

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: S/4100722/17

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Held in Glasgow on 24, 25 & 28 August 2017 & 5  
and 7 September 2017

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Employment Judge: Laura Doherty  
Members: Mr I C MacFarlane  
Mrs A J Middleton

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Mr Kevin Weldon

Claimant  
Represented by:  
Ms S Meehan -  
Solicitor

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Shamini Logendran  
t/a BP Glasgow Airport

Respondent  
Represented by:  
Mr M Howison -  
Consultant

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The unanimous judgment of the Employment Tribunal is that;

(1) the claimant was not unfairly dismissed and the complaint of unfair dismissal is dismissed;

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(2) the claimant was not discriminated against on the grounds of his race under **Section 13** of the Equality Act 2010 ( the EQA) and the claim of discrimination on the grounds of race is dismissed;

E.T. Z4 (WR)

(3) the claimant was not discriminated against on the grounds of disability under **Section 15** of the EQA and the claim of disability discrimination is dismissed;

5 (4) the claim of breach of contract of dismissed.

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### REASONS

1. In a claim lodged on 26 April 2017 the claimant claimed unfair dismissal, race discrimination, disability discrimination, breach of contract, and made an unspecified claim in respect of a breach of the TUPE Regulations. The latter claim was withdrawn in the course of the Hearing; however, the other claims remained live before the Tribunal.

20 2. The issues before the Tribunal were identified at a PH for case management purposes which took place on the 29<sup>th</sup> of June. In respect of the claims the issues before the Tribunal were as follows:-

(1) **Unfair Dismissal** under Section **94** of the Employment Rights Act 1996 (ERA). The single issue for the Tribunal in connection with this claim is whether the claimant was dismissed, the respondent's position being that the claimant was not dismissed. No alternative reason for dismissal is advanced by the respondents.

30 (2) **Race Discrimination.** This is a complaint under Section **13(1)** of the Equality Act 2010 (EqA). The less favourable treatment said to have been accorded to the claimant is a dismissal. It is said by the claimant that he was dismissed, so that the respondents could take on employees of Asian origin. The claimant relies upon a hypothetical comparator, whose personal characteristics are in all other respects materially the same as the claimant's, but is Asian.

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There is a factual issue in relation to the less favourable treatment complained of, but the Tribunal did not understand there to be an issue in relation to the identification of the characteristics of the hypothetical comparator relied upon. The issue therefore is, was the claimant subjected to less favourable treatment, and if so was that treatment on the grounds of his race/nationality.

- (3) **Disability Discrimination.** The claimant suffers from cerebral palsy, and has learning difficulties. It is accepted by the respondents that the claimant is a disabled person in terms of EQA. Nor is there an issue as to knowledge of disability.

The claimant's complaint is under Section 15 of the EQA. There are two acts of unfavorable treatment complained of. The first is the respondent's failure to follow a procedure before dismissing the claimant. It is said this unfavorable treatment was accorded to the claimant because of something arising in consequence of his disability, in that the respondent is said to have taken advantage of the fact that the claimant suffers from learning difficulties in order to dismiss him without following any procedures.

It is also said that the act of dismissal was an act of unfavourable treatment, because the claimant was vulnerable to criticism about doing his job effectively, and that this vulnerability is "*the something arising*"<sup>1</sup> from the claimant's disability.

There is no justification defense advanced, as it is not accepted by the respondents that the claimant was dismissed, and hence it is not accepted that there was a failure to follow any procedure before dismissal.

5 The issues are was the claimant dismissed, and if so was that because of something arising from his disability? And if the claimant was dismissed, did the respondents fail to carry out any procedure prior to dismissal because of something arising from the claimant's disability?

(4) **Breach of Contract.** Determination of this follows on determination of whether there was a dismissal. It is accepted that the claimant was not paid notice.

10 3. The Tribunal heard evidence from the claimant. For the respondents evidence was given by Mr Andrew Akilan, the Manager of the outlet where the claimant worked, and Robert Vernon an employee of the respondents. A joint bundle of documents was lodged.

15 4. The remedy sought is compensation. The claimant's pre-dismissal earnings are agreed at £115.20 per week (both net and gross). In the event the claimant succeeds in his claim, it was agreed that the notice pay to which he is entitled was £1,036.80 (9 weeks x £115.20).

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### **Findings in Fact**

5. From the evidence before it the Tribunal made the following findings in fact.

25 6. The respondent, who trades as a sole trader, operates the franchise of a BP garage at Glasgow Airport. The respondent has around 12 to 15 employees.

