



EMPLOYMENT TRIBUNALS

Claimant: Mr S Rajbali Pour

Respondent: Metro Bank PLC

Heard at: London Central

On: 18, 19, 22, 23 & 24 Nov
2021 and
25 Nov (in chambers)

Before: Employment Judge H Grewal
Mr P Madelin and Mr T Robinson

Representation

Claimant: In person

Respondent: Mr N Caiden, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2 The complaint of direct race discrimination/harassment related to race in respect of Mr Tucker's failure to change the Claimant's role to a non-customer facing role is not well-founded;

3 The Tribunal does not have jurisdiction to consider any of the other complaints of direct race discrimination/harassment related to race;

4 The Claimant was not disabled by reason of work-related stress and anxiety between June 2019 and June 2020;

5 The Claimant was disabled by reason of sciatica from the end of March 2020 onwards;

6 The complaints of disability discrimination and failure to make reasonable adjustments are not well-founded.

REASONS

1 In a claim form presented on 29 January 2020 the Claimant complained of race and disability discrimination. The Claimant commenced Early Conciliation (“EC”) on 24 January 2020 and the EC certificate was granted on 27 January 2020. On 29 August 2020 the Claimant was given permission to amend his claim to include complaints of unfair dismissal and disability discrimination in respect of his dismissal on 28 May 2020.

The Issues

2 It was agreed at the outset of the hearing that the issues that we had to determine were as follows.

Direct race discrimination/race-related harassment

2.1 The Claimant describes himself as Iranian. Whether the following acts occurred and, if they did, whether they amount to direct race discrimination or harassment related to race:

- a. A delay in the Claimant’s (“C”) sign off for Academy training;
- b. In about April/May 2018 Basir Qayumi (“BQ”) said in front of other colleagues “Saeid is self-employed” and “being at home has had more baby nappy change for you” and asked C if he was fasting during Ramadan;
- c. BQ deliberately misled C or gave him wrong information to prevent his progression at work;
- d. BQ’s communications in respect of C’s internal job application and C’s rejections for internal job applications;
- e. C’s end of year Amaze Review rating for 2018 and BQ’s communication in respect of that (in the list of issues this was said to be for the end of year rating for 2019 but that appeared to be an error as the Claimant did not get a rating at end of 2019 and BQ was not his line manager at that time);
- f. In about February 2019 BQ did not permit C to shadow the Recruitment Team;
- g. BQ lied to C by saying that if he went on Tier 3 (business line) training that would result in a pay increase;
- h. BQ informed C that Resource and Planning had contacted him to say that C was taking too many comfort breaks;
- i. From January 2019 C was not provided with adequate equipment (namely, an adjustable chair, a back-rest and a foot-rest);
- j. BQ informed C that he needed to be Tier 2 to be able to apply for an internal role;

- k. Chris Tucker ("CT") did not pay attention to complaints from C and interrupted him;
- l. CT's communication in respect of C's end of year Amaze Review rating for 2019;
- m. The warning issued to C on 31 July 2019;
- n. Failure to implement the recommendation in C's GP's letter of 27 August 2019;
- o. CT's failure to change C's role to any role other than a customer facing role.

2.2 Whether the Tribunal has jurisdiction to consider complaints about any acts that occurred before 25 October 2019.

Disability discrimination

2.3 Whether at the material time the Claimant was disabled by reason of sciatica and/or work-related stress and anxiety. It was conceded by the Respondent that at the time of his dismissal the Claimant as disabled by reason of sciatica.

2.4 Whether the following acts occurred and, if they did, whether they amount to direct disability discrimination, discrimination arising in consequence of disability or disability-related harassment:

- a. The June 2019 behaviour warning;
- b. The July 2019 written warning;
- c. Not paying C a bonus at the end of 2019;
- d. Not allowing C to progress in his job;
- e. Dismissing C.

2.5 In respect of the complaint of discrimination arising in consequence of disability, whether the Respondent knew or could reasonable have been expected to know at the relevant time that C was disabled and whether any act was a proportionate means of achieving a legitimate aim.

2.6 Whether the Tribunal has jurisdiction to consider complaints about any acts that occurred before 25 October 2019.

Failure to make reasonable adjustments

2.7 Whether the Respondent knew or could reasonably have been expected to know that C was disabled at the material time.

2.8 Whether R applied PCPs that C had to sit for extended periods and had to face customers.

2.9 If it did, whether those PCPs put C at a substantial disadvantage compared to persons who were not disabled.

2.10 Whether the Respondent knew or could reasonably have been expected to know that the PCPs put him under that disadvantage.

2.11 Whether the Respondent failed to make reasonable adjustments.

2.12 Whether the Tribunal has jurisdiction to consider complaints about any acts that occurred before 25 October 2019.

Unfair Dismissal

2.13 What was the reason for the dismissal? The Respondent contends that it was capability.

2.14 If it was capability, whether the dismissal was fair.

The Law

3 Section 6(1) of the Equality Act 2010 (“EA 2010”) provides,

“A person (*P*) has a disability if –
(a) *P* has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on *P*’s ability to carry out normal day-to-day activities.”

Schedule 1 para 2(1) EA 2010 provides,

“The effect of an impairment is long-term if –
(a) It has lasted at least for 12 months,
(b) It is likely to last for at least 12 months, or
(c) It is likely to last for the rest of the life of the person affected.”

4 In **Goodwin v Patent Office [1999] ICR 302** Morison J in the EAT held that in approaching the issue of disability the following four questions should be considered:

- (1) Does the claimant have a mental or physical impairment?
- (2) Does the impairment affect the claimant’s ability to carry out normal day-to-day activities (does it have an adverse effect on his ability to carry out those activities)?
- (3) Is the adverse effect substantial?
- (4) Is the adverse effect long-term?

5 The point in time to be looked at by the Tribunal when evaluating whether the claimant is disabled under section 6 is not the date of the hearing, but the date of the alleged discriminatory act – **Cruickshank v VAW Motorcast Ltd [2002] ICR 729 at paras 22, 25 and 26**. Hence, it must be determined whether, at the time of the alleged act of disability discrimination, the impairment had a “long-term” adverse effect, i.e the effect had lasted or was likely to last for at least until 12 months. That determination must be made on the basis of the evidence that was available at that time – **Richmond Adult Community College v McDougall [2008] ICR 431 at paras 21, 23**.

6 Section 15 EA 2010 provides,

- “(1) A person (A) discriminates against a disabled person (B) if –*
- (a) A treats B unfavourably because of something arising in consequence of B’s disability, and*
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

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

7 **Section 20(3) EA 2010** provides that there,

“is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with person who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

The duty to make reasonable adjustments does not arise if A does not know and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in section 20(3) – **EA 2010 Schedule 8 para 20**.

8 **Section 13(1) EA 2010** provides,

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

Race and disability are protected characteristics. On a comparison of cases for the purpose of section 13 there must be no material differences between the circumstances relating to each case (**section 23(1) EA 2010**).

9 **Section 26 EA 2010** provides,

- “(1) A person (A) harasses another (B) if –*
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
 - (b) The conduct has the purpose or effect of –*
 - (i) Violating B’s dignity, or*
 - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

...

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

- (a) the perception of B;*
- (b) the circumstances of the case;*
- (c) whether it is reasonable for the conduct to have that effect.*

10 **Section 123 EA 2010** provides,

“(1) Subject to section 140B proceedings on a complaint under section 120 may not be brought after the end of –

(a) The period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of that period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

Section 140B(3) EA 2010 provides that in working out when the time limit set by section 123(1)(a) expires the period beginning with the day after Day A (the day on which the Claimant commenced Early Conciliation) and ending with Day B (the date on which the Early Conciliation Certificate was granted) is not to be counted. **Section 140(B)(4)** provides that if the time limit set by section by 123(1)(a) would (if not extended by that subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit instead expires at the end of that period.

11 **Section 136 EA 2010** provides,

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

12 **Section 98** of the **Employment Rights Act 1996** (“ERA 1996”) provides,

“(1) In determining ... whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls under this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind for which he was employed by the employer to do,

...

(3) In subsection 2 (a) –

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality

...

(4) Where the employer has fulfilled the requirements of subsection(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

The Evidence

13 The Claimant and his wife gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent (the job titles in brackets are the jobs that they held at the relevant times)– Chris Tucker (Amaze Direct Site Manager), Geraldine Richardson (Amaze Direct Site Manager) and Mansi Radia (People Advisor). Mr Qayumi had provided a witness statement for the hearing. Subsequent to that, his employment with the Respondent had terminated. On 9 August 2021 the Respondent applied for a witness order to compel his attendance as he was reluctant to attend as he was working for a new employer and his job entailed travel. The Tribunal made such an order on 18 September 2021. The Respondent sent Mr Qayumi the joining instructions for the hearing. He did not respond to any communication from them and did not attend on the first day of the hearing. The Tribunal then sent him an email reminding him of the possible consequences of not complying with the Tribunal’s order and asking him to confirm by 4 pm on which date he could attend. He did not respond to that. We could not tell whether he had received the communications. The Respondent applied to admit his witness statement. The Claimant objected to that. The Tribunal admitted it and said that we would attach such weight to it as we thought appropriate having regard to the fact that his evidence had not been tested in cross-examination. The documentary evidence before the Tribunal comprised nearly 1,000 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of fact

14 The Claimant describes himself as Iranian.

15 The Claimant commenced employment with the Respondent on 28 March 2018 as a telephone Customer Service Representative. The Respondent’s call centres are known as Amaze Direct and the employees working in it as AMAZE Direct Representatives (“ADR”). The job description for the role made it clear that the primary purpose of the role was respond to customer calls and that the post holder would be in constant contact with the Respondent’s customers over the telephone.

Amaze Direct Representatives are expected to handle approximately 40 inbound calls from customers each day, assist with general customer enquiries and make transactions on behalf of the customers. The Claimant was based at the Borehamwood Amaze site.

16 Shortly after the Claimant commenced employment Basir Qayumi was appointed Amaze Direct Assistant Manager (“ADAM”) at Borehamwood and became the Claimant’s line manager. Mr Qayumi was new to the role. He is of Afghan national origin.

17 The Respondent requires new ADRs to complete a period of induction training, known as the Academy, before they are signed off as competent to perform their role. The induction takes place at one of the Respondent’s Academies and involves Academy coaches training the new ADRs on the processes used by the Respondent and providing one-to-one support to them in putting them into practice. At the time the training usually lasted about eight days. If an individual was not signed off as competent on the telephone at the end of this period, the training would be extended for a few days and the individual would be transferred to the site where he was due to work for further support. Failure to perform at the required standard at the end of that period would lead to a review meeting and the possible termination of the individual’s employment.

18 On 19 April 2018 an Assistant Manager at the Academy extended the Claimant’s training as he was not fully competent with the Respondent’s identification and verification (ID&V) process. The Claimant was transferred to the Borehamwood site for support during the extension.

19 On 8 May Geraldine Richardson, the Borehamwood site manager, informed the Academy Manager, Kelly Francis, that although the Claimant had had a two-week extension and had had considerable support, he was still not at the level where he could be signed off. She said that she thought that they needed to look at having a review meeting.

20 On 9 May Ms Francis asked Ms Richardson and Mr Qayumi whether the role was just not right for the Claimant or it was a case of him needing a few more days. Mr Qayumi responded and explained the reasons for not being able to sign off the Claimant. He said that the Claimant did not fully understand the customer’s query on most of the calls and as a result did not have enough/correct information when bumping up, he needed support for most of the calls because he did not understand most of the Respondent’s processes, he struggled with his questioning skills and did not always capture the main call reason codes, he was not making sufficient use of Metropedia and due to his pace and tone/language skills he sounded unsure on calls. He said that they had been supporting the Claimant side by side every day and the he was not sure whether an extension would help him to improve sufficiently to be signed off but said he would try his best to get him closer to being signed off. Mr Qayumi warned the Claimant that if he was not signed off it could lead to the termination of his employment.

21 On 16 May Ms Francis prepared a letter inviting the Claimant to a review meeting. However, the letter was not sent as Ms Richardson and Mr Qayumi decided that the Claimant could continue using the Academy Training status until 18 June.

22 The Claimant was provided one-to-one coaching by two different coaches on 16, 18 and 22 May 2018. The first one identified the following as areas in which the Claimant needed to improve – he was not familiar with resolving card inquiries, timescales for processes and Metropedia, pace and tone needed to be improved, he was not firm and assertive, he was not confident with setting up faster payments to new beneficiaries. The second one said that the main area for development from what she had seen was that in some cases there was a language barrier, especially when the Claimant had not come across a query before. This resulted in there being confusion between him and the customer and the customer being out on hold. He needed to ask more questions so that he could be clear about what the customer wanted.

23 On 30 May Mr Qayumi informed Ms Francis and Ms Richardson that, although the Claimant had made improvements, he was still not ready to be signed off. He asked them how he should proceed. Ms Richardson advised him to attempt a remote sign off the following day. That would entail no one sitting with the Claimant but someone listening in to his call. Mr Qayumi did that and whoever listened to the Claimant's call decided that he had dealt appropriately with that call and the Claimant was signed off on 1 June 2018. Like all those who are signed off, the Claimant used the Academy Graduate status for the next two weeks. That gives the individuals extra time to complete tasks and they are under less pressure when they are new to the role.

24 Ms Gilbride was appointed an ADR at about the same time as the Claimant. She resigned a few weeks after starting in the role. She explained that she thought that she had applied for a role working in a store and that she did not like dealing with customers over a telephone and was used to dealing with customers in person. She was a good ADR and Ms Richardson spoke to the store manager at Borehamwood who said that there a cashier role available. Ms Gilbride was interviewed by the store manager to ensure that she was suitable for the role. She was then allowed to move to that role.

25 During Ramadan in May-June 2018 Mr Qayumi asked the Claimant whether he was fasting. He did so in order to elicit whether his shifts needed to be rescheduled so that he could be at home at the time that the fast ended on each day.

26 The Amaze Direct employees were appraised in middle of and at the end of each year. They were given ratings for their behaviour and performance. The behaviour ratings were "amaze", "champion", "live", "be better" and "non-fit" (the first being the highest and the last the lowest). The performance ratings were "amaze", "exceed", "deliver", "do better" and "below".

27 The Claimant's half year appraisal was carried out by Mr Qayumi on 9 July 2018. He did not give the Claimant any ratings as he said it was too soon to rate as the Claimant had only been signed off from the Academy on 1 June 2018. That was subsequently changed to "live" and "deliver" which was the default rating for anyone who could not be rated for any reason. Mr Qayumi made some positive comments about the Claimant. He said that he had a good future as he was keen to learn and improve, had shown great behaviours and was always professional. The Claimant's comments on the appraisal document were,

"... I am signed off from Academy and I am still trying to get used to the calls and focusing on my communication skills. I have enjoyed working with Basir

as he has fully supported me so far and I am glad that he will be managing me for the future. I will try to be a competent ADR and improve my communication skills for the future.”

28 On 31 July Mr Qayumi awarded the Claimant a badge and publicly “recognised” the Claimant’s hard work on a company app. He said that the Claimant had only received one error since he had been signed off. He continued,

“Saied has shown great behaviours and is always willing to learn and improve his skills. Saeid it is great to have you in my team and I am sure you will have a great future ahead and thank you for your hard work!”

29 On 25 September 2018 Mr Qayumi informed Mr Tucker (the new site manager at Borehamwood) that the Claimant had had three one-day absences in the preceding four months and sought his advice on whether they needed to do anything. Mr Tucker advised him that he would need to hold an review meeting with the Claimant. The Respondent’s procedure states that where an employee’s level of attendance becomes a concern he should be invited to an attendance review meeting. The Respondent’s managers referred to them as absence review meetings.

30 On 28 September Mr Qayumi invited the Claimant to an absence review meeting on 1 October 2018. He was advised of his right to be accompanied. At the meeting on 1 October they discussed the causes of the Claimant’s stomach problems which had been the cause two of his absences, and what he was doing to prevent the problem recurring. At the end of the meeting Mr Qayumi informed the Claimant that his decision to was to take no further action at that stage but that if there was any further sickness absence within the next six months, he could be invited to a further absence review meeting.

31 On 23 October 2018 the Claimant provided positive feedback on Mr Qayumi on the Respondent’s “Recognise” platform. He said,

“Basir is a real supportive manager. He is always available for bump up to him even when he is too busy with different workloads.”

32 The Claimant told Mr Qayumi that he was interested in moving to a different role in the bank and Mr Qayumi advised him that the best way to find out about other roles was to shadow people working in those areas. On 1 November he told him that he could release him for shadowing between 12 and 22 November 2018. The Claimant contacted the Mortgage Pre-Offer team and the Recruitment and Partnership team to arrange shadowing.

33 Following shadowing in the Mortgage team, the Claimant decided to apply for a Mortgage Operations Specialist role. Earlier in November he had asked Mr Qayumi what his end of year rating would be and Mr Qayumi had told him that he proposed to give him “live” “deliver”. Mr Qayumi did in fact propose those ratings for him. All ratings are then discussed at a meeting of senior managers and the People Partner for the area to ensure that the ratings are fair and consistent across the board. At the calibration meeting the Claimant’s performance rating was altered to “do better.” The Respondent measures performance against certain standards. These include ACW (the average time spent on after call work), hold (the time that the customers are on hold) and ADR ability (based on customer satisfaction surveys received). The

standard for ACW was 20 seconds, the Claimant's average times each month from July to November were 30, 23, 35, 34 and 21. The standard for hold was 30 seconds and the Claimant's times from July to November were 24, 34, 41, 46 and 46. The standard for ability was 65%. The Claimant's percentages from July to November were 38, 77, 67, 7 and 50. It is clear from the Claimant's scores that he was not performing in line with those standards. In those circumstances, it is not surprising that his performance rating was changed at the calibration.

34 The recruitment team asked HR what the Claimant's most recent rating had been and the reply that he had received "live" "do better."

35 In December the Claimant applied for a Mortgage Underwriter role and again the recruitment team asked HR about the Claimant's most recent rating and they were told he would get "live" "do better" at the end of the year.

36 On 2 January 2019 both applications were rejected by the Recruitment team because of the Claimant's end of year rating. In order to get thought the initial sift on any internal job application, the applicant had to have a minimum of "live" "deliver" rating.

37 On 7 January 2019 the Mr Qayumi discussed the Claimant's review with him and he was given the ratings of "live" "do better." Mr Qayumi noted that in the second half of the year the Claimant had worked hard to improve his performance but he still needed to work towards being within the standards. He said that the focus for the next year would be to improve his performance to achieve at least a "deliver" for his performance.

38 At the beginning of January 2019 the Claimant complained of back pain and Mr Qayumi noted that he took breaks to walk around. On 10 January the Claimant telephoned Mr Qayumi to say that he would not be attending work as his back pain was worse and he was going to see his doctor. He saw his GP who prescribed pain killers and gel. The Claimant returned to work the next day. He used a pillow to support his back while sitting on his chair. Mr Qayumi conducted a return to work interview with the Claimant and the Claimant confirmed that he was fit to work.

39 The Claimant had arranged to do shadowing in the Recruitment team on 12 February 2019. He was nor permitted to do that shadowing on that day because the Respondent could not accommodate his absence from his team on that date.

40 The Claimant was absent sick for three days from 14 to 16 February 2019 with back pain. He called Mr Qayumi and told him that he was suffering from extreme back pain. He said that he went to the hospital and the doctor told him that he would book him in for an MRI scan and prescribed pain-killers. He said that he could not walk properly due to the severe back pain. At the return to work discussion on 17 February he said that he still had some pain but he preferred to come to work.

41 The Claimant was absent sick for one day on 14 March with flu and high temperature and for five days between 1 and 6 April 2019 with stomach issues.

42 As a result of his sickness absences between January and April 2019 the Claimant was invited to another absence review meeting on 9 April 2019. He was asked about his absences. He said that he had had chronic back pain for a long time

and had had an x-ray but that had not shown anything. He said that he had been advised to do light exercises and to avoid sitting for long periods and heavy lifting. He said that he was taking painkiller but that they did not help very much. Mr Qayumi advised him to take it seriously and to follow it up with his doctor. On 10 April Mr Qayumi wrote to him that they would take no further action at that stage but that if he had any further sickness absence within six months of the receipt of the letter, he might be invited to a further absence review meeting.

43 On 17 April 2019 the Claimant applied for two other roles – People Operations Specialist and Finance Business Partner. Those applications were rejected at the initial sift on 24 April 2019 because of the Claimant's end of year ratings. The People Partner (HR) in the Claimant's team suggested to Mr Qayumi that it might be worth having a conversation with the Claimant about what he wanted to do as the two roles for which he applied were completely different.

44 Following this Mr Tucker and Mr Qayumi spoke to the Claimant about applying for roles. Mr Tucker suggested that, instead of applying for a large number of different roles, he should focus on one area in which he was interested and to get shadowing experience in that area. Mr Qayumi advised him in May that he would be proposing "live" "exceed" for his mid-year ratings. They both told him to speak to them before he applied for any role so that they could inform the People (HR) team in the relevant area what his rating was likely to be.

45 On 5 June 2019 the Claimant informed Mr Tucker that he had applied for the Finance Business Partner role. Mr Tucker expressed his disappointment to Mr Qayumi that the Claimant had not discussed it with him before he applied as he had been told to do. The application was initially rejected by the People team (HR) because of the Claimant's end of year rating, but the Claimant's managers persuaded the People team to allow it through the sift on the basis that the Claimant was likely to get the minimum ratings. At a calibration on 12 June 2019 the Claimant's behaviour rating was reduced to "be better" because of his periods of sickness absence. Notwithstanding that, his managers continued to support his application and it passed the initial sift. The application was rejected on 21 June 2019 by the recruiting manager because the Claimant did not have the experience required for the role. They needed someone with demonstrable and proven FP&A experience as well as a solid background in decision supporting and business partnering. The Claimant's CV did not demonstrate that he had that experience.

46 In June 2019 Mr Qayumi moved to a different site and Winston Tarrant became the Claimant's line manager.

47 On 27 June Mr Tarrant sent an email to the Recruitment manager that the Claimant felt that the CV he had submitted in support of his application had not fully reflected his experience. He attached to his email a revised version of the Claimant's CV and asked him to consider it. The Recruitment Manager's response was that the matter had been closed and that the Claimant's expectations needed to be managed firmly. He said that the Claimant had been unappreciative of professional feedback and had continued to push for what was unrealistic.

48 The Claimant was absent sick from 1 to 9 July 2019. He was certified by his GP as unfit to work for that period because of sciatica. In discussions with Mr Tarrant over this period the Claimant described his level of pain as being between 6 and 7 out of

10 (1 being fit for work and 10 being bed-bound), said that he was on strong pain killers and that he required a chair with lower spine support. Mr Tarrant said that he would look at getting specialised chair with optimum back support for him and it was agreed that he would continue to periodically stand up and walk around in circles while working.

49 On 10 July 2019 the Claimant did a Display Screen Equipment self-assessment and Mr Tarrant added comments to it. The Claimant stated that his chair was not suitable and that the small of his back was not supported by the chair's backrest. He said that his feet were flat on the floor without too much pressure on the back of his legs. He did not say anything to indicate that he needed a footstool.

50 Mr Tarrant sent the assessment to the Health and Safety department on the same day. Attempts were made for someone from Health and Safety to attend and meet with the Claimant, but that had not happened by 7 August. On 7 August Mr Tarrant chased it up with Health and Safety. He said that the Claimant's back pain was impacting on his ability to do his role and they needed to action it within the next few days.

51 On 16 July the Claimant was invited to a disciplinary meeting on 24 July to discuss his level of sickness absence. The letter set out the five sickness absences that he had had since the start of the year. He was advised of his right to be accompanied and that the outcome of the hearing could be no further action or a formal warning.

52 Mr Tucker conducted the meeting on 24 July. The Claimant accepted that his absences would put pressure on his colleagues and would have an impact on customers. He said that he had told his doctor that his job was based sitting on a computer and that he had been advised not to sit for long periods and to walk around to ease it, He said that he was waiting to have an MRI scan. He said that the back pain was constant and that he was on pain killers. On 25 July Mr Tucker sent the Claimant the outcome of the attendance review meeting. He gave him a six months' written warning. He said that the Claimant had had a high level of sickness absence over the previous six months (a total of 16 days' absence on 4 occasions) and that that had an impact on his colleagues and the service that the customers had received. The warning would remain live for six months and during that time the Claimant would not be eligible to apply for any other roles within Metro Bank. He advised him of his right of appeal.

53 On 24 July 2019 the Claimant appealed the half yearly rating of "be better" for behaviours.

54 Someone from Health and Safety attended the Claimant's workplace and met with him on 14 August and ordered an orthopaedic chair for him.

55 On 19 August 2019 the Claimant made a formal written complaint against Mr Qayumi to Ms Radia. He said that on the basis of what Mr Qayumi had told him that his half year rating would be he had had applied for the Finance Business Partner role. Mr Qayumi had not told him that the rating that he had given had been changed in the calibration session. He also said that in January and February 2019 he had asked for a special chair because of his back problems and that Mr Qayumi had not taken any action to progress that. His failure to act had led to the Claimant having

further sickness absences because of his back problems. The Claimant made no reference to Mr Qayumi's treatment of him having anything to do with the fact that he was Iranian.

56 Ms Radia responded that Mr Tucker would get in touch with him to deal with his complaint. The Claimant responded that he did not want Mr Tucker to deal with it as he was already aware of everything but was "covering" Mr Qayumi. He said that he wanted to speak directly to her or someone else in the People (HR) team. Ms Radia responded that she would be available from the week commencing on 2 September. On 27 August the Claimant commenced a period of sickness absence. On 29 August Ms Radia told him that she would arranged a meeting as soon as he was better and back at work,

57 On 27 August 2019 the Claimant commenced sickness absence that continued until the termination of his employment on 27 June 2020. He attended work on 27 August and gave Mr Tarrant a letter from his GP which stated that the Claimant was suffering from severe sciatica and had been referred to a specialist. The letter continued,

"Please can you make adaptations to his working environment to help him manage this while at work, including regular breaks from sitting or a different role."

The Claimant said that he was in extreme pain and had forced himself to come into work because he was afraid of what the impact of any sickness absence would be on the warning that he had been given. The Claimant was advised by his managers to go home as it was evident that he was not well enough to work.

58 On 28 August the Claimant called in and said that his pain was more severe and that he would not be in. The Claimant did not contact his managers on 29 and 30 August and 2 September. They attempted to contact him but did not get any response. On 3 September Mr Tucker spoke to the Claimant who said that he was still in a lot of pain. Mr Tucker informed him that he had not been following the sickness absence procedure and that he would need to submit a doctor's certificate that he was unfit for work.

59 On 5 September the Claimant provided a certificate from his doctor whom he had seen on 4 September. The certificate said that he was unfit to work from 2 to 9 September because of *"left sided back pain -sciatica."*

60 On 11 September the Claimant provided a medical certificate that he was unfit to work until 25 September because of *"severe back pain and work-related stress"*. It also said that he might benefit from amended duties and workplace adjustments and commented *"needs to avoid prolonged sitting & change of role."*

61 On the same day the Claimant sent Mr Tucker an email that Health and Safety had still not provided an appropriate chair although it is *"too late for that."* Ms Radia pursued the matter with Health and Safety who acknowledged that there had been had been a delaying providing the chair. The individual dealing with it said that in light of the latest medical certificate he would recommend exploring options of an alternative role for the Claimant.

62 On 17 September Mr Tucker invited the Claimant to a “wellbeing meeting” on 20 September . He said that the purpose of the meeting was to ensure that they had all the relevant information about the Claimant’s health and to discuss when he might be able to return to work and any adjustments that might help his return to work.

63 The meeting took place on 20 September 2019. It was conducted by Mr Tucker who was assisted by Ms Radia. The chair that had been order for the Claimant had already arrived. The Claimant said that in respect of his sciatica his GP had recommended not sitting for prolonged periods, taking regular breaks and walking around often. He had a referral to see a specialist on 21 January 2022. In relation to stress and anxiety he said that his GP had recommended a change in job role. He said that speaking to customers gave him anxiety and that he had experienced that since he started in his role and that he had raised it regularly with his line manager. He said that he had no previous experience working with customers. He said that any customer facing role was not suitable for him and suggested that Finance would be more appropriate and if he was given such a role he could start work as soon as possible.

64 After the meeting Ms Radia looked at the notes of the Claimant’s one-to-one meetings and noted that the Claimant had never said that dealing with customers caused him anxiety. She also looked at his CV and noted that he had previous experience of working with customers. She also considered that a Finance role would be stressful and would not resolve the issues with the Claimant’s sciatica as that role too involved sitting at a desk for prolonged periods. She sent the Claimant an email on 4 October in which she set out what had been discussed at the meeting and what she had learnt after that. She concluded that at that time the Respondent was comfortable that he return to his current role. She said that they would ensure that the Claimant had regular breaks and that she would speak to Health and Safety to see whether they could provide any additional support. She also set out the support that the Respondent could provide in order to support him if he wished to pursue a career in Finance.

65 Following the wellbeing meeting on 20 September Ms Radia spoke to the Claimant about his grievance to see whether it could be resolved infomally. The Claimant said that his desired outcome was for Mr Qayumi to be dismissed or for him (the Claimant) to have a change of role.

66 The Claimant provided further medical certificates on 23 September and 7 October 2019 that he unfit to work until 4 November because of severe back pain and work-related stress. The Claimant’s GP notes showed that on 7 October he told his GP that his employer had informed him that they would not change his role and that by 9 October 2019 solicitors acting for him were seeking his medical records from his GP. It is very likely that the two matters were connected and that the Claimant had consulted solicitors about his employment situation.

67 On 21 October 2019 Ms Radia sent the Claimant an email setting out her views on resolving his grievance. The Claimant had complained that Mr Qayumi had not signed him off until 1 July 2018 and had not given him any reasons for not doing so. Ms Radia said that the evidence showed that Mr Qayumi had signed off the Claimant on 1 June 2018, had explained to him why he was not ready to be signed off until then and had supported him. She accepted that Mr Qayumi should not have told the Claimant what his rating would be before the calibration session but he had

supported the Claimant in his application for a Finance Business Partner role and that the Claimant had not got the role because he did not have the experience required for that role and not because of his rating. She said that she was happy to organise mediation between Mr Qayumi and him to resolve any issues between them. If the Claimant was not happy with her outcome, he could pursue the matters as a formal grievance.

68 The Claimant responded on 22 October 2019 that he was not happy with the outcomes of both the well-being session and the outcome of grievance. He said that he was not happy with the former because she had not listened to him, had changed his words and explanations and had not kept her promises. As far as his grievance was concerned Ms Radia had "*had a biased decision making*" and had "*covered Basir*". Ms Radia informed the Claimant that Dan Byron, Store Manager, would hear his formal grievance and would meet with him on 8 November.

69 On 4 November the Claimant was given a medical certificate that he was unfit to work until 4 January 2019 because of severe back pain and work-related stress. On receipt of that Mr Tucker called the Claimant to discuss a referral to Occupational Health but the Claimant did not answer his calls. He then sent him an email about it. The Claimant's response was that he did not wish to speak to or share his information with anyone else.

70 On 8 November Mr Byron met with the Claimant to discuss his grievance. The Claimant produced at the hearing three additional documents complaining about Mr Qayumi, Ms Radia and Mr Tucker. Mr Byron read them during a break in the hearing. The meeting lasted two hours. The Claimant expanded verbally on the matters that he had raised in his written grievance.

71 As part of his investigation Mr Byron interviewed Mr Qayumi, Mr Tucker and Ms Radia and sought information from other sources about the matters raised by the Claimant and looked at the relevant documents. He gave the Claimant his outcome on 25 November 2019. The outcome was also given in a letter of the same date. In the letter Mr Byron set out the complaints that the Claimant had made, what his investigation had revealed in respect of each of them and his conclusions. He did not uphold any of his grievances.

72 The Claimant appealed against the grievance outcome on 1 December.

73 The Claimant was not eligible for a discretionary bonus at the end of the year as he had not achieved a minimum rating of live/deliver in the first half of the year.

74 On 2 January 2020 the Claimant submitted a further medical certificate that he was unfit to work until 2 March 2020. because severe back pain and work-related stress.

75 The Claimant's grievance appeal was heard and investigated by K Fountain, Regional Retail Manager. On 13 January 2020 he sent the Claimant a detailed letter setting out his conclusions on the issues raised by the Claimant. The grievance appeal was not upheld.

76 On 24 January Ms Waterlow, a People Partner, (HR) informed the Claimant that they would be inviting him to another well being meeting with Mr Tucker to talk about his continued absence from work and what the Respondent could do to support his

return to work. The Claimant responded that it was ridiculous that she was suggesting that Messrs Tucker and Qayumi who had bullied and discriminated against him and had prevented him progressing would support him to return to work.

77 On 28 January Msterlow invited the Claimant to a well-being meeting with Mr Tucker on 6 February 2019. She said that the purpose of the meeting was to discuss when the Claimant might be well enough to return to work and what adjustments the Respondent could make to facilitate his return to work. She said that they would discuss a referral to Occupational Health. The Claimant responded on the following day. He said,

“I appreciate for putting more pressure and stress on me in this horrible situation. As I have already had the wellbeing meeting with Chris Tucker and Mansi Radia (with the same position as yours) and also I have discussed it in informal grievance, formal grievance and appeal grievance meetings with respect of no change in my situation, then I will not attend to the same useless meeting with the same people and the same content and discussion just for your paperwork procedure.”

Ms Waterlow encouraged the Claimant to attend and offered to meet him closer to his home if he preferred that. She said that if he did not attend they would hold the meeting in his absence and gave him the opportunity to submit anything in writing if he so wished. The Claimant responded on 5 February that he would not attend *“this inhuman and useless meeting.”*

78 The Claimant did not attend the meeting on 6 February 2019 and it took place in his absence. Ms Waterlow sent him the outcome on 9 March 2019. The letter stated that after the hearing the Respondent had received a further medical certifying the Claimant as unfit work until 2 May 2019. It also said that the Claimant had declined to give his consent for an OH referral and that as he had declined to attend the meeting they had not been able to ascertain what the prognosis was for his sciatica. In the absence of an OH report and a discussion with him, it was difficult for them to determine what they could do to assist him to return to work. Nor had they had an opportunity to discuss what they could do to help repair his working relationship with his managers. It noted that the Claimant had been absent sick for 140 days and there was nothing to indicate that he would be able to return to work in the foreseeable future. It noted that a chair had already been provided and that they were looking at providing him with a wireless headset to enable him to move around more freely. They understood that the Claimant wanted to work in Finance but did not see how moving to another office based role would help. Furthermore, they could not just move him to a different role. He was asked to confirm by 20 March whether he consented to being referred to Occupational Health and was warned that if his sickness absence continued beyond 2 May and they were unable to have any discussions with him about his return to work or, having had such discussions, it appeared that the Claimant was still unable to return to work, the Respondent might need to consider terminating his employment.

79 On 1 May 2019 the Claimant was certified as unfit to work until 1 July 2019. On 7 May the Claimant was again asked to consent to a referral to Occupation Health but he did not do so.

80 On 15 May 2019 Ms Richardson invited the Claimant to a capability meeting by telephone on 21 May. She warned him that an outcome of the meeting could be dismissal on capability grounds. He was advised of the right to be accompanied. The Claimant did not attend on 21 May and he was sent another invitation to attend the hearing 27 May 2019.

81 The Claimant did not attend the rescheduled meeting on 27 May and it took place in his absence. Ms Richardson sent the Claimant the outcome in a letter dated 28 May 2020. Her decision was to terminate the Claimant's employment on 27 June 2020. She set out in some detail the sickness absences that the Claimant had because of his back problems and work-related stress, the adjustments that the Respondent had made for his back condition, the fact that he had never previously said that working with customers caused him stress and that his doctor had not said that, the recommendations that had been made by his GP, the fact that he had been offered a referral to Occupational Health on numerous occasions but that he had not consented to it. She set out the issues that she would have liked to explore further with him had he attended the hearing. She concluded by saying,

“Having reviewed your absence record for the last 52 weeks, I can see that you have been absent 197 days which is approximately 73% of the last working year which has had a significant impact on your colleagues, your direct team and our customers.

...

I am satisfied we have made suitable adjustments to your work environment, some of which you have not been able to try, as you have not returned work. [sic] You have consistently refused to give your consent to an Occupational Health referral, and you therefore have not given us the opportunity to understand what else we can do to support your return and on-going health.

Taking this into consideration I believe you are unable to undertake the role you were employed to do, and you have not given us the opportunity to explore alternative roles. I therefore have been left with no alternative but to end your employment with Metro Bank.”

The Claimant was advised of his right of appeal.

82 The People Team (HR) erroneously processed the Claimant's employment as terminating on 27 May 2020. It made no real difference because Ms Richardson had concluded that as the Claimant had exhausted his sick pay entitlement he would not be paid during his notice period.

83 For the purpose of this litigation, the Claimant consented to the Respondent referring him to an Occupational Health doctor. The doctor conducted a telephone assessment of the Claimant on 11 August 2020 and produced a report dated 18 August 2020. The report was based on the Claimant's GP records from 1 January 2018 to June 2020 and a written statement from the Claimant and what he told the doctor. In response to specific questions the OH doctor said that his opinion was that the Claimant had a mental and physical impairment and they both had a substantial adverse effect on his ability to carry out normal day to day activities. The physical impairment (the back condition) had been ongoing since the beginning of 2019 and

that the mental health impairment had been having an adverse effect since about August 2019.

Conclusions

Race discrimination/harassment

84 The Claimant complained about fifteen acts or omissions which he alleged were acts of direct race discrimination or harassment related to race, and his case was that they amounted to conduct extending over a period or a continuing act. All of them, with the possible exception of Mr Tucker's failure to change the Claimant's role to any role other than a customer facing role, occurred before 25 October 2019. One of the complaints identified in the list of issues (para 2.1 I (above)) is about Mr Tucker's communication in respect of the end of year rating for 2019. There was no evidence about any end of year rating in 2019 and it appears that that might be a reference to the end of year rating in 2018. Although the Claimant was told on 4 October 2019 that he was not going to be moved to a non-customer facing role, it is arguable that that continued beyond that date and that complaint was, therefore, presented in time.

85 If the Tribunal concludes that Mr Tucker's failure to consider the Claimant for another role was not an act of race discrimination or harassment related to race, all his other complaints of discrimination will not have been presented within the primary time limit and the Tribunal would only have jurisdiction to consider them if it considered that it was just and equitable to do so.

86 We considered first whether the only complaint that was in time was an act of direct race discrimination or harassment. In considering that issue, we did not look at it in isolation but in the context of the evidence about the other alleged acts of race discrimination/harassment. The majority of the complaints of race discrimination were about the conduct of Mr Qayumi. Mr. Mr Qayumi left the Borehamwood site in June 2019.

87 The Claimant's case in essence was that although he had applied for and been appointed to a customer facing role, Mr Tucker should have placed him in a completely different and higher paid role without his having to satisfy the recruiting manager that he was suitable for that role. It is difficult to see how that could amount to a "detriment" or "unwanted conduct". Prior to the start of the Claimant's sickness absence at the end of August 2019, Mr Tucker supported the Claimant in trying to secure other roles. He gave him advice in April/May 2019 how he should focus on a particular role and get shadowing experience in that area rather than applying for a variety of different roles and he pushed his application for the Finance Business Partner to pass the sift stage although the Claimant had not attained the minimum ratings. The Claimant was considered and rejected for that role because he did not have the requisite experience for it.

88 At the wellbeing meeting on 20 September 2019, eighteen months after he started in his role, the Claimant said for the first time that speaking to customers gave him anxiety and that a customer facing role was not suitable for him. Prior to 11 September 2019 the Claimant had not had any sickness absence for stress. There was no medical evidence that dealing with customers caused him to suffer from stress and anxiety.

89 There was no evidence that in refusing to move the Claimant to a different role the Respondent treated him less favourably than it treated or would have treated someone else of a different race whose material circumstances were the same. The Claimant relied on the treatment of Ms Gilbride. The material circumstances in her case were different. She resigned from the role to which she had been appointed very soon after she started because she did not like dealing with customers over the telephone. She was not then placed in a different and higher paid role. There was a vacancy for customer facing role in a store and she was interviewed for that role. The role was at the same level, it still involved dealing with customers, the only difference being that in the new role she dealt with them face to face rather than over the telephone. The recruiting manager being satisfied that she was suitable for that role, she was appointed to it.

90 There was absolutely no evidence from which we could infer that had the Claimant not been Iranian Mr Tucker would have acted any differently. There was no evidence to indicate that any of Mr Tucker's dealings with the Claimant had in any way been influenced by or had anything to do with the fact that he is Iranian. The Claimant has failed to establish a prima facie case of race discrimination/harassment in respect of that complaint.

91 It follows from that that all his other complaints of race discrimination/harassment were not presented in time. We considered whether it would be just and equitable to consider them. The Claimant's earlier complaints are about acts/omissions that occurred between May 2018 and September 2019. The majority of those complaints were presented one year or more after the time limit for presenting them expired. There has been a considerable delay in presenting them. The Claimant has not put forward any explanation for the considerable delay or any basis on which it would be just and equitable to allow him to pursue those claims. Prior to the start of his long-term absence at the end of August 2019 the Claimant was at work. He did not raise any grievance about these matters until 19 August 2019. By that time the time limit for presenting many of his complaints had already expired. The Claimant did not at any stage while he was employed by the Respondent say that race played any part in the way that he was treated. By October 2019 he had consulted solicitors. The first time any allegation of race discrimination was made was in the claim form. Mr Tarrant had left the Respondent by the time the claim was received. Mr Qayumi left the Respondent in January 2021 and did not attend although he had given the Respondent a statement and the Respondent had obtained a witness order. Many of the Claimant's allegations related to what he claimed Mr Qayumi had said to him and after the delay it was not possible to get evidence from those who might have been present when the alleged conversations took place. Having considered all the above we concluded that it would not be just and equitable to consider the claims that were considerably out of time.

92 In case we are wrong in reaching that conclusion, we set out briefly what we would have concluded had we considered those claims. The Claimant's Academy training was extended because there were genuine concerns about his ability to perform the role. Mr Qayumi was not the only person who had those concerns. The training was initially extended by the Assistant Manager at the Academy, Mr Qayumi set out his concerns in detail on 9 May 2018, the same areas of concerns were noted by two different coaches who sat with the Claimant on 16 and 22 May 2018. Mr Qayumi did not mislead the Claimant about his ratings – he told him the ratings that

he proposed to give the Claimant. Those ratings were altered in the calibration sessions. It might have been better if he had refused to share his ratings with the Claimant in advance of the calibration session. The ratings that the Claimant was given at the calibration session were objectively justified on the basis of his performance and attendance. All the documentary evidence showed that Mr Qayumi supported the Claimant's shadowing other teams and told him the dates when he could do it. If he did not allow him to do any shadowing at a particular time, it was for business reasons. Mr Qayumi asked the Claimant whether he fasted during Ramadan. That was done to determine whether he needed any alterations to be made to his shifts. It is difficult to determine after all this time whether Mr Qayumi made remarks about the Claimant being "self-employed" or him having to change nappies while he was off work. He might have done so.

93 There was no evidence that in doing any of the above acts Mr Qayumi treated the Claimant less favourably than he treated or would have treated another employee in similar circumstances. There was no evidence at all from which we could infer that the Claimant's Iranian nationality had anything to do with any of the Respondent's actions. There was no evidence that the Respondent treated the Claimant less favourably than it treated or would have treated another employee in similar circumstances in respect of the complaints at paragraph 2.1 k – n (above) or that the Claimant's Iranian national origin played any part in it. The Claimant accepted in evidence that his team was racially diverse and that there were other non-British and Muslim persons in the team. Had we considered the complaints of race discrimination or harassment, we would have concluded that the Claimant had failed to establish a prima facie case and that the Respondent had satisfied us that there were sound objective reasons, totally unrelated to race, for the way in which it treated the Claimant.

Disability

94 We considered first whether the Claimant was at any time between June 2019 and his dismissal on 27 June 2020 disabled by reason of work-related stress and anxiety. The first reference in the Claimant's GP notes to him raising stress with his doctor is on 27 August 2019 when he talked of stress from work with reference to both workload and work pressure. However the GP made no reference to that in the letter he wrote to the Respondent on that date. On 11 September the Claimant told his GP that he got panicky with palpitations and had disturbed sleep and his medical certificate of that date stated that he was unfit to work for 2 weeks because of severe back pain and stress. The Claimant was prescribed medication for the stress. Thereafter all the Claimant's medical certificates said that he was unfit to work because of severe back pain and work-related stress. The Claimant complained to his GP of having disturbed sleep with nightmares on 23 September, 7 October, 4 November 2019 and 2 January 2020. The next reference to stress in the GP notes was on 1 May 2020 when it was noted that the Claimant was still complaining of stress.

95 There was no medical evidence about what aspect of his work caused him stress. There was no medical evidence that the Claimant suffered from anxiety. The Claimant told Mr Tucker and Ms Radia on 20 September 2019 that speaking to customers gave him anxiety. He had never raised that previously with his managers. He had worked in that role for eighteen months and had not had any absence for stress or anxiety. He said that his GP had recommended a change in role for his

stress and anxiety. What is GP had in fact said on 11 September was that he might benefit from amended duties and workplace adjustments and that he needed to avoid prolonged sitting and a change of role. The Claimant also told Mr Tucker and Ms Radia on 20 September that if he was given a role in Finance he would be able to return to work immediately.

95 By that stage the Claimant had received two ratings that were below the standards expected, had applied for a number of other roles and had not been successful, had received a written warning for his poor attendance which meant that he could not apply for another role for six months. The Claimant found the prospect of returning to work stressful because he did not like the job that he was doing and he could not obtain a different higher paid role which he felt was more appropriate for him. He made it clear that if he was given a role in Finance he would be able to return to work immediately.

96 We are not satisfied, purely on the basis that the Claimant was certified as unfit to work for about nine months because of work-related stress, that the Claimant had a mental impairment at the time. The Claimant's stress was a reaction to the situation he found himself in at work where he wanted to move to a different role but could not do so. If he were to be given the role he wanted or ceased to work for the Respondent, it was likely that the work-related stress would cease. We are also not satisfied on the evidence available up to the Claimant's dismissal that any stress from which the Claimant may have suffered had a substantial and long-term adverse effect on his ability to carry out normal day to day activities. The only medical evidence that we had was that between September 2019 and 2 January 2020 it had an impact of his sleep. It could not have been said in May 2020 on the basis of that the stress was likely to have substantial adverse effects on his normal day to day activities for at least 12 months. We, therefore, concluded that the Claimant was not disabled by reason of work-related stress and anxiety at any stage between June 2019 and June 2020 and, even if he was, the Respondent did not know that and could not reasonably have been expected to know that. All it had were the medical certificates.

97 The Respondent has conceded that at the time of his dismissal the Claimant was disabled by reason of sciatica. The only issue that we had to determine was whether he was disabled by reason of sciatica before then and, if so, when and whether the Respondent knew or could reasonably have been expected to know that. The Claimant first complained of back pain in January 2019 and he had one day's sickness absence because of it on 10 January. That was also the first time that he saw his GP about it. Between 10 January and 27 August 2019 the Claimant had two sickness absences for his back pain – 14-16 February 2019 (3 days) and 1-9 July (7 days). In the latter case the Claimant's GP certified him as unfit to work because of sciatica. The next time the Claimant saw his GP about the back pain after 10 January was on 24 June 2019 and 1 July 2019. The Claimant told the Respondent that his back pains were being treated with pain-killers. He said in April 2019 that he had had an x-ray and that had not revealed anything and that he was awaiting an MRI scan. On 10 July the Claimant said that he was on strong pain-killers and required a chair with lower spine support. On 7 August the Claimant's line manager noted that the Claimant's back pain was having an impact of his ability to perform his role. On 27 August the Claimant's GP said that he was suffering from severe sciatica and asked the Respondent to make adaptations to his working environment. On that day he was advised by his managers to go home as he was clearly not well enough to be at

work. Thereafter, the Claimant remained unfit to work until June 2020, partly because of his sciatica and partly because he did not wish to return to his role. The Claimant was seen in the Orthopaedic department in a hospital on 21 January 2020 and it was decided that medical intervention was not required as the nerve was not trapped. The Claimant started physiotherapy.

98 We accept that the Claimant had a physical impairment and that from the beginning of July 2019 it had an adverse effect on his ability to sit for long periods (which is a normal day to day activity). The real issue for us in determining when the Claimant became disabled by reason of his sciatica was when could it have been said that that adverse effect was going to last at least until 12 months. The medical evidence does not assist in this matter. There is no exact science to identifying the time when it could have been said that the adverse effect was going to last at least 12 months. The longer the adverse effect lasted, the greater the likelihood of it lasting at least 12 months. Doing the best that we can, we consider that by the end of March 2020, when the Claimant had been off sick for about seven months and the physiotherapy had not improved his condition to allow him to return to work, it would have appeared likely that the adverse effect on his ability to sit was going to last for at least until 12 months. The Claimant did not provide the Respondent with any medical evidence other than his fit to work certificates and the very short letter from his GP. We concluded that the Claimant was disabled by reason of Sciatica from the end of March 2020 and that the Respondent could reasonably have been expected to know that from about that date.

Disability discrimination

99 As we have concluded that the Claimant was not disabled until the end of March 2020 he cannot pursue any of his complaints of disability discrimination that relate to acts that occurred before that date (2.4(a) – (d) above). The only complaints that he can pursue are those that relate to his dismissal. Furthermore, the complaints at paragraph 2.4 (a), (b) and (d) were not presented in time and we would not have considered it just and equitable to consider them for the reasons already given at paragraph 91 above.

100 There was no evidence before us from which we could infer that by dismissing the Claimant the Respondent treated him less favourably than it treated or would have treated a non-disabled person in similar circumstances and that it did so because he was disabled. By the time of his dismissal the Claimant had been absent sick and unable to carry out his role for nine months, he had refused to give his consent to be referred to Occupational Health, he had failed to engage with his employers to discuss his return to work and it was clear that he did not want to, and was not going to be fit to, return to his role or any customer facing role. There was no evidence of the Respondent treating anyone else in similar circumstances more favourably than it treated the Claimant, nor was there any evidence which we could infer that it would have done so. It was clear to us that the Claimant was dismissed because he had not performed the role which he had been employed to do for a long time and there was no indication that he was going to do so in the foreseeable future. The Claimant has failed to establish a prima facie case of direct disability discrimination or disability-related harassment in respect of his dismissal.

101 The real issue in this case is whether the Respondent dismissed the Claimant because of something arising in consequence of his disability and, if it did, whether

the Respondent has shown that dismissal was a proportionate means of achieving a legitimate aim. That includes considering whether the Respondent failed to make reasonable adjustments that could have facilitated the Claimant's return to work. It is not in dispute that the Respondent dismissed the Claimant because of his long sickness absence and the absence of any indication that he was going to be able to return to work in the foreseeable future. The long sickness absence was something arising in consequence of his disability (sciatica).

102 The legitimate aim relied upon by the Respondent was ensuring that it maintained adequate levels of staff attendance to meet the demands of its customers and to operate effectively and efficiently and in order to maintain the employees' skillsets. We accept that that is a legitimate aim. We considered whether dismissal of the Claimant was a proportionate means of achieving that legitimate aim.

103 In considering that issue we took into account the following matters. When the decision to dismiss the Claimant was made on 27 May 2020 he had been continuously absent from work for nine months and had been certified on 1 May 2020 as being unfit to work until 1 July 2020. Prior to the Claimant commencing his long-term sickness absence the Respondent had agreed that the Claimant could have short periodic breaks during the working day and a special chair had been ordered for him. There had been a short delay (about a month) in the chair being ordered but it had arrived by 20 September when the Claimant met with Mr Tucker and Ms Radia. No footrest was ordered because the Claimant had not said anything in his DSE assessment to indicate that he needed one. The Respondent was prepared to consider and make any further adjustments but in order to do that it needed specialist advice from Occupational Health and to have discussions with the Claimant. Despite being asked numerous times to consent to an Occupational Health referral the Claimant refused to do so. Equally he refused from January 2020 to have any discussion with his employer about his medical conditions and what steps could be taken to facilitate his return to work. The Respondent was willing to explore a number of options – phased return to work, working part-time hours or fixed shifts, working at an alternative site, a wireless headset. The Respondent had investigated his grievances and that process had concluded by January 2020. The Claimant was employed in a customer facing role and made it clear that he did not want to work in a customer facing role, no matter what adjustments the Respondent made for him in that role. Moving the Claimant to a different and higher paid role, without him satisfying a recruitment manager that he had the skills and experience to carry out such a role, was not a reasonable adjustment. We concluded that the Respondent did not fail to make reasonable adjustments to facilitate the Claimant's return to work and that in all the circumstances of the case dismissal of the Claimant was a proportionate means of achieving the Respondent's legitimate aims.

Unfair Dismissal

104 The reason for the Claimant's dismissal was capability. When the decision to dismiss was made he had been incapable of doing the work which he was employed to do for nine months and there was no indication that he would be able to return to work to carry out that role in the near future.

105 We then considered whether the Respondent acted reasonably on 27 May 2020 in treating that as a sufficient reason for dismissing the Claimant. For all the reasons given at paragraph 103 (above) we conclude that it did. The Claimant's very lengthy

absence had an impact on his colleagues (who had to do more work to cover his calls) and on the service that the Respondent provided its customers. The Respondent had already made some adjustments to the Claimant's role and was prepared to make more but could not do so in circumstances where the Claimant did not wish to engage with his employer and Occupational Health. The Respondent attempted to consult with the Claimant and to get up to date advice on his medical condition and what it could do to facilitate his return to work. The Claimant refused to engage in any such conversations. The Claimant was unable or unwilling to return to work in the role to which he had been appointed and to assist the Respondent to make it possible. In the absence of those discussions and expert medical advice the Respondent was not obliged to consider alternative roles for the Claimant. In any event, it could not move the Claimant to a completely different type of role without deciding whether he had the requisite skills and experience for that role. We concluded that, in all the circumstances of the case, the Respondent acted reasonably in dismissing the Claimant on 27 May 2020.

Employment Judge Grewal

Date 8 February 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 February 2022

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FOR THE TRIBUNAL OFFICE