with the fact that the blackouts that he had a short warning of a blackout and that they usually occurred when he had been ill for other reasons.

97. Nevertheless, we find that by January 2017 the respondent had stopped the claimant from driving and that he did not drive a heavy goods vehicle until after his pacemaker had been fitted. Accordingly, we are satisfied that not being able to drive a heavy goods vehicle where this was part of the claimant's role in employment is a substantial adverse effect on the claimant's ability to carry out day-to-day activities. We have had regard to the guidance in the Code of Practice on Employment when considering the substantial adverse effect. We have reminded ourselves that where someone with an impairment has received medical treatment which alleviates or removes the effects, the impairment is taken to have the effect it would have had without such treatment.

98. Therefore we find the claimant had an underlying heart condition and the treatment, namely the fitting of the pacemaker, is to be regarded as alleviating the effects although not the impairment itself (see paragraph 16 of the Code of Practice on Employment).

99. We turn to the issue of actual or constructive knowledge. The respondent in the Occupational Health report in October 2017 confirmed that they considered the claimant to be a disabled person within the meaning of the Equality Act 2010 by that date because of the heart condition.

100. We find the respondent had constructive knowledge of the impairment (that the claimant was a disabled person by reason of his heart condition) from April 2017 after the pacemaker had been fitted. Although the claimant was referred to Occupational Health at that time, this question was not specifically asked.

101. In conclusion the claimant was a disabled person by reason of his heart condition from April 2017 and the respondent had constructive knowledge of the fact he was a disabled person by reason of the heart condition from that date.

102. We turn to consider the other impairment of stress. The claimant had a short-lived episode of stress in 2015.

103. After that he did not suffer from stress until he went absent from work in July 2017. He had only recently returned to work by the time of this Tribunal hearing.

104. We find that the claimant's stress substantially affected his normal day-to-day activities because it rendered him unable to work during that period.

105. However, the question for the Tribunal was whether or not the condition was long-term. A long-term effect of an impairment is one which lasts at least 12 months or where the total period for which it lasts is likely to be at least 12 months or which is likely to last for the rest of the life of the person affected.

106. The Tribunal must be cautious about using hindsight to assess this.

107. We find that when the claimant first was absent from work in July 2017 there was no indication to the respondent or indeed the claimant himself that this would amount to a lengthy period away from work. The Tribunal finds that the condition was not likely to last at least 12 months until April 2018. By that stage the claimant had been absent from work for a period of 9 months. He had been referred by his GP for Cognitive Behavioural Therapy and he had also been prescribed anti-depressant medication.

108. We find by April 2018, given the claimant had been absent from work with a stress related psychological illness for a period of 9 months despite having been prescribed CBT and anti-depressants, the respondent was fixed with the constructive knowledge that the claimant was likely to be suffering from a long-term condition likely to last at least 12 months. Accordingly, we find the claimant was a disabled person by reason of stress at that time. We find the respondent is fixed with constructive knowledge from that date, April 2018, of the claimant's condition of stress. However the claimant's impairment of stress is not relevant to these proceedings as all the allegations predate December 2017 when the claim was presented. At the relevant time July 2017-December 2017 the claimant was not a disabled person within the meaning of the Equality Act by reason of stress.

Direct Discrimination

109. The Tribunal turns to deal with the claimant's claim for direct discrimination. The question for the Tribunal is: did the respondent treat the claimant less favourably than a real or hypothetical comparator because of disability?

110. The Tribunal reminds itself that the only relevant disability for the purposes of the claimant's claim is his heart condition because we have found he was not disabled by reason of the stress condition until after the relevant period.

111. The Tribunal reminds itself of the narrow comparator in a direct discrimination claim. We were not referred to a real comparator. A hypothetical comparator must be in the same set of circumstances as the claimant and with the same limitations on ability. See **High Quality Lifestyles Limited v Watts [2006] IRLR 850**.

112. The Tribunal reminds itself that in a discrimination case there is rarely direct evidence of discrimination and the Tribunal may draw an adverse inference from other evidence.

113. The Tribunal turns to the first allegation:

> "(1) In the knowledge that the claimant was already feeling excluded from the workplace, the respondent stationed the claimant away from colleagues on his return to work."

114. The Tribunal finds that this is factually incorrect. The Tribunal relies on the evidence of Mr Taylor that on his return to work the claimant was placed on the lightest possible duties, namely working on the festoons and the snowflakes. We rely on the evidence of Mr Taylor whom we found to be a direct, forthright and honest witness that these items were placed in an area within a few feet of other colleagues. We find that the claimant's view of other colleagues was partially obscured behind a wall. We find the claimant was not isolated and not excluded. Accordingly we find there was no less favourable treatment.

> "(2) Telling the claimant to go back into the workplace when he was asking for help."

115. This allegation is vague. The claimant was asked when giving evidence what he meant by it. He said he was referring to an incident on 11 July when he asked another electrician, Michael Duckworth, for help and was told to "do one" by his supervisor, Mr Taylor.

116. The Tribunal prefers Mr Taylor's recollection of this incident.

117. It was not disputed that within the workshop Radio 2 is played. We find that Mr Taylor saw the claimant at Mr Duckworth's workbench listening to the Radio 2 pop quiz at about 10.30am on the morning of 11 July. Mr Taylor had noted the claimant had been at Mr Duckworth's workbench for seven or eight minutes listening to the quiz. It was for that reason he told the claimant to "do one", in other words to return to his own workstation. He said the reason he had not used the same remark to Mr Duckworth was that he was at his own workstation.

118. The Tribunal is satisfied that issuing the instruction in a forthright manner, "do one", is capable of amounting to less favourable treatment. However, the Tribunal must then consider whether this was because of disability and whether a hypothetical comparator would have been treated in the same way.

119. We find that the reason Mr Taylor told the claimant to "do one" was that he was away from his workstation listening to the pop quiz for seven or eight minutes rather than working. We find a hypothetical comparator in the same circumstances as the claimant would have been spoken to in the same way. Accordingly this allegation fails.

> "(3) Telling the claimant he should expect office banter due to taking time off for his medical condition."

120. The claimant was reluctant to identify who he alleged told him he should expect office banter due to taking time off for his medical condition. When expressly asked by the Employment Judge he said he was not willing to give the name. However, his representative cross-examined Mr Ferguson asking him whether he made that remark. Mr Ferguson categorically denied it.

121. The Tribunal notes that this was an environment where joking occurred. The Tribunal relies on its findings of fact of the "lord" comment which it finds the claimant made to the paramedic.

122. The tribunal finds the four men in this department worked closely together and Mr Ferguson, the claimant and Mr Taylor had worked together for a very long period of time. Mr Ferguson and the claimant had been friends for a number of years, though less close in recent times.

123. Given Mr Ferguson's express denial and the claimant's reluctance to identify who it was who made that remark, the Tribunal is not satisfied that it was made and accordingly it cannot amount to less favourable treatment.

> "(4) Telling the claimant to 'do one' when he was asking a colleague for assistance."

124. The Tribunal relies on its finding above. The Tribunal is not satisfied that the claimant was asking Mr Duckworth for assistance at the time the remark was made. The claimant may have originally been at Mr Duckworth's bench to ask for assistance but we find that he had remained to listen to the pop quiz and that was why he was told to "do one".

> "(5) Threatening the claimant with no pay for his absence."

125. We find this relates to a comment made by Mr Williams in one of the telephone conversations with the claimant. We are not satisfied that it is accurate to say that Mr Williams threatened the claimant with no pay for his absence. The claimant was paid in full for his sick leave and for his medical suspension. There was confusion about the claimant's return to work when the claimant wished to make further enquiries of the EMF report once the medical suspension had been ended on 26 June. The Tribunal finds that the claimant was never required to take unpaid leave or take holiday for the period from 3 June until his return to work on 10 July.

126. However, if we are wrong and this is capable of amounting to unfavourable treatment we must consider whether Mr Williams treated the claimant less favourably than a real or hypothetical comparator in the same set of circumstances. We find he would have treated any individual in the same way. At the time he said to the claimant he would need to take unpaid leave the claimant had been told that OH had ended his medical suspension, a thorough report had concluded it was safe for him to return to work and it had been agreed with Mr Williams he would return to work on 3 July 2017 and attend Occupational Health. Despite this the claimant did not return to work until the following week, 10 July. We find that Mr Williams would have said the same thing to a hypothetical comparator in the same set of circumstances.

Discrimination arising from disability

184. The Tribunal asked itself the question: "did the respondent treat the claimant unfavourably because of something arising in consequence of disability?

185. To answer this question the Tribunal must firstly identify the unfavourable treatment. Secondly, the Tribunal must ask itself: did the respondent treat the claimant unfavourably because of an (identified) "something"? Thirdly, the Tribunal must enquire did that "something" arise in consequence of the claimant's disability? See **City of York Council v Grosset [2018] EWCA Civ 1105** and **Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**.

186. If the answer is yes, the Tribunal must turn to the respondent for the issue of justification i.e. can the respondent show the treatment was a proportionate means of achieving a legitimate aim?

187. The Tribunal turns to the first allegation of unfavourable treatment:

(a) Putting pressure on him to return to work whilst he was medically suspended.

188. The Tribunal finds that this is factually incorrect. The Tribunal finds the respondent did not place pressure on the claimant to return to work whilst he was medically suspended. The claimant asked to return to work early and it was as a result of his request that duties in the Parks Department were arranged. The medical suspension ended when the Occupational Health doctor issued the Occupational Health letter dated 21 June 2017 and it was sent to the claimant on 26 June 2017 by email with the EMF report being sent to the claimant on the same day. It is a fact that Mr Williams contacted the claimant several times in late June and early July asking about his return to work. However, the Tribunal finds that at that point the medical suspension had ended. Mr Williams was contacting the claimant because the medical suspension was over and he needed to know when the claimant was returning to work. Therefore, the Tribunal finds it is factually incorrect to state that the claimant had pressure put upon him to return to work whilst he was medically suspended.

189. However, in case the Tribunal is wrong about this we have gone on to consider the next question: was any unfavourable treatment because of an identified "something"?

190. The Tribunal finds the alleged unfavourable treatment is the telephone calls from Mr Williams asking the claimant when he was returning to work at a time when Mr Williams understood the medical suspension was over but when the claimant was raising additional questions about the report from the expert Mr Bird.

191. In this case there was no clearly identified "something". In the claim form at paragraph 74 (see page 25N) it states:

> "In this case the claimant's disability caused his sickness absence and the claimant avers that the respondent who had a negative attitude to his absence treated him unfavourably."

192. The Tribunal finds that the identified "something" appears to be his sickness absence and the respondent's "negative attitude to his absence".

193. The Tribunal must then ask: did those "somethings" arise in consequence of the claimant's disability?

194. The Tribunal finds it is factually incorrect that the claimant's disability caused his sickness absence. In the relevant period with which the Tribunal is concerned the claimant was not away on sickness absence, he was medically suspended. Therefore Tribunal finds the allegation fails at this point.

(b) Failing to respond to his questions about light duties and operation of machinery.

195. The Tribunal is not entirely clear about the facts to which this allegation may relate as it does not identify the individuals to whom the claimant is referring or when the failure to respond took place.

196. It may be the claimant is referring to page 153A where he contacted Mr Joyce after his attendance in the Parks Department on 2 May 2017 where he states:

> "As you know I'm unwell following (in my opinion) the inappropriate redeployment and allocation of heavy manual work in Parks Department yesterday."

197. However, the Tribunal did not hear evidence of the claimant expressly raising questions of Mr Joyce about light duties or the operation of machinery. Accordingly, the Tribunal is not satisfied that this allegation is factually correct.

198. However in case we are wrong about that and the claimant is referring to his conversation with Mr Joyce after he attended the Parks Department we turn to the next question which is: if this is capable of amounting to unfavourable treatment, was it because of "something" arising in consequence of disability?

199. The "something" in the claim form is the claimant's absence on sick leave. The claimant was not absent on sick leave at this point in time, he was medically suspended. Accordingly the allegation fails at that stage.

(c) Threatening the claimant about having to use his annual leave to cover his sickness absence.

200. The Tribunal finds this allegation is factually incorrect. The Tribunal finds it likely that the claimant is referring to his conversation with Mr Williams. We are not satisfied that it is accurate to say that Mr Williams threatened the claimant about having to use his annual leave to cover his sickness absence. At this stage the

claimant was not absent from work sick. He had been medically suspended and in fact the medical suspension had come to an end on 26 June given the Occupational Health report of 21 June. Accordingly the allegation fails at this stage.

201. However, in case we are wrong about that we turn to consider the next question, which is: was the alleged unfavourable treatment because of something arising in consequence of disability? Once again, the "something arising" is said to be the claimant's absence from work on sick leave. This is factually incorrect. He was medically suspended. Accordingly the allegation fails at this stage.

(d) In relation to (c) above, contacting him about his return to work with a frequency which caused him to feel stressed and anxious.

202. It is not disputed that Mr Williams contacted the claimant frequently between the dates he was expected to return to work on 27 June and the date he actually returned to work on 10 July. We find that the claimant regarded this as unfavourable treatment.

203. We therefore turn to the next issue: was it because of "something" arising in consequence of the claimant's disability? The "something" relied upon in the claimant's claim form is his sickness absence. This is factually incorrect because the claimant was not absent from work at this point on sickness absence. He had not returned to work because he had further concerns about his pacemaker and the test results supplied by the EMF company. However, he had received those answers by 4 July 2017. The Tribunal is unclear precisely why he did not return to work until 10 July 2017.

204. Accordingly the unfavourable treatment was not because of something arising in consequence of disability because the claimant was not absent from work on sick leave at this point. If the Tribunal gives the claimant the benefit of the doubt and assumes that in fact medical suspension was meant rather than sickness absence the Tribunal must turn to the next issue.

205. Was the unfavourable treatment because of the "something "arising in consequence of disability. The Tribunal finds that the unfavourable treatment (the phone calls) were not because of the claimant's medical suspension which related to his disability. The phone calls were made because the claimant had not returned to work once his medical suspension was at an end.

206. In case we are wrong about that we turn to the last issue: whether the treatment was a proportionate means of achieving a legitimate aim.

207. Mr Williams was legitimately concerned about a member of staff who had not returned to work when his department was short-staffed. His legitimate aim was to ensure the effective running of his department. He had information from Occupational Health and test results which said that the workplace was safe for the claimant to return. In these circumstances it was reasonable for him to telephone the claimant regularly to ask him about when he was returning to work. The treatment was a proportionate means of achieving a legitimate aim.

(e) Subjecting him to bullying comments such as “you have a target on your head” and “you look like a ghostbuster” as well as telling him to “do one”, maintaining that he had taken too much time off and that his condition was “self induced” and that he should expect “banter”.

208. The Tribunal is not satisfied that the comment “you have a target on your head” was said. The Tribunal finds the “you look like a ghostbuster” comment was said by Mr Ferguson. The Tribunal finds the comment “do one” was said by Mr Taylor. The Tribunal is not satisfied that the claimant was told by Mr Ferguson that he had taken too much time off and that his condition was self-induced and that he should expect “banter”.

209. Insofar as the Tribunal accepts the comments above were said, the Tribunal must turn to consider whether the comment was unfavourable treatment. The Tribunal accepts that we find the claimant found the comments referred to above were unfavourable treatment. The Tribunal must then consider whether the treatment was because of “something” arising in consequence of the claimant's disability. The only “something” identified in his claim form was his “sickness absence”. The Tribunal relies on its finding that the claimant was not absent on sick leave, he was medically suspended.

210. Even if the Tribunal accepts the claimant actually meant to refer to the claimant's medical suspension rather than his sick leave, the Tribunal is not satisfied that the comment “you look like a ghostbuster” was made because the claimant had been absent from work on medical suspension. The Tribunal finds that Mr Ferguson made the comment in a jovial fashion because the claimant was wearing a leaf blower with a backpack on his back and so did look like a ghostbuster as within the film “Ghostbusters.” The two men had been friends over many years and it was a jocular comment unrelated to the claimant's absence from work on medical suspension.

211. The other comment the Tribunal finds was said was the “do one” comment by Mr Taylor. The Tribunal reminds itself that the context of that remark was that the claimant was standing listening to a pop quiz and was instructed to return to his bench. The Tribunal relies on its previous findings of fact. The Tribunal finds that the comment was not made because of the claimant's medical suspension or absence from work on sick leave. It was made because he was not doing what he should be i.e. working.

(f) Breaching his confidentiality by referring to him and the fact he had a pacemaker fitted at a training session.

212. The Tribunal did not hear any detailed evidence about who was alleged to have said this and when. The claimant did not identify who said it and every witness it was put to denied it. Accordingly, the Tribunal is not satisfied that it occurred and it fails at this stage.

(g) Instructing his colleagues not to contact him.

213. The Tribunal relies on its findings of fact that Mr Hawkin, a senior manager asked members of staff not to contact employees absent from work, including the claimant unless it was necessary. The Tribunal finds that the claimant considered this to be unfavourable treatment.

214. The Tribunal turns to identify the "something". The claim form refers to the fact the claimant's disability caused his sickness absence. As stated above, the sickness absence is not relevant in this case, it is the medical suspension which is relevant. Accordingly the allegation fails at this stage.

215. If the claimant meant to state "medical suspension" the Tribunal finds that this does amount to unfavourable treatment because of something arising in consequence of disability as the remark was issued because the claimant was absent from work medically suspended, as a result of his disability.

216. However, the Tribunal turns to the last issue: was the treatment a proportionate means of achieving a legitimate aim? The claimant gave evidence that he felt stressed by being contacted at home. The Tribunal is satisfied that an instruction not to contact him at home unnecessarily was a proportionate means of achieving a legitimate aim, namely his wellbeing. The Tribunal relies on the evidence of Mr Joyce that there is a difficult balance between keeping in close contact with employees who wish to be contacted and not contacting employees who prefer not to be contacted.

(h) Stating that the phased return recommended by doctors would be included within the claimant's normal 37 hours.

217. The claimant gave evidence that he considered it was unfavourable treatment that when he returned to work in July 2017 although he worked on light duties he did not have reduced hours as recommended by Mr Sanderson of Occupational Health.

218. The Tribunal therefore turns to the next issue, which is: what is the "something" arising in consequence of disability? The "something" is the sickness absence. The claimant was not absent on sick leave at this stage. He was medically suspended. Even if the claimant meant to say "medically suspended" rather than sick leave, the Tribunal finds that the unfavourable treatment, namely requiring the claimant to work light duties but on full-time hours for two weeks, was unrelated to his disability. Mr Sanderson agreed that the claimant was fully fit in April 2017. There was no medical requirement for him to have light duties or a phased return to work. It was simply a kind gesture suitable for a person who had been absent from the workplace. It was unrelated to his disability. Accordingly the unfavourable treatment was not because of something arising in consequence of disability and the allegation fails.

(i) Isolating the claimant from his colleagues on his return.

219. The Tribunal has found that this is factually incorrect and so cannot amount to unfavourable treatment.

(j) Requiring him to carry out unsuitable heavy work.

220. The Tribunal finds this is factually incorrect. On his return to work in July 2017 the claimant was placed on light duties.

(k) Failing to respond seriously to the claimant's condition, requiring paramedic support and a statement that the claimant was not technically ill.

221. The Tribunal finds the first part of this allegation refers to the events on 12 July 2017. The Tribunal relies on its findings of fact. It is satisfied that the respondent responded seriously to the claimant's condition. The claimant was attended to by a first aider in the work place. An ambulance was called and he was permitted to go home. Therefore this statement is factually incorrect and so does not amount to unfavourable treatment.

222. The Tribunal turns to the second part of the allegation: the statement that the claimant "was not technically ill". The Tribunal relies on its findings of fact that this comment was made by Mrs Roberts in an email and is factually correct. At the relevant time the claimant was not technically ill. He had been declared fully fit for work in April 2017. The only reason he had been suspended was because the employer wanted to ensure that it was safe for him to work as an electrician now that he had a pacemaker fitted. The Tribunal is not satisfied in the context of that email of 14 July from Mrs Roberts to the claimant's trade union representative, Mr Jarman, (see page 225A) that there was anything pejorative in the phrase. The full sentence states:

> "Under the circumstances I wouldn't consider this to be unreasonable as Andy wasn't technically ill as he was medically suspended awaiting details of his pacemaker."

The remark is made in the context of a query about contact with the claimant by management.

223. Accordingly the Tribunal is not satisfied that there is unfavourable treatment and the claim fails at that stage.

(l) Failing to pay the claimant for the duration of his disability related absence and putting pressure on him to attend meetings.

224. The Tribunal finds that this statement is factually incorrect. The Tribunal finds that the claimant was paid in full for the duration of his disability related absence. This claim concerns the claimant's impairment of a heart condition. The Tribunal has found that the claimant was not disabled by reason of stress until April 2018, which is after the period to which this claim relates. This claim relates to events before December 2017. The only relevant period of disability related sickness absence is

February to April 2017 when the claimant was paid in full. He was also paid in full for the period of medical suspension up to 26 June and also for the period 27 June to 10 July when the medical suspension had ended but the claimant had not returned to work. Accordingly the claim fails at that stage.

225. The second part of the allegation is "putting pressure on him to attend meetings". The Tribunal finds no pressure was put on the claimant to attend meetings. The claimant had one meeting under the respondent's long-term attendance management policy during his absence to have his pacemaker fitted (see finding of fact) and no pressure was put upon him to attend that meeting. We find there was no pressure put upon him to attend meetings during his medical suspension.

226. The claimant alleges that pressure was put upon him to attend meetings during his second long-term absence from work, namely the absence which commenced after 12 July 2017 and continued until shortly before the Employment Tribunal hearing. That absence was for stress related reasons. The Tribunal is only concerned with the period prior to December 2017.

227. Firstly, the Tribunal is not satisfied that pressure was put upon the claimant. The Tribunal finds that the claimant was contacted in the usual way in accordance with the attendance management policy and then was permitted to answer questions by email when he indicated he did not wish to attend a meeting in person.

228. However even if the claimant was pressured to attend meetings, the claimant cannot show that it because of something arising in consequence of his disability because the relevant disability is stress and the Tribunal has found that he was not a disabled person by reason of stress at the relevant time. Accordingly this allegation fails.

<u>Disability related harassment</u>

229. The Tribunal must ask itself: did the respondent engage in unwanted conduct? Secondly, if any or all of the conduct referred to in allegations (a)-(g), was it related to disability? If yes, did the conduct have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(a) In the knowledge that the claimant was already feeling excluded in the workplace and contrary to the advice of Occupational Health, the respondent stationed the claimant away from other colleagues upon his return to work.

230. The Tribunal turned to consider whether this conduct occurred. The Tribunal finds it did not. The Tribunal is not satisfied there was any advice from Occupational Health about where the claimant was to be stationed. The Tribunal finds that the claimant was not stationed away from other colleagues upon his return to work. The Tribunal finds that the claimant was only a few feet away from colleagues. The

Tribunal finds the claimant was placed at a workbench where the items on which he was due to work were placed, namely the festoons and the snowflakes.

231. Even if the Tribunal is wrong about that and the claimant can show that it amounted to unwanted conduct being stationed away from other colleagues, the Tribunal must ask whether the conduct was related to his disability. The Tribunal finds it was not. The Tribunal accepts the evidence of Mr Taylor whom it found to be a direct, forthright and honest witness, that the only reason the claimant was placed in that area was so that he could carry out light duties on the snowflakes and festoons. Accordingly the claim fails at that stage too.

(b) Telling the claimant to get back to work when he was asking for help.

232. The Tribunal relies on its findings of fact. The Tribunal finds that the claimant may have gone to ask his colleague, Michael Duckworth, for assistance with his work but he remained at Mr Duckworth's workbench for seven or eight minutes listening to the pop quiz on Radio 2. The Tribunal finds that the claimant considered being asked to get back to work by Mr Taylor was unwanted conduct.

233. The Tribunal turns to the next question: was it related to disability? The Tribunal finds it was not. Mr Taylor told the claimant to get back to work because he was standing at the workbench of a colleague listening to the pop quiz instead of working. Accordingly this allegation fails.

(c) Telling the claimant that he should expect office banter due to taking time off for his medical condition.

234. The claimant was reluctant to identify in Tribunal who was alleged to have said this. However, the question was asked of his colleague, Mr Ferguson. Mr Ferguson denied making the comment. The Tribunal relies on its findings of fact that Mr Ferguson did not make the remark. Accordingly, given we find it was not made it cannot amount to unwanted conduct.

(d) Telling the claimant to "do one" when he was asking a colleague for assistance.

235. The Tribunal finds that this is the same allegation as allegation (b) and we rely on our findings of fact above that it is capable of amounting to unwanted conduct but it is unrelated to disability.

(e) Threatening the claimant with not paying him for his absence and instead requiring him to take holiday.

236. The Tribunal relies on its finding of fact. On 14 July the claimant was reminded his medical suspension had ended on 26 June.p224

237. The Tribunal relies on the finding that Mr Williams said in one of his conversations with the claimant, when he was expecting the claimant to return to work on 27 June 2017, that either he would need to take unpaid leave or holiday if

he did not return given his medical suspension was over. The Tribunal notes that it is factually incorrect to state that the claimant was required to take holiday because the evidence at the Tribunal was in fact that the claimant had been paid in full for the period from 27 June until 10 July and it was not marked as holiday.

238. However the Tribunal finds that the claimant considered being told his ongoing absence should be taken as unpaid leave or holiday to be unwanted conduct. The claimant saw the OH report on 26 June confirming his medical suspension was at an end and the test report from Mr Bird on the same date. The claimant told OH on 26 June he "hadn't had time to digest the information". He asked for an OH appointment to discuss the report with OH doctor on 3 July. We find although he disputed informing Mr Williams he had other appointments that week which meant he could not return to work at that time, his union rep representative told Mrs Roberts on 5 July that the claimant had told Mr Williams he had a hospital appointment on 26 June.P212B. We find this suggests the claimant did say the reason he could not attend was another appointment.

239. The Tribunal turns to consider whether this this alleged unwanted conduct related to disability. The Tribunal finds it was not. This conversation took place because the claimant's medical suspension had ended and he had not returned to work; he was not signed off sick by his doctor and therefore his absence needed to be covered either with unpaid leave or holiday pay. It was not related to disability.

240. Even if the Tribunal is wrong about that the Tribunal finds that Mr Williams did not have the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Mr Williams had been a sympathetic manager who had ensured that the appropriate tests were carried out to ensure the workplace was safe for the claimant an electrician who had a pacemaker fitted.

241. The Tribunal must then consider whether, taking into account all the circumstances of the case, including the perception of the claimant whether it was reasonable for the conduct to have that effect.

242. The Tribunal finds, taking all the circumstances into account, that it was not reasonable for the conduct to have that effect. The claimant had an incorrect perception that he was entitled to have a meeting with Occupational Health and have all his questions answered before he returned to work, despite the fact that there was a report from Occupational Health saying he was safe to return based on a telephone meeting of the relevant individuals, having considered the test report.

243. In a situation where the claimant did not want to return to work until he had the answers to further questions he wanted to ask Mr Bird, the author of the report, but the Respondent had found the workplace safe and ended the suspension, it was not unreasonable for his manager to suggest that he should take his further absence as either unpaid leave or holiday. Accordingly, we find it was not reasonable in all the circumstances for the conduct to have the proscribed effect. Therefore that allegation fails.

(f) Belittling his symptoms or inappropriately comparing with other people who had been unwell.

244. This was another allegation where the claimant did not clearly identify who he said had made the remark. It was put to both Mr Ferguson and Mr Taylor, who both denied it. We find it was not said and accordingly it cannot amount to unwanted conduct.

(g) Stating that the claimant was technically not unwell.

245. The Tribunal relies on its finding of fact that this comment was made by Mrs Roberts in an email to the claimant's representative. The claimant regarded it as unwanted conduct. The comment was related to his disability because it was made in the context of his medical suspension. The Tribunal therefore turns to consider whether the conduct had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal is satisfied by the evidence of Mrs Roberts that she had no intention whatsoever to create the proscribed effect.

246. The Tribunal turns to consider the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have the effect. The Tribunal takes into account that the comment was factually accurate. The Tribunal finds it is not a pejorative comment. The Tribunal finds the context in which the comment was made was when Mrs Roberts was explaining to the claimant's trade union representative the reason why Mr Williams had been contacting the claimant. In all these circumstances it was a reasonable remark to make by a Human Resources Manager to the claimant's representative and we find it did not have the proscribed effect.

Victimisation

247. The first question for the Tribunal is: has the claimant carried out a protected act? The claimant relied on two protected acts. The next question is: did the claimant suffer a detriment? The claimant relied on 20 detriments. The last question is: was the detriment because the claimant carried out protected act?

248. The Tribunal turns to the first question: has the claimant carried out a protected act? The claimant relied on the following as the first protected act:

> "The contents of his telephone call on 20 June 2017 with Mr Joyce (Illuminations Project Manager) who contacted the claimant following Dr Ahmad's letter of 26 May 2017. Mr Joyce contacted the claimant saying that he should now return to work. The claimant said he remained concerned about his unfair treatment by the respondent. Mr Joyce asked the claimant to elaborate and the claimant explained that he was forced to return previously when he was medically suspended putting his health and ultimately his life at risk. The claimant also complained no risk assessment had been done and no-one had contacted him to check he was ok, showing a complete disregard for his health. Mr Joyce said in reply that John Hawkin (Head of Service) had

> instructed everyone not to contact the claimant. Mr Joyce did not respond to any of the claimant's other concerns and simply said Carol Gee would be in touch in relation to his return to work."

249. The Tribunal reminds itself that protected acts are defined in section 27(2) Equality Act 2010. The only potential relevant protected act here is "making an allegation (whether or not express) that A or another person has contravened the Equality Act.

250. It is not necessary that the Equality Act is actually mentioned in the protected act, and we find that it was not. However, the asserted facts must be capable of amounting to a breach of the Equality Act. The Tribunal is not satisfied that there was anything in the conversation which suggests that the respondent has breached the Equality Act. The claimant was not absent from work on sick leave, he was medically suspended. The Tribunal relies on its findings of fact that the claimant made general allegations about health and safety but it is not satisfied there was anything to suggest there was a breach of the Equality Act. Accordingly the Tribunal finds there was no protected act.

251. The Tribunal turns to the second alleged protected act:

> "An email to Janet Roberts on 5 July 2017 from his representative, Kevin Jarman (Unite) which refers to the claimant's treatment by the respondent (in particular the frequent and insistent calls by Mr Williams putting pressure on the claimant to return whilst he was signed off by Occupational Health as 'tantamount to bullying and harassment'."

252. The Tribunal reminds itself of the wording of section 26:

> "A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act."

253. Accordingly the legislation appears to envisage that the protected act is done by the person suffering a detriment. In this case the claimant is not alleged to have done the protected act, it is his representative, Kevin Jarman, from the trade union. The Tribunal is not aware of any case law which suggests that a representative doing a protected act attracts the protection of section 27 of the Equality Act 2010. Accordingly we find no protected act.

254. Having found no protected act, the victimisation claims must fail at this stage.

255. However, in case we are wrong about that we have gone on to consider the detriments. Did the claimant suffer the following alleged detriments?

> (1) Was placed away from any other members of staff and was working alone.

256. The Tribunal relies on its findings that this is factually incorrect. The claimant was only a few feet from other members of staff. However, he was working alone.

257. We therefore turn to the last question which is causation. We rely on our previous findings of fact that the reason the claimant was working in that area was w because he had returned to work on light duties and the festoons and snowflakes were in the work area where he was stationed. We find the reason for the treatment is entirely unrelated to his telephone call with Mr Joyce. The decision about where to place the claimant was made by Mr Williams and Mr Taylor based on the advice of OH that the claimant should have the benefit of light duties on his return.

258. Likewise we find the email from Janet Roberts to his trade union representative (the second alleged protected act) to be wholly unrelated to where the claimant was placed in terms of work.

(2) Was carrying our heavy duty work (testing electric cables, winding them up and lifting them in a storage container).

259. The Tribunal finds this is factually incorrect. The Tribunal accepts the evidence of Mr Taylor that the claimant was carrying out the lightest duties he had available on his return to work. Accordingly the Tribunal is not satisfied that this is a detriment. However, in case the Tribunal is wrong about that it has gone on to consider causation. The Tribunal is satisfied that the duties the claimant was working on, the festoons and the snowflakes, were determined by Mr Taylor and were unrelated to the email from Janet Roberts to the claimant's union representative or the telephone conversation between the claimant and Mr Joyce. (The alleged protected acts)

(3) Was approached by Mr Ferguson who questioned the claimant about his time off, stating that he took too long and comparing with another individual who supposedly had the same issue. The claimant was also told by Mr Ferguson that he should expect office banter regarding his time off and queried why he was asking for a phased return to work following just one afternoon of cutting grass.

260. The Tribunal relies on its findings of fact. The Tribunal finds that the claimant is mistaken and these remarks were not made by Mr Ferguson. The Tribunal relies on the evidence of Mr Ferguson. Accordingly the Tribunal finds there was no detriment and the allegation fails at that stage.

(4) Following his lunch break the claimant was stationed away from other colleagues again. He was tasked with electronically testing and repairing illumination features (approximately 3 metres x 3 metres) which were too heavy to move single-handedly.

261. The Tribunal finds that the claimant is referring to working on the illumination features, which were the snowflakes. The Tribunal relies on the evidence of Mr Taylor that these were the lightest duties available. It is not disputed that they were too heavy to move single-handedly and the claimant was able to ask for assistance from a colleague. Given that these were the lightest duties available and that the

claimant was fully fit to return to work the Tribunal is not satisfied there was any detriment.

(5) Various employees of the respondent have made negative comments about the length of time the claimant had taken from work in order to recover from surgery.

262. This allegation is vaguely pleaded. It was put to both Mr Ferguson and Mr Taylor both of whom denied it. The Tribunal accepts their evidence and accordingly finds the remarks were not made.

(6) Various employees of the respondent had spread rumours that the claimant had a target on his head and that he was at risk of losing his job due to his medical condition.

263. The claimant declined in evidence to say who he was referring to in relation to this allegation. The Tribunal is not satisfied they had any evidence that anyone had spread rumours. It was put to Mr Ferguson that he made the "target on his head" remark and he denied it. Accordingly the Tribunal finds no detriment because we find these allegations are not factually correct.

(7) In the full knowledge that the claimant was recommended by OH on 19 April 2017 to be medically suspended until further tests were completed, the respondent requested that the claimant return to work on 27 April 3 May, 20 June, 28 June, 30 June, 3 July, 4, July, 5 July and 6 July.

264. The Tribunal relies on its findings of fact that Mr Williams telephoned the claimant about his return to work on 28 June, 30 June, 3 July, 4, July, 5 July and 6 July. The Tribunal did not hear any evidence that the claimant was requested to return to work on 27 April. The Tribunal does not understand the reference to requesting the claimant to return to work on 3 May. The claimant informed the respondent he would not be returning to work on 3 May.

265. The Tribunal turned to consider whether Mr Williams requesting the claimant to return to work on 28 June, 30 June, 3 July, 4 July, 5 July and 6 July could amount to a detriment. The Tribunal finds there was a discussion between the claimant and Mr Joyce on 20 June but Mr Joyce did not request the claimant to return to work on that date, he merely informed him that he would be able to return to work.

266. The Tribunal accepts that the claimant considers it was a detriment to be asked to return to work by Mr Williams on the dates 28 June to 6 July.

267. The Tribunal turns to consider causation. The Tribunal finds Mr Williams' request was unrelated to the claimant's phone call with Mr Joyce or the email between Janet Roberts and Mr Jarman. There was no evidence that Mr Williams knew the detail of either. We find the reason Mr Williams requested the claimant to return to work was because he had test results in his possession saying that there was no danger to the claimant if he returned to work and advice from Occupational

Health stating categorically the claimant was fit to return to work. Accordingly that allegation fails.

(8) Instructing the claimant to come into work to perform “light duties” in the period of time when he was medically suspended from work. In any event the duties given to the claimant were not light. Some tasks often needed the assistance of another colleague or further exacerbated the claimant's medical condition.

268. The Tribunal finds that this relates to the claimant attending the Parks Department in May 2017. The Tribunal relies on its finding of fact and finds that the claimant considered this to be a detriment.

269. The Tribunal turns to consider causation. This incident occurred on 3 May. Both the alleged protected acts occurred after this date on 20 June and 5 July 2017 so can not have caused the detriment.

(9) The council did not carry out any risk assessments prior to the claimant returning to work after his operation.

270. The Tribunal finds that this relates to the claimant's complaint that when he worked in the Parks Department on 2 May 2017 and used a heavy lawnmower and a leaf blower no risk assessment was carried out. The Tribunal finds this allegation relates to 2 May and amounts to a detriment. The Tribunal turns to causation. This detriment cannot have been caused by either of the protected acts because they both postdate the alleged detrimental treatment.

(10) Unilaterally using the claimant's annual leave days in place of the time he was signed off as medically suspended in and around 28 June and/or telling him that alternatively he would have to have at least two weeks’ annual leave without pay.

271. The Tribunal relies on its previous findings of fact. The Tribunal finds that it is inaccurate to state the respondent unilaterally used the claimant's annual leave days in place of the time he was signed off as medically suspended in and around 28 June 2017. The Tribunal finds that Mr Williams said to the claimant when he did not return to work on 27 June that he would need to use holidays and/or annual leave. The Tribunal relies on its findings of fact that the claimant told Mr Williams initially that he was unable to return to work because of appointments. The Tribunal relies on its findings of fact that the respondent never deducted any pay from the claimant or showed absence from work between 27 June and 10 July as holiday.

272. However, the Tribunal accepts that the claimant considered being told by Mr Williams that he should use the period of time from 28 June to 10 July as unpaid leave and/or annual leave as a detriment.

273. The Tribunal turns to consider causation. The Tribunal finds, as it has stated above, the reason Mr Williams did this was because he was in possession of a report from Mr Bird which stated there was no safety risk to the claimant returning to

work and the view from Occupational Health that they too had said he was fully fit to return to work. Accordingly the Tribunal is not satisfied that the alleged detriment was caused by the protected acts.

(11) Putting the claimant in a position where he had conduct a significant amount of the investigation for his test results, the correct internal procedure, returning to work and appointments with OH.

274. The Tribunal finds this is factually incorrect. The Tribunal finds that when Mr Joyce was finding it difficult to find an expert to provide a test report he did ask the claimant if he would enquire of his own cardiologist if he knew an expert. The Tribunal finds that that is not unreasonable. The Tribunal finds that when the claimant raised further concerns with OH following the test report OH suggested to him that it may be easier to liaise with the expert, Mr Bird, himself. The Tribunal finds the claimant contacted OH of his own volition to arrange an appointment for himself at OH to take place on 3 July 2017. There was no pressure or suggestion that he should do so. Nevertheless, the Tribunal accepts the claimant finds these matters amount to a detriment.

275. The Tribunal turns to causation. The contact with the claimant's own cardiologist prior to an expert being instructed cannot be a detriment caused by either of the protected acts because it occurred before 20 June and before 5 July. The claimant chose to contact Mr Bird direct as suggested by OH and chose to contact OH direct. The Tribunal is not satisfied that either of those actions by the claimant were connected to his telephone call with Mr Joyce on 20 June. So far as the second protected act is concerned, it was dated 5 July and so post-dated the alleged detriments. It therefore cannot have caused them.

(12) Failed to adopt the phased return to work proposals of HR.

276. The Tribunal accepts that the claimant considered it a detriment that his employer did not adopt the phased return to work proposals of OH namely the suggestion in relation to reduced hours. The Tribunal turns to causation. The Tribunal finds that Mr Williams and Mr Taylor noted that the claimant had been signed fully fit for work in April 2017 and was only medically suspended because the Occupational Health doctor wanted to ensure that his work as an electrician was safe for him given his pacemaker. Once the test results had been received which confirmed it was safe for him to return, and Occupational Health had also confirmed this by 21 June 2017, Mr Taylor and Mr Williams considered the claimant was fit to work. They noted the suggestion of OH and decided to place the claimant on light duties rather than also short hours. The Tribunal is not satisfied there is any evidence to suggest that the email to Janet Roberts from the claimant's union representative on 5 July or the claimant's telephone conversation with Mr Joyce on 20 June were in any way related to that decision.

(13) Advising council staff not to contact the claimant when he was absent from work.

277. The Tribunal relies on its finding of fact. The Tribunal is not satisfied this amounts to a detriment given the instruction was not to unnecessarily contact the

claimant at home and that the claimant at other times complained about being contacted excessively from home.

278. However, in case the Tribunal is wrong about this it has gone on to consider causation. The Tribunal finds that the instruction had already been given before the phone call of 20 June because Mr Joyce refers to it in that conversation and so it cannot have been caused by the protected act of 20 June or the protected act on 5 July.

(14) In the knowledge that the claimant was already feeling excluded in the workplace and contrary to the advice of Occupational Health the respondent stationed the claimant away from other colleagues upon his return to work.

279. The Tribunal relies on its previous findings of fact that the claimant was not stationed away from other colleagues and there was no advice from Occupational Health about where the claimant was to be stationed. Accordingly, the Tribunal is not satisfied that this amounts to a detriment. In case the Tribunal is wrong about that the Tribunal finds the decision was made by Mr Williams and Mr Taylor and was entirely unrelated to the claimant's conversation with Mr Joyce and the claimant's representative's email to Janet Roberts.

(15) Telling the claimant to get back to work when he was asking for help.

280. The Tribunal relies on its previous findings of fact in relation to this allegation. It accepts that the claimant considered being told to "do one" by Mr Taylor amounted to a detriment. The Tribunal relies on its previous findings of fact that the reason for the treatment was because the claimant was standing at the desk of a colleague for 7-8 minutes listening to the answers to a pop quiz instead of working. The Tribunal finds it was unrelated to the protected acts. There was no evidence to suggest Mr Taylor had any knowledge of either protected act.

(16) Telling the claimant that he should expect office banter due to taking time off for his medical condition.

281. The Tribunal relies on its previous finding that this comment was not made and accordingly cannot amount to a detriment.

(17) Telling the claimant to "do one" when he was asking a colleague for assistance.

282. The Tribunal finds this is a duplication of allegation (15) and relies on its findings in relation to that allegation.

(18) Threatening the claimant with not paying him for his absence and instead requiring him to take holiday.

283. The Tribunal finds that this is a duplication of allegation (10) and it relies on its findings in relation to that allegation.

(19) Belittling his symptoms or inappropriately comparing with other people who had been unwell.

284. The Tribunal relies on its previous findings of fact that this was not said and accordingly cannot be a detriment.

(20) Stating that the claimant was “technically not unwell”.

285. The Tribunal relies on its previous findings of fact. The Tribunal finds that the claimant considered this to be a detriment.

286. The Tribunal relies on its previous finding of fact that the reason the comment made was an explanation to Mr Jarman, the claimant's union representative, as to why Mr Williams had been contacting the claimant at home. Mrs Roberts was explaining to Mr Jarman that during the relevant period the claimant was not, as had been suggested, off work sick but instead was medically suspended and therefore was technically not ill. The Tribunal finds that this was the reason Mrs Roberts made the comment and not because of a telephone conversation between the claimant and Mr Joyce, and nor because Mr Jarman had informed her that the claimant considered he was being bullied by Mr Williams.

Failure to make reasonable adjustments

287. The issues for the Tribunal are:

(1) Did the respondent apply a PCP? The respondent relied on the following PCPs:

(i) Putting pressure on employees, including the claimant, who have been absent to return to work and isolating them (the pressure to return to work and isolation PCP); or

(ii) Failing to train employees about discrimination or harassment and allowing a discriminatory environment to flourish (the hostile work environment PCP).

(2) Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

(3) If yes, did the respondent take such steps as was reasonable to have to take to avoid the disadvantage? The reasonable adjustments identified by the claimant were:

(i) Allow the full recovery and the proper obtaining of medical advice/risk assessment;

(ii) Creating a culture of supporting those who are absent and treating their reintegration into the workforce in a positive way;

(iii) Taking greater care to educate its employees.

288. The Tribunal turns to PCP (i) "putting pressure on employees including the claimant who have been absent to return to work and isolating them".

289. The Tribunal did not hear any evidence to suggest that any other employee who had been absent from work was pressured to return to work and isolated.

290. The Tribunal relies on its finding of fact that there was no pressure on the claimant to return to work and that the claimant was not isolated on his return. The claimant asked to return to work in May 2017 and when the return to work was not successful he remained absent, medically suspended.

291. The claimant was asked to return to work at the end of his medical suspension on 26 June 2017.

292. The claimant went absent from work again from July 2017. The Tribunal finds that there was no pressure applied to the claimant to return to work during the period July to December 2017. The Tribunal finds that the respondent properly applied its absence management policy and when the claimant indicated he did not wish to attend a meeting he was permitted to answer questions via email.

293. Accordingly, the Tribunal finds there was no PCP of putting pressure on employees including the claimant who have been absent to return to work and isolating them, and the claim fails at this point.

294. Even if the Tribunal is wrong about that and turns to the next issue, there was no evidence adduced to suggest how such a PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled. Therefore the claim fails at that stage.

295. The Tribunal turns to PCP (ii) "failing to train employees about discrimination or harassment and allowing a discriminatory environment to flourish".

296. The Tribunal relies on the evidence of Mr Williams, Mr Taylor, Mr Joyce and Mr Ferguson that they did receive training in equal opportunities and discrimination via a computerised learning system. The Tribunal finds it is factually incorrect to suggest that the respondent allowed a discriminatory environment to flourish. The claimant was paid in full for his absence related to his heart condition when he had the pacemaker fitted. When he went absent again from July he received the benefit of the respondent's sickness absence pay scheme and we heard evidence from one the respondent's witnesses which was not disputed that at the respondent's discretion he received sick pay in excess of the amount to which he was contractually entitled. This is not suggestive of an employer who allows a discriminatory environment to flourish.

297. In case we are wrong about that we turn to the second issue: did the application of such a provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? There was no evidence adduced that the application of such a provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Therefore that claim fails.

Public Interest Disclosure Detriment

298. We turned to the claimant's public interest disclosure detriment claim. We reminded ourselves that the first issue for the Tribunal is: what is the disclosure of information relied upon by the claimant? The claimant's disclosures of information are set out at page 39A of the bundle.

Protected Disclosure 1 – On 20 June 2017

299. "During a phone call the claimant was told by John Joyce that he should now return to work as the tests had been carried out. The claimant stated that he was concerned about the treatment by the council of him, being forced to return whilst medically suspended and putting his health and safety at risk. The claimant also stated that no health and safety risk assessments had taken place and that no-one had made contact to enquire about his health and wellbeing".

300. We find that the claimant telephoned Mr Joyce to enquire what was happening on 20 June 2017. We find Mr Joyce told the claimant informally that the test results had been received and that he would be able to return to work. The claimant agreed in cross examination his email of 25 June 2017 to Carol Gee was referring to his conversation with Mr Joyce where he stated at page 202:

> "I have been informally advised that I may now return to work."

301. Mr Joyce agreed when cross examined that the claimant had spoken to him in the terms suggested in the above disclosure of information. Mr Joyce agreed that he had responded to the claimant's comment that no-one had made contact to enquire about his health and wellbeing, that John Hawkin, Head of Service, had, he understood, issued a general practice instruction to think before contacting a person who is absent from the workplace at home. Mr Joyce explained to the Tribunal that it was a fine line because some employees felt stress if they were contacted at home whereas other employees considered it was a supportive action like an "arm around the shoulder" to be contacted at home.

302. The Tribunal finds that this situation occurred with the claimant. In part of his case he complained that he was not contacted at home, namely in his phone call to Mr Joyce, but later when he was contacted regularly within a few days by Mr Williams at the end of June/early July he objected to the contact.

303. The claimant said in cross examination that in his phone call with Mr Joyce he was talking specifically about the incident in the park department in May. Mr Joyce said in cross examination that the claimant did not specifically mention the incident with the park department in that conversation. We find the claimant did not expressly mention it. It is not referred to in his statement nor in the table at 39A. It was only revealed by the claimant when he was expressly asked in cross examination what he meant. We find it is likely the incident in the park was in his mind when he spoke to Mr Joyce on that occasion but we find he did not expressly mention it.

304. Having made a finding about the conversation between the two men we must turn to consider whether there was a disclosure of information. We remind ourselves

of the guidance in **Kilraine** that section 43B(1) ERA 1996 should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other. We remind ourselves that whether a particular disclosure satisfies the test in section 43B(1) it should be assessed in the light of the particular context in which it is made. We find the statement made by the claimant on 20 June 2017 is ambiguous. It could be read as referring to the incident in the park, but it could also be read in relation to the claimant's continued medical suspension. Given the claimant did not expressly refer to the incident at the park in that conversation, we are not satisfied the claimant had disclosed information to the respondent. We find he simply made allegations.

305. However, in case we are wrong about that we have turned to the next question, which is whether the disclosure was, in the claimant's reasonable belief, tending to show one of the breaches as set out in section 43B(1)(b) and/or (d) as set out in the document. We find this test is fulfilled in terms of the danger to the health and safety of any individual. It was clear that the claimant had become anxious, following the attempted return to work in the Park, about his health in returning to work with a pacemaker. We find such disclosure was in the public interest because although it related only to the claimant the health and safety of an individual in the workplace we find he reasonably believed it was was a matter of public interest.

306. There is no dispute the allegation was made to the employer.

307. We turn to the next issue, which is detriment. The detriment relied upon by the claimant was that on 20 June 2016 Mr Joyce said that John Hawkin had instructed everyone not to contact the claimant but made no response to any of the claimant's other comments and finished the call saying Carol Gee would contact him about returning to work.

308. Firstly, the Tribunal is not satisfied that the instruction from John Hawkin not to contact the claimant amounts to a detriment. The Tribunal notes the respondent has a policy which is an attendance management policy, and that provides for regular contact with an absent employee. In addition the medical suspension letter of 21 April noted, "during this period you will be able to receive your normal pay and may still keep in contact with the office and your work colleagues and we will be in regular contact with you". We find contact occurred. We find the claimant wanted to return to work and liaised with Mr Joyce to arrange his attendance at the Park Department on 2 May 2017. Accordingly any instruction given by Mr Hawkin was in relation to any unnecessary contact with the claimant rather than no contact at all. Accordingly we are not satisfied it amounts to a detriment.

309. The second alleged detriment was "made no response to any of the claimant's other comments" and we find given the low threshold for a detriment, this is capable of amounting to a detriment.

310. We find "finishing the call by saying Carol Gee would contact the claimant amount returning to work" does not amount to a detriment. Mr Joyce was simply factually stating what he understood would occur.

311. However, if we are wrong about this and the claimant has suffered a detriment by (1) Mr Hawkin issuing an instruction to everyone not to contact the claimant, and (3) Mr Joyce failing to respond to the claimant's other comments made in his telephone call on 20 June 2017, we must turn to causation.

312. We must turn to causation in relation to detriment (2) namely Mr Joyce "made no response to any of the claimant's other comments" in the conversation of 20 June. We remind ourselves that in a whistle-blowing claim we must look at the conscious and unconscious motivation of the alleged discriminator.

313. We find that the surrounding evidence suggests that Mr Joyce was well disposed towards the claimant. He had worked hard firstly to try to find a company to carry out the testing on the claimant's behalf, and secondly he made every effort to ensure that the claimant's request to return to work on 2 May was properly actioned. He had agreed appropriate duties with the manager from the Park Department. We find that the errors which occurred on 2 May when the claimant attended had nothing to do with Mr Joyce. Of course this does not mean Mr Joyce did not discriminate against the claimant as there may be unconscious motivation.

314. Turning to the alleged detriment 1, we find that Mr Joyce informed the claimant that Mr Hawkin had instructed everyone not to contact the claimant because factually this was what had occurred. Mr Joyce was simply relaying information. He was not causing the claimant a detriment because the claimant had made a protected disclosure to him.

315. We find that Mr Joyce made no comments in relation to the claimant's other remarks because they were ambiguous and he did not understand them as requiring a reply. His failure to reply was not on the ground of a protected disclosure.

316. Finally in relation to the third detriment "finishing the call by saying Carol Gee would contact the claimant about returning to work" the Tribunal finds Mr Joyce made this remark because that was what he understood the process to be in relation to the claimant's return to work, not because the claimant had disclosed information to him about the incident in the Park.

317. Therefore to conclude the Tribunal finds firstly there was no protected disclosure. Secondly we find no detriment except in relation to Mr Joyce's failure to respond to the claimant's other comments in that conversation. However we find and so far as that detriment or any of the other 2 alleged detriments is concerned it was not done on the ground of the protected disclosure. Therefore this claim does not succeed.

Protected Disclosure 2 - On 4 July 2017

318. "Richard Williams telephoned the claimant to say that the claimant was expected in work the following day. The claimant advised that in the OH meeting on the previous day he had asked several questions regarding the safety of the workplace in relation to his pacemaker and working with electricity, specifically the EMF tests, and that Stuart Sanderson was to find the answers and revert to the claimant. The claimant also said that he was concerned that with the lack of

answers that the working environment would not be safe for him to return to in the absence of this information".

319. The Tribunal reminds itself the first question is whether there was a disclosure of information. We find Mr Williams was expecting the claimant to return to work on 27 June. See p224.He had received the EMF test results and was made aware (although he had not seen the report) that from the OH point of view the medical suspension was over.

320. Following a discussion with the claimant and OH, and having regard to the OH report which was sent to the claimant on 26 June together with the test results, and having been informed that Mr Perrins wanted five working days to respond to the OH report (see page 162(3), Mr Williams was expecting the claimant to return to work on Monday 3 July when he expected him to attend an Occupational Health appointment. See page 208, "Based on this Andy needs to turn up at Lightworks 8.00am on Monday 3 July so we can complete the back to work process. He will then he able to attend his Occupational Health appointment". The Occupational Health appointment was arranged on 26 June for 3 July at the claimant's request.

321. We find that there was a misunderstanding on the part of the claimant. The claimant appeared to believe that he needed to see Occupational Health before he could return to work. See note of the Occupational Health administrator, Annie Rimmer, on 30 June 2017 at page 162(5) "I informed Richard that Mr Perrins wanted confirmation from the OHP that he was fit to return and still had some questions to ask and therefore it would be better if he could have the discussion prior to him returning".

322. From Mr Williams' perspective, an OH report already stated there was no reason why the claimant was not fit to return to work and he was aware that the Occupational Health position had discharged the medical suspension. Accordingly he expected the claimant to return to work. His understanding was that the claimant was unable to attend during the final week of June because he had other appointments, and this appears to be borne out by the claimant's union representative in a later letter on 5 July which stated Mr Perrins informed Mr Williams that he had a hospital appointment and was unable to return on 26 June. P212B

323. There is no dispute that Mr Williams contacted the claimant on 4 July (see his summary note at page 221 completed in July). We find the telephone conversation took place in the morning. We find the claimant told Mr Williams that in the OH meeting the previous day (3 July) he had asked several questions about the safety of the workplace in relation to his pacemaker and working with electricity. We find that the occupational physician was not present but that the Occupational Health adviser, Mr Sanderson, said he would find out and revert to the claimant (see page 162(7)).

324. We turn to consider whether disclosure 2 was a "disclosure of information". We find it does amount to a disclosure of information. The claimant explained that he was seeking information specifically in relation to his pacemaker and working with the electricity. We find that he expressed a concern that the working environment in the context of this unknown information would be unsafe for him. We find that in his reasonable belief it amounted to a breach of section 43B(1)(d), that the health and

safety of an individual is likely to be endangered. We find he considered a matter of this importance is potentially in the public interest.

325. We turn to the alleged detriment: "Mr Williams was not happy with the claimant raising this point and expressed his hostility and a contrary view. Mr Williams maintained his position in spite of the claimant's concern about the safety of the environment and stated that the claimant should have been back at work on Monday 3 July 2017."

326. Although he denied hostility, we find it likely that Mr Williams did express himself in a direct manner to the claimant. At this stage the claimant had been absent from work on medical suspension for many weeks. We accept the evidence of Mr Taylor that the department was short-staffed.

327. We turn to the issue of causation. We find the way the claimant communicated with OH was unusual. Normally it is for the employer to refer an employee to OH. Instead the claimant had taken it upon himself to contact OH and make an appointment.

328. We find that by 4 July 2017 Mr Williams had a copy of the released Occupational Health report which clearly stated that the medical suspension was ended. Mr Williams knew that at the point the claimant was medically suspended at the end of April he was fit to return to work and the only reason for the suspension was because of a concern that he might not be suitable for working with electricity. Those fears had been unfounded. Mr Williams is himself an electrical engineer. We find he expressed himself in a direct manner by saying to the claimant he should have been back at work on 3 July 2017 because that position was factually correct. The claimant should have been back at work on 3 July 2017: he chose not to attend work. He could have attended the OH Department from work. Accordingly this allegation does not succeed because the way Mr Williams spoke to the claimant, which was direct, when telling the claimant that he should have been back at work on Monday 3 July 2017 was because of the way that the claimant had conducted himself, not because the claimant had disclosed information that he had asked questions about his pacemaker to HR.

Protected Disclosure 3-on 5/7/17

329. The Tribunal turns to consider whether the next disclosure amounted to a disclosure of information:

> "Richard Williams telephoned the claimant again to instruct that he return to work. The claimant repeated that he was still waiting for the answers to the questions regarding the test results from Occupational Health. The claimant informed Mr Williams that he had made contact with the testing company as advised by Occupational Health to ask the questions about the safety of the equipment with his pacemaker."

330. The Tribunal reminds itself of the context of this conversation. There is no dispute that Mr Williams contacted the claimant on 5 July on two occasions, one of which was very brief, probably leaving an answer machine message (see page 221).

The Tribunal reminds itself that the claimant emailed Mr Williams on the afternoon of 4 July saying that he had contacted Tony from the EMF Group direct. He said he had sent all the information and awaited his response from Mr Bird "possibly tomorrow". In fact we find the claimant received a response from Mr Bird that same day, 4 July 2017 (see page 212).

331. We find that the claimant never emailed Mr Williams to inform him that Mr Bird, the electronics engineer who had conducted the EMF tests, stated:

> "I have reviewed the details provided and there is no change to the report status. That is to say the data files indicate no reason to be concerned."

332. The Tribunal also notes that on 5 July the claimant told OH that he had the information from the EMF expert but now wanted to contact his pacemaker clinic to ask for some information.

333. We find the conversation between the claimant on the morning of 5 July was as the claimant has recorded, although the Tribunal finds that the claimant was not frank with Mr Williams. By 5 July Mr Bird has given the claimant the answer to his questions, confirming the outcome of his report was unchanged and so he considered it safe for the claimant to return to work questions.

334. The Tribunal is not satisfied that there is any disclosure of information which suggests a breach of any legal obligation or a danger to the health and safety of any individual. The claimant is simply informing Mr Williams he is awaiting further information.

335. However, in case we are wrong about that and there is a disclosure of information which the claimant reasonably believes was in the public interest we turn to the issue of detriment.

336. We find that Mr Williams did tell the claimant he should have been back at work by now because Mr Williams genuinely and reasonably believed that was the case given that he had received the test results and the Occupational Health report which said the claimant as fit to return to work, and yet he had failed to do so. We are not satisfied that this conversation was aggressive in tone. We find that Mr Williams was not expressly told by the OH Department that they had suggested the claimant contact Mr Bird direct. We find it is very unusual for the claimant to be dealing with OH direct rather than through a referral from a manager. Accordingly we are not satisfied that there was any detriment.

337. However, if we are wrong about that the comment from Mr Williams that he "should have been back at work by now" can amount to a detriment, we are not satisfied that there is any causation because the reason the comment was made by Mr Williams was because on the information he had, the claimant should have returned to work because the medical suspension was over, not because of any disclosure of information.

Protected Disclosure 4 on 5/7/17

338. The Tribunal turns to consider the alleged protected disclosure as follows:

> "The claimant had mentioned previously to Kevin Jarman (the claimant's union representative) about the constant harassing phone calls from Richard Williams and he said that he would contact HR. He sent an email to Janet Roberts regarding this on behalf of the claimant."

339. This email (page 212B) was sent by the claimant's trade union representative. The Tribunal has had regard to the language of the statute at Section 47B ERA 1996 which states:

> "A worker has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the worker made a protected disclosure."

340. The language of the statute is not suggesting that there can be a disclosure to a third party. The language of section 43B refers to a qualifying disclosure being a disclosure of information in the reasonable belief of the *worker* making the disclosure. It does not refer to an agent or other party making a disclosure on the claimant's behalf. Accordingly it is not a protected qualifying disclosure within the meaning of the Act.

341. In case the Tribunal is wrong about this it turns to consider the detriment where Ms Roberts said, "Andy isn't technically ill but the manager should have waited to receive the Occupational Health report before expecting him to return to work". The claimant relied on the "technically ill" comment as being distressing. The Tribunal finds the "not technically ill" comment was factually correct. The claimant was signed fit for work at the end of April. He was suspended on medical grounds whilst investigations were carried out to see if he was safe to work with a pacemaker, as an electrician. Accordingly where a comment is factually accurate and is not pejorative, the Tribunal is not satisfied it is capable of being a detriment. Therefore this allegation fails.

Protected Disclosure 5-On 10/7/17

342. The Tribunal turns to consider the fifth alleged disclosure as follows:

> "In the meeting with Rob Taylor the claimant told Mr Taylor that he felt under stress and was very concerned about how he had been treated, and there appeared to be no concern over his wellbeing. The claimant also stated that Occupational Health had advised a phased return to work over a 2-4 week period now that the medical suspension had ended and that had not happened."

343. This conversation was alleged to have occurred on 10 July 2017. There is no dispute that Mr Taylor held a return to work meeting with the claimant on that date. The claimant raised generalised concerns with Mr Taylor. We find the nature of the alleged disclosure is factually incorrect. We find there was a discussion about the

nature of the phased return. We find Mr Taylor explained to the claimant that he would have a two week phased return of light duties but working full-time hours. Mr Taylor confirmed to the Tribunal that the claimant stated he was unhappy he would be working full-time hours rather than short hours.

344. The Tribunal is not satisfied that the claimant was raising more than general concerns in relation to stress and how he had been treated. There were no specific facts as to what the claimant meant about this. However, the claimant did object to the fact that his phased return had not occurred in the way suggested by OH. We find once again the claimant did not clearly identify facts to Mr Taylor to identify what it was about the phased return he objected to. Accordingly we found no disclosure of information.

345. The Tribunal turns to the reasonable belief of the claimant that there was a breach of a legal obligation or that the health and safety of an individual was likely to be endangered. The claimant thought that a phased return over two weeks on light duties fulltime was unreasonable because the OH report suggested short hours.

346. However, the claimant had become confused. He seemed to equate his situation to someone who had been off on long-term sick. He had not been. He was fully fit and had been medically suspended. However, he had persuaded Occupational Health he needed a phased return. See the record at 162(13)) where Annie Rimmer states “Mr Perrins is happy for OH to inform Mr Williams on his return and explain that it would be beneficial for Mr Perrins to have a phased return and explain the delay in Mr Perrins’ returning”. This appears to be Mr Perrins on 6 July 2017 directing Occupational Health rather than the other way around.

347. Likewise the entry at 162(15), “a phone call from Christine Smith, HR, to say she had just received a phone call from Mr Perrins to say that he was going to leave at 12.00pm as I had informed him that he could. Christine just wanted to check this information. I informed Christine I did not say that and informed her of the conversation above”. The “conversation above” was that “phone call from Mr Perrins informing me he had returned to work today and that he had been informed by Richard Williams that they were not going to implement a phased return. I informed him that our advice is only a recommendation and the manager did not have to follow this”.

348. However, we find that the claimant appeared to misunderstand the reason for the medical suspension and to believe that he was entitled to a phased return to work on short hours despite the fact that he had not been absent on long-term sickness absence. We find given we have to consider the belief of this worker, Mr Perrins, that on balance, given his misunderstanding, it was within his reasonable belief, that he had made a disclosed information(objecting to the phased return on full time hours) which he reasonably believed was likely to cause danger to his health and safety. (We find he had no reasonable belief that there was a breach of a legal obligation. The legal obligation was never identified.

349. We turn to consider whether Mr Perrins reasonably believed that disclosure was in the public interest. We are not satisfied he has. The only evidence we heard

was that Mr Perrins was concerned for his personal safety. Accordingly the allegation fails at this point.

350. However in case we are wrong about that ,we turn to detriment. The alleged detriment is firstly Mr Taylor had said that HR instructed staff not to contact the claimant. Firstly for reasons we have already described in this judgement we find this is a reference to a communication by Mr Hawkin not to contact absent employees at home unless it is necessary. For the reasons given already we find it is not a determent.

351. The Tribunal also finds that as a matter of causation even if this was a detriment, it does not relate to protected disclosure made at the meeting with Mr Taylor. Mr Taylor was only communicating information that had been issued by the Head of Service, Mr Hawkin, sometime earlier.

352. Secondly, the claimant alleged it was a detriment that he needed to fill in a holiday card/request for the previous two weeks. The Tribunal is not satisfied that this was a detriment. The reason the claimant was asked to fill in the holiday card or request for the previous two weeks is that from the perspective of Mr Williams and Mr Taylor the medical suspension had ended on 27 June and it was the claimant's further enquiries which he had himself sought which had led to the further delay in his return. Furthermore, it was entirely unclear to the Tribunal why the claimant had not returned to work on 3 July.

353. The Tribunal found Mr Taylor to be a clear, honest and truthful witness. The Tribunal entirely accepts his evidence that he did not state in a hostile fashion the information that a phased return would be included within his 37 hours. We find the claimant is factually incorrect when he says in his table that it was light duties until lunchtime. We find Mr Taylor had told the claimant it was light duties for 37 hours for two weeks and that was management's decision. We find Mr Taylor agreed he would doublecheck this information.

354. Given that the claimant was fully fit and that we find the phased return to work over two weeks on light duties was done as a matter of goodwill because the claimant had been absent from the workplace for some time, not for any medical reason, there was no detriment.

355. However, even if we are wrong about that and requiring the claimant to have to complete a holiday card/leave request and/or requiring him to work 37 hours on light duties rather than finishing at lunchtime can amount to a detriment, we find there is no causation. Neither of these matters were caused by the claimant informing Mr Taylor that he was unhappy about the way the phased return to work was going to be implemented. Mr Taylor was implementing a phased return which had previously been authorised by Mr Williams. He was simply the messenger. Likewise was the issue in relation to the holiday card/request form. Accordingly this allegation fails.

356. At the end of his table the claimant relies on three further detriments. The first one is that on 11 July 2017 the claimant was told to "do one and get back to your work as we are under pressure".

357. The Tribunal relies on its finding of fact that this was Mr Taylor who made this remark. The Tribunal relies on its finding that the claimant was standing with another colleague, Michael, at Michael's workbench for 7-8 minutes listening to answers on the pop quiz on Radio 2, and that was the reason why he was told to go back to his work. We find it was wholly unrelated to the claimant's disclosures of information. In any event the only disclosure that could be relevant would have been the conversation with the claimant on Mr Taylor on 10 July 2017 as we are not satisfied Mr Taylor had any knowledge of the earlier disclosures.

358. We turn to the next alleged detriment: Richard Williams on 12 September 2017 putting pressure on the claimant to meet.

359. The Tribunal finds that there was no pressure put on the claimant to meet. The respondent's absence management procedure anticipates regular meetings with an employee who is absent from work (see the Attendance Management Policy). By 12 September 2017 the claimant had been continuously absent from 12 July 2017 by reason of stress. The respondent sought an opportunity to meet the claimant. When he indicated he did not wish to meet he was permitted to respond to questions via email. Accordingly the Tribunal is not satisfied that there was any detriment.

360. Even if we are wrong about that and the claimant was suffering a detriment, we are not satisfied there is any causal connection with any of his protected disclosures. We find the respondent was simply applying its attendance policy for an employee who was long term sick.

361. Finally, the claimant relied on a detriment of failing to respond to the claimant's grievances. We find this is factually incorrect. The respondent did respond to his grievances. They carried out a very detailed investigation by appointing an independent manager, Kate Aldridge, who investigated by interviewing the claimant's colleagues and producing statements following taped interviews. The claimant objected to the length of time taken for the grievance to be conducted, but that is not clear in the way that the detriment is expressed. The Tribunal reminds itself that the claimant presented his claim on 25 December 2017 so any complaint must pre-date that time. (No application was ever made to amend). The Tribunal reminds itself that the claimant's grievance which was presented on 6 September 2017 by his solicitor runs to 18 pages. The claimant received an outcome on 6 April 2018 from Mr Nick Henson, Head of Care and Support Adult Services. Some of the grievances the claimant agreed were upheld. Therefore we find where the alleged detriment is factually incorrect, there is no detriment. It is therefore unnecessary to consider whether there is any casual connection with any alleged protected disclosure and this alleged detriment.

362. For all these reasons the claimant's claims for protected interest disclosure detriment fail.

Employment Judge Ross

Date 1 April 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

4th April 2019

FOR THE TRIBUNAL OFFICE

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