7. The claimant, whose date of birth is 6 June 1976, commenced working with  
30 the respondent on 24 December 2007. The claimant has a disability. He suffers from 2 impairments, which are learning difficulties and cerebral palsy. The claimant can read, but can become confused with numbers.

8. The claimant obtained his employment via Remploy. He was employed as a Forecourt Cleaner and worked 16 hours per week. The claimant worked every day of the week, apart from Sunday which was his day off. He generally started around 8am, finishing at either 10am or 11am.
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9. The claimant's employment TUPE transferred from a Douglas Anderson to the respondent on 22 July 2017.
10. Mr Akilan, who is the respondent's husband, became the Manager of the outlet after the transfer, and had responsibility for the day to day running out the garage.
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11. On taking over the business, the respondent received some information about the staff who TUPE'd over. At some point after the transfer Mr Akilan obtained the claimant's mobile telephone number and the telephone numbers of the other members of staff, which he stored in his mobile phone.
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12. After Mr Akilan took over as manager he had a staff meeting to tell staff about the standards he expected of them. Mr Akilan also spoke to the claimant about how he did his work. On one occasion he advised him that when he was cleaning the forecourt he should keep the kerb area clear of weeds. The claimant did as was asked, and Mr Akilan was satisfied with the claimant's work.
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13. On or around 7 December 2016 the claimant consulted with the Citizens Advice Bureau (CAB), accompanied by his mother. The CAB records (page 45/6) notes that the garage had been taken over recently by another company, and there was a new manager. The record notes that the claimant advised the CAB that the manager told the claimant that he should look for another job as he was going to be sacked at Christmas. The CAB note recorded that recently it was said that the manager had been telling the claimant he was not doing his job correctly. It is also recorded that the claimant advised the CAB that he had heard from another member of staff
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the station would be closed for two weeks in January 2017 for building work.

- 5 14. Mr Akilan prepared a staff rota every week, and staff members received their individual rota from him week in advance, via text message. Staff were usually rota'd to work the same hours every week, but this could be changed.
- 10 15. The claimant did not form part of the rota, as he always worked on the same days, for the same hours. Sign in and sign out sheets were used for staff, however the claimant was not required to sign in and out because of the regularity of his hours.
- 15 16. At some point in January 2017 the respondents opened a Subway franchise within the garage. Part of the garage was closed off to allow work be carried out in order to create the space for Subway outlet, but the garage continued to trade. Staff were not told that it was intended for the garage to close while this work was done.
- 20 17. The garage opens 7 days a week, 24 hours each day, and does not close for public holidays, or over Christmas and New Year.
- 25 18. A list of the employees employed by the respondents is produced at page 38 of the bundle.
- 30 19. The staff who were employed at the point when the respondent took over, were Naresh Guttigonda, Indian; Ukachukwu Abaraogu, Nigerian; Margaret McLean, Scottish; and the claimant Scottish. When the transfer took place Mrs. McLean was on sick leave and remained on sick leave until May 2016 when she resigned.
20. Mr Akilan, who is Sri Lankan, commenced working with the respondent on 30 January 2015.

21. Mr Roberts, who is Sri Lankan, was recruited on 5 October 2016. He attends the same church as Mr Akilan, and was recruited by him without formal interview.
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22. A number of employees were recruited by Mr Akilan in light of the Subway opening and they began work on 1 February 2017. Of these employees, 3 are Scottish; 1 is Sri Lankan; 1 is Indian; 1 is Czechoslovakian; 1 is Polish; 1 is Bulgarian and 1 is Hungarian.
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23. Mr Akilan recruited these staff by way of an interview process. A number of the staff were recruited to work in exclusively in Subway, but some carry out duties in both the Subway outlet, and the garage. In addition to Mr Akilan, there are four members of staff who carry out duties both in Subway, and in the BP garage; of these two are Sri Lankan, and two are Indian. All the staff regardless of whether they work in Subway, or the garage, or both, are employees of the respondent.
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24. The claimant travelled to and from work by taxi, under the Access to Work scheme. The claimant booked taxis for the days he attended work, and on the days he did not attend or was on holiday, he advised the taxi company of this. In order to pay for the taxi fares, an 'Access for Work Claim for travel to work costs' form (the form) had to be submitted by the claimant. A number of examples of the form are produced in the bundle.
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25. Part 2 of the form is headed "*claim details*". This part had to be completed in order to specify the period of the claim; how many days of work were done each week, and the date and number of journeys or mileage per day.
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26. Part 3 of the form is the Employer's Declaration, and is preprinted with the employer's details (albeit, these details were incorrect subsequent to the TUPE transfer). Part 3 also contained a box for the employer to sign
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certifying that the person making the claim had been at work on the dates shown in Part 2 of the form.

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27. Part 4 of the form is a Customer Declaration which requires to be signed by the claimant, and is dated.
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28. The claimant signed the form but the remainder of the form (other than part 3), including Part 2, which contained details of the journeys which were claimed for, was completed on his behalf his by his Social Worker or someone else who was supporting him. There was no input from the respondents into the information contained in Part 2 of the form.
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29. Once the form was completed, the claimant or someone acting on his behalf posted it to the return details on Part 5 of the form.
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30. Mr Akilan knew that the claimant travelled to work by taxi, but he had no involvement in the organisation of this. He signed one form for the claimant at some point after he took over as manager, but the forms were not submitted to him regularly for signature. None of the forms produced in the bundle have been signed by or on behalf of the respondents
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31. Invoices from the taxi company were provided separately, and were addressed to a Mrs. Paterson at the Learning Disability Team in East Renfrewshire Council. These invoices detail the number of journey's made each week, but do not provide the dates upon which the journeys claimed for were made.
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32. The claimant submitted an Access to Work travel claim form (page 42) for the period from 1 January 2017 to 14 January 2017. The form is signed by the claimant, but was completed otherwise by another individual. It is not signed by or on behalf of the respondent. In that form a claim is made for two journeys each day back and forward to work on the dates of 4h, 5th, 6th, 7th and 9th January 2017. The form is dated 13th January 2017.

33. The system for requesting holidays was that staff asked Mr Akilan if he/she could to take leave and Mr Akilan granted or refused the request on the basis of operational needs.
- 5 34. Mr Akilan understood the claimant to have a full year's leave entitlement at the point when he transferred to the respondent's employment.
35. Around two weeks before Christmas the claimant approached Mr Akilan, and asked for a week off over the Christmas holiday period. Christmas Day  
10 fell on a Sunday which was the claimant's day off. Mr Akilan agreed to the claimant's holiday request. On the basis of one week's leave the claimant would have been on holiday from 26 December 2016, returning on Monday 2 January 2017, (25<sup>th</sup> December and 1 January 2017 falling on a Sunday, which was the claimant's fixed day off).
- 15 36. The respondent did not make or retain a written record of the claimant's request for annual leave over the Christmas period 2016/17, or the fact that it had been granted.
- 20 37. The claimant attended work on 2nd, 3rd, 4th and 5th January 2017 which was Monday to Thursday of that week. He was due to attend on Friday 6<sup>th</sup> and Saturday 7th but did not do so. Mr Akilan attempted to contact the claimant on the mobile telephone number which he had for him on Friday and Saturday, but his telephone calls did not go through.
- 25 38. The claimant was due to attend work again on the Monday. Mr Akilan did not know whether or not the claimant's was going to attend, and had therefore he arranged for Ukachukwu Abaraogu, another employee, to come in to cover the claimant's shift.
- 30 39. Mr Roberts was working on the morning of 6th and 9th January 2017, his rostered hours generally being Monday to Friday on early shift.

40. The claimant attended work on 9 January 2017. Mr Akilan was already at work. He spoke to the claimant as soon as he came into the garage, and asked him why he had been absent from work for the last 2 days. The claimant said that he was off on annual leave. Mr Akilan told him it was not authorised leave and the claimant answered that it was his leave. Mr Akilan told the claimant that he had been trying to get hold of him for the last two days and as he had not come into work, and he had arranged for another employee to cover his shift. He told the claimant to go home, but to come back for the rest of the week to work the rest of his shifts.
41. The claimant did not attend work on 10 January 2017 and did not attend thereafter. Mr Akilan attempted to contact the claimant on the telephone, but was again unable to get through.
42. The claimant attended the CAB with his mother on the 11 January.
43. The CAB notes (pages 45/46) record that the claimant attended on 11 January 2017 with his mother and advised that he was dismissed from his job on 9 January 2017. It is recorded that he advised the CAB he was given no explanation but his mother had spoken to ACAS and was advised that he should appeal against dismissal in writing. It was recorded that she was to bring in the name of the employer so the CAB could write an appeal letter on the claimant's behalf. It was recorded that the claimant and his mother were contacted by the CAB regarding the letter and gave the impression that the claimant did not want to appeal against dismissal but only wanted to ask the employer about his P45, and a letter was sent regarding this.
44. The CAB record notes that on 25 January 2016 the claimant's mother was in the office. She said that the claimant's Social Worker contacted the employer regarding his P45 and was told that the claimant had not been sacked and that the claimant's mother now said that she did tell the CAB that she wanted a letter appealing the dismissal and that the claimant wanted this too.

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45. Mr Akilan spoke to the claimant's Social Worker shortly after he stopped attending work. The Social Worker asked if the claimant was dismissed, Mr Akilan said no, and he asked her to let the claimant know that he was free to come back to work. He told the Social Worker that he had been trying to telephone the claimant.
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46. The respondents have not replaced the claimant, and the cleaning duties he previously carried out are been split among the existing garage staff. It remains the respondent's position that the claimant can return to work.
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47. The CAB wrote to the respondents on 16 January 2017 (page 48) advising they had been approached by the claimant advising that he had not received a P45 and monies outstanding and asking if the respondents would look into this matter as quickly as possible. There was no written response to this correspondence from the respondents.
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48. The CAB wrote again to the respondents on 25 January 2017 (page 49) advising that the claimant had advised that he wished to appeal against the decision to dismiss, and that he stated he was not given a reason for dismissal. There was no written response to this letter from the respondent
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49. The claimant suffered from stress and depression for a period of around 10 weeks following 9 January 2017 and would have been unable to work during this period because of his ill health.
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50. The claimant has thereafter, with the assistance of a Support Worker made applications for in the region of 60 jobs. So far he has been unsuccessful in obtaining employment, or interviews for employment. He is in receipt of benefits.

**Note on Evidence**

51. The assessment of the credibility and reliability of the witnesses in this case is fundamental to the question the Tribunal had to answer, and which lies at the root of the claim. That question is whether the claimant was dismissed on 9 January 2017?

52. In order to answer this question the Tribunal considered the credibility and reliability of the witness generally and the evidence on the particular conflicts which it had to resolve.

**The Claimant**

53. The Tribunal formed the impression that although there was no attempt whatsoever on the part of the claimant to deliberately mislead, his evidence was significantly lacking in reliability.

54. On the key question of when the claimant returned to work after the Christmas holiday, he gave evidence which was inconsistent throughout, both in his evidence in chief and in cross-examination. In evidence in chief the claimant initially said he asked for 2 weeks off and returned to work on the 9<sup>th</sup> of January, although his employer said he should have returned on the 8<sup>th</sup> of January. He was then taken to the Further Particulars of Claim and led by his solicitor on the position outlined in those particulars, which stated that he had returned to work on 4 January 2017. He was asked did he return to work on the 4<sup>th</sup> of January and answered no. He was then led once again to the particulars of claim and asked to confirm if these were correct, and confirmed they were.

55. On two further occasions in evidence in chief the claimant said that he returned to work on 2 January 2017.

56. In cross examination the claimant said he returned on the 3 January. He subsequently changed this to the then 2 January and then to 4 January.

57. The claimant's evidence as to how the forms were completed was also unreliable. He initially gave evidence to the effect that he was assisted by a Social Worker in the completion of the forms, and that he took the forms to his employer, who stamped them. The claimant's position on this changed  
5 however in the course of the evidence; he later gave evidence to the effect that he did not know who completed the forms; and than gave evidence that it was for his employer to fill in the form, and send it off.

58. The claimant stated that the form dated 13 January 2017 had been signed  
10 by the respondents, but he accepted he had never returned to the respondents premises after 9th January 2017, which rendered his evidence on this point incredible.

59. It was suggested to the claimant by Ms. Meehan that he signed the forms,  
15 and then got the respondents to stamp to the forms, and he accepted this was the case. On the face of the documentation however, and taking into account the fact that the respondents details did not match what is said to be their stamp, and the fact that the evidence supported the conclusion that the respondents had not seen the form dated 13 January (which also has  
20 what is said to be their stamp on it) it appeared to the Tribunal, that it was highly unlikely that this was the case.

60. The Tribunal was satisfied that forms were preprinted with the employer details, and were not stamped by the respondents/  
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61. The Tribunal was satisfied that the respondents had not regularly seen or signed the forms after the transfer, and in particular, they had not seen or signed the form on 13 January 2017, which specified journeys to work on 4, 5, 6, 7 and 9 January 2017.  
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62. The Tribunal was satisfied that it was likely that the claimant obtained assistance in completing the forms from his social worker (or someone who supported him), and that the substance of form was completed on his behalf

with no input from the respondents, and that the respondents did not confirm that the travel details supplied in the form. Despite Ms Meehan's submission there was no evidence at all to support a conclusion that the taxi company input details into the form.

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63. The Tribunal took into account the content of the form dated 13 January which recorded the claimant's journeys to work as having taken place on the 4th, 5th, 6th and 7th January, but taking account of how the form came to be completed, and that fact that there was no input from the respondents, it did not find that form to be determinative of when the claimant attended work that week.

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64. The claimant's reliability was undermined to some extent, in that not only did he provide inconsistent dates in terms of days upon which he returned to work after leave, but in the narrative explaining the background to his dismissal also changed to some degree between the original ET1, additional information produced on 18 July, and further additional information produced by the claimant on 20 August 2017.

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65. In the original ET1 stated "*The claimant returned from the Christmas break in January 2017 and was dismissed without reason or notice.*"

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66. The first set of further particulars produced by the claimant stated; "*the claimant took annual leave over the Christmas period finishing on 24 December 2017, and returned to work on 2 January 2017 and working on 2 to 5 January 2017. The respondents told the claimant he was not able to attend work on 6 and 7 January 2017 due to the garage being fitted with a Subway outlet.*"

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67. In the final additional information produced in August 2017, the claimant changed the dates and stated that he returned to work on 4 January 2017 and worked the rest of the week until 6 January 2017 having his day off. When he returned on the 9th he was summoned by the respondent into his office and summarily dismissed. It was said that the claimant was told by a

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colleague that garage would close for 2 weeks in January 2017 due to a Subway outlet being fitted.

5 68. In light of the evidence that the garage did not close, the Tribunal concluded that it unlikely that Mr Akilan, or anyone else would have told the claimant that the garage was going to close because the Subway outlet was being fitted, and this appeared to be an example of the claimant's lack of reliability.

10 **Mr Akilan**

69. The assessment of credibility was not an easy task in this case, and while ultimately the Tribunal found Mr Akilan's evidence to be credible on the material points before it, there were elements of his evidence which  
15 weighed against his credibility, and which the tribunal attached weight to in its consideration of the evidence.

70. The first element the Tribunal considered was the fact that Mr Akilan had no written record of the claimants holiday requests and had not produced a  
20 holiday book, or written record the claimant's annual leave.

71. It was Ms Meehan's submission that Mr Akilan, although represented by a solicitor, had been present at a PH when this had been discussed; there was an agreement that the holiday book should be produced in the course  
25 of that PH, and Mr Akilan had not indicated that no such book was available.

72. The Tribunal found Mr Akilan's explanation that he did not consider it was appropriate to speak out at the PH, to be a believable one, and did not draw  
30 any inference adverse to Mr Akilan's credibility from this. However had the respondent been able to produce documentation to support its position that the claimant was on leave until 2 January this would no doubt have been of assistance, and the lack of a written record of the claimant's

5 holidays was something to which the Tribunal attached a degree of weight in its overall assessment of the evidence. In doing so however it took into account that while it could be argued, as suggested by Ms Meehan, that the respondent could hide behind a lack of written records, it was also the case that it was disadvantaged by having no written record to support its position.

73. The Tribunal also had regard to Ms Meehan's submission to the effect that Mr Akilan said that holidays were normally only allowed in one week blocks, but that his Nigerian employee had been allowed extended annual leave. Leaving aside Ms Meehan's submission to the effect that Mr Abaraogu is no longer an employee of the respondents, Mr Akilan's explanation of this was that this employee needed more time to return home to visit his family, and while this was inconsistent with the position which he initially outlined in evidence, this did not on the face of it seem to be unreasonable.

15 74. The Tribunal also took onto account that there was an inconsistency between the evidence of Mr Akilan and Mr Roberts in that Mr Akilan said it was only the claimant who asked for holiday in the period between the transfer and Christmas. Mr Roberts said he asked for time off at some point in November. This was again an inconsistency in Mr Akilan's evidence

25 75. It did not appear however to the Tribunal that a great deal turned on these inconsistencies, in circumstances where the respondent accepts that they did not have a written record of the claimant's holiday request and its assessment of the evidence the Tribunal took into account that there was no written record produced by the respondent.

30 76. Another element which the Tribunal took onto account and attached weight to was the inconsistencies in the dates provided by the respondents of the claimant's annual leave.

77. There is an inconsistency between the dates of the claimant's annual leave as specified in the respondents initial ET3 response, an email of 2 January 2017, and the further particulars, provided shortly before the Hearing.

5 78. The initial ET3 stated that *\*7n late December 2016 the claimant did not attend work and was considered AWO.L"* There was then an email of 13 July 2017, from the respondents agents, which states that *"the respondents contend the claimant was on holiday for the period 26 to 31 December 2016 and was scheduled to return to work on Monday 2 January 2017, however*  
10 *he did not turn up on that date, nor did he advise the respondents he would absent and the respondents were unable to contact him. He attended work on Tuesday 3 January 2017 but was advised that his shift had been covered due to his failure to attend the previous day. He was asked to return the following day as usual (he was paid for this day). However, the*  
15 *claimant did not attend on Wednesday 3 January 2017 and no further contact had been received since. The claimant was therefore AWOL on 2 and 3 January 2017."*

79. Additional information provided by the respondents before the Hearing  
20 stated that the claimant returned and worked on 2nd, 3rd, 4th and 5th January 2017, however, the did not attend work on 6th and 7th January 2017 despite being roistered .

80. Mr Akilan explanation of these inconsistencies in evidence did not go  
25 beyond that he got his dates mixed up, and the Tribunal attached weight to the fact that this was the case.

81. It also took into account however that notwithstanding the inconsistencies in  
30 dates, the respondent's narrative throughout has been consistent to the extent that it's position is that the claimant did not attend work and was considered AWOL, and that the respondent arranged to cover his shift as it received no confirmation that he was returning to work .When the claimant

turned up for work he was told that his shift that day was covered but asked to come back to work for the remainder of the week; he failed to do so.

5 82. The Tribunal also attached weight to the fact that the respondents did not  
reply in writing to the letters which were sent by the CAB or write to the  
claimant. Mr Akilan evidence was to the effect that he could not recall if he  
received the letters from the CAB albeit he thought he may have received  
one of them. He said the postcode on the letters was incorrect, but did not  
10 suggest that the address was in any way otherwise wrong, and he accepted  
without difficulty that he had not replied to them in writing.

15 83. It would no doubt have been better if there had been a written response to  
the CAB's correspondence, and again this lack of written response was  
something the Tribunal took into account. This however had to be weighed  
against the fact that Mr Akilan spoke to the claimant's social worker after the  
9<sup>th</sup> of January and told her that the claimant had not been dismissed and  
was free to return to work. The Tribunal is supported in its conclusion that  
such a conversation took place between Mr Akilan and the social worker, in  
20 that it is recorded in the CAB notes that the claimant's mother had spoken  
to the claimants social worker who told her that Mr Akilan had confirmed  
that claimant had not been dismissed. The Tribunal is also supported in this  
conclusion in that it has been respondent's position throughout that the  
claimant was not been dismissed, and it remained the respondent's position  
at the Tribunal Hearing that claimant is welcome to return to work.

25 84. The Tribunal did not conclude therefore that the inconsistencies in the dates  
provided by the respondents, or the lack of written records, was sufficient to  
undermined the credibility of Mr Akilan's evidence to the extent that the  
tribunal was unable to accept it on al) material points.

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**Mr Roberts**

85. The Tribunal found Mr Roberts to be a credible and reliable witness, who sought to give his evidence without exaggeration or embellishment. In reaching this conclusion it took into account that Mr Roberts did not seek to expand his evidence beyond that the claimant did not attend work on the 6<sup>h</sup> of January, and that he saw Mr Akilan attempt unsuccessfully to contact the claimant on his mobile telephone on Friday 6th January 2017.

86. Mr Roberts was at work in the garage on 9 January 2017 when the claimant arrived, but did not seek to suggest that he witnessed the exchange between the claimant and Mr Akilan. In the Tribunal view Mr Roberts's credibility was enhanced by the fact that he confined his evidence to the events of the 6<sup>th</sup> of January.

87. It was suggested by Ms Meehan that Mr Roberts had an agenda to support Mr Akilan in giving his evidence, on the basis that he was grateful to him.

88. Mr Roberts candidly accepted that he was appointed without interview and that he was grateful to Mr Akilan for giving him a job, and in the Tribunal's view his candor on this point again served to enhance his credibility, and in light of the narrow compass of his evidence the Tribunal was not prepared to infer that he was motivated only to support Mr Akilan's, rather than to reflect the truth in his evidence.

**Events of 9<sup>th</sup> January**

89. With these considerations in mind the Tribunal addressed the task of determining the crucial issue of what occurred on 9 January.

90. In connection with this there were two other relevant conflicts which the Tribunal had to resolve.

91. That first was whether Mr Akilan told the claimant that he could not afford to keep him on, and that he had to get a new job before Christmas. It was the claimant's position that Mr Akilan said this to him. Mr Akilan denied it.

5 92. The claimant was asked in evidence in chief what happened when Mr Akilan took over? He responded that Mr Akilan gave him too many jobs to do. He was asked was he threatened. He said yes. He was asked what he was threatened with. He said that he needed to do all the jobs in an hour. He was then asked what other things Mr Akilan said. The claimant that he was told he needed to do things properly, and keep things nice and clean as possible.

10 93. The claimant was then led by Ms Meehan to the claimants additional information ( page 67) which states that the respondent told him he could not afford to keep him on, and that shortly before the Christmas break the respondent told the claimant *'he should find another job before New Years Eve'*. The claimant was asked then what was said in further particulars, and he reiterated their contents.

15 20 94. Albeit that Mrs. Meehan had to prompt and lead the claimant to give evidence about what Mr Akilan was alleged to had said to him about the need to find a new job, there was support for the claimants version of events in that he had attended the CAB with his mother on the 7<sup>th</sup> of December complaining that the new manager had told him to look for another job and that he was going to be sacked at Christmas time, and this was a factor which the Tribunal attached weight to.

25 30 95. The weight which the tribunal attached to this was however to a degree diminished in that the claimant also reported to the CAB that the garage was to be closed for 2 weeks in January for building work. The claimant in his evidence said he could not remember who told him this, and he then that he did not know who told him this. The fact that the garage did not

close down, rendered it unlikely in the Tribunals view that the claimant had been told that there was to be a 2 week shut down.

- 5 96. Mr Akilan denied having told the claimant that he could not afford to keep him on and that he had to find a new job before Christmas or New Year. He accepted that he spoke to all the staff about standards when he took over, and that he had spoken to the claimant about how he performed some aspects of his job after he took over, on one occasion telling him to keep the kerb area of the forecourt clear of weeds.
- 10 97. Ultimately, on balance the tribunal was not persuaded that Mr Akilan had told the claimant he needed to get a new job before Christmas, as was recorded in the CAB notes.
- 15 98. Firstly the claimant worked beyond Christmas (and New Year).
99. Secondly, notwithstanding the claimants visit to the CAB on 7 December when it was recorded that the claimant told the CAB advisor that he had been told that he was going to be sacked at Christmas time, there was a lack of specifics in the claimants evidence about what Mr Akilan was alleged to said, which impacted in its reliability.
- 20 100. As noted above in evidence in chief the claimant only gave evidence on this point when taken to the particulars of claim. In cross examination he could give no indication of when it was alleged this comment had been made, even with reference to the CAB visit.
- 25 101. Thirdly there was an inconsistency between what it was recorded in the CAB notes (the claimant would be sacked at Christmas) and the claimant's evidence which was that Mr Akilan told him that he would be sacked before New Year.
- 30

102. None of these elements on their own would have been sufficient to determine the conflict in the evidence, but taken together and set against the consistent and straightforward denial on the part of Mr Akilan that this statement had been made, the Tribunal was not persuaded that it had  
5 been. It is fortified in this conclusion in that it was satisfied that Mr Akilan confirmed to the claimant's social worker that he was not dismissed at some point shortly after 9 January, and his position remains that the claimant is free to return to work if he wishes. This action on the part of Mr Akilan is consistent with his denial that he had threatened the claimant with dismissal  
10 at some point prior to 7 December.

103. The second conflict was around the dates when the claimant was off on holiday, and when he returned to work. As indicated above there were elements which impacted on the credibility or reliability of both the  
15 claimant's and Mr Akilan's version of this, which the tribunal took into account.

104. For the reasons outlined above although the Tribunal attached some weight to it, it did not conclude that the form dated 13 January which recorded  
20 journey's to work was determinative of the issue. The Tribunal took also into account the failure of the respondent to produce any record of the claimants leave. Against that it took onto account the evidence of Mr Roberts, which the Tribunal found to be credible, and having regard to all these elements, together with the plausibility of each sides version of events  
25 (dealt with below), it was satisfied that on the balance of probabilities the respondent's version was more likely to be the correct one.

105. Ultimately, in reaching its conclusions on the events of 9 January the Tribunal considered that the version of events given by the respondent was  
30 more plausible than that presented by the claimant.

106. The claimant's position was that he was told by Mr Akilan at some point that he was going to be sacked by Christmas. Leaving aside issues of reliability

about dates of holiday leave, the claimant's position was that he was on leave from 24<sup>th</sup> December returning on 4 January. He worked his normal shifts on 4th to 7th January; the 8<sup>th</sup> was his fixed day off. He attended work on 9th January 2017 and at the end of his shift he was spoken to by Mr Akilan, who said "*what are you doing here*", the claimant responded by saying "*I work here*". It was the claimant's evidence that Mr Akilan then told him that he no longer worked at the garage, and to go home, and that he did not work at the garage any longer.

10 107. It was Mr Akilan's evidence that the claimant was on leave until the 2nd January. He returned to work on the 2<sup>nd</sup> and worked the 2<sup>nd</sup>, 3<sup>rd</sup>, 4th and 5th. He was due to work on the 6<sup>th</sup> and 7<sup>th</sup> but did not turn up. The claimant did not contact the respondent, and Mr Akilan was unable to get through to him on his mobile phone. The 8<sup>th</sup> of January was the claimant's day off. Mr Akilan arranged for another employee to cover the claimant's shift of 9th January as he did not know if the claimant was going to turn up for work.

108. The claimant did attend on the 9<sup>th</sup>. Mr Akilan spoke to him at the beginning of the shift, and asked him why he had been absent for the past 2 days when he was due to attend work. The claimant said that he was on leave, and Mr Akilan told him that leave was not authorised. Mr Akilan told him that he had another employee to cover his shift that day and to go home, but to come back the following day, and for the rest of that week.

25 109. In the Tribunal's view it was inherently unlikely that the claimant would have been summarily dismissed, with no reason, at the end of his shift on 9th January. There was no evidence of any discussions between the alleged threat, said to have been made once, at some unidentified point (but having regard to the CAB records before 7 December 2016), and the claimant's summary dismissal on the 9 January 2017. The absence of any evidence to link the two or to explain why Mr Akilan dismissed the claimant at the end of his shift on the 9th, in the Tribunal's view rendered it unlikely that the

claimant was told that he no longer worked at the garage at the end of his shift on 9th January.

5 110. It appeared to the Tribunal that that the respondents position was the more plausible one. It was credible that the claimants' failure to attend two shifts was a catalyst for Mr Akilan arranging alternative cover on 9th January, asking the claimant about why he had not turned up for two previous shifts; and sending him home on the 9<sup>th</sup> but asking him to come back to work for the remainder of his week's shifts.

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111. Mr Akilan's evidence was supported by Mr Roberts' evidence, who spoke to the fact that the claimant did not attend on 7 January 2017, and that Mr Akilan attempted to contact him then.

15 112. The Tribunal was also supported in its conclusion, in that it was satisfied that Mr Akilan spoke to the claimant's Social Worker shortly after the 9<sup>th</sup> (and certainly prior to 25 January, and therefore before he faced any threat of litigation) and advised her that the claimant had not been dismissed, and that he was welcome to return to work. This remained Mr Akilan's position  
20 at the Tribunal. Such a position is inconsistent with Mr Akilan having summarily dismissed the claimant on 9th January 2017.

## Submissions

### 25 Claimants Submissions

113. Ms Meehan produced written submissions which she supplemented with oral submissions. She criticised the respondent's evidence in relation to dismissal, submitting that the information they provided shadowed that  
30 produced by the claimant, and she took the Tribunal to the terms of the ET1 and the ET3 response and further particulars provided by the claimant, and thereafter the respondents.

114. Ms Meehan relied on the inconsistency in the evidence of Mr Akilan to the effect that leave was only allowed to be taken in one week blocks but a Nigerian employee had taken leave to return to Nigeria which was considerably longer than a week.

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115. Ms Meehan submitted that the respondent's lack of recording of medical absence holidays lacked any credibility. She submitted no holiday book had been produced despite this being agreed at PH for case management purposes.

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116. Ms Meehan submitted the claimant's evidence was credible and reliable. It was supported by the Access to Work forms which she submitted had to be signed by the employer following completion by the taxi company and the Social Worker, and signed by the claimant or on his behalf.

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117. Ms Meehan asked the Tribunal to find that the claimant attending the CAB supported his position that he was told he had to find a new job by New Year. The claimant was frightened at work due to threats from the respondents which began as soon as they took over the business.

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118. Ms Meehan submitted that the respondent hoped the lack of a paper trail would assist them.

119. In relation to unfair dismissal, Ms Meehan asked the Tribunal to find that the respondents carried out their threats made when they took over the business in July 2016 to dismiss the claimant at Christmas. When the claimant returned from legitimate annual leave he was summarily dismissed.

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120. In relation to discrimination, Ms Meehan firstly addressed the Tribunal on Section 13 of the EQA under which the race discrimination claim is brought. It was her position that the claimant was dismissed so that the job could be given to a person of Asian origin, She referred to page 38 of the bundle,

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which contains a list of employees of the respondents, as at 9 January 2017. The claimant was dismissed so that the respondent could give the claimant's job to a person of Asian origin. Of all of the members of staff who had transferred under TUPE only those of Asian origin continued to work in the business. The claimant had not been replaced and instead his work has been taken by other Asian employees who were recruited by the respondents following the takeover of the business. In connection with the additional staff recruited to work at Subway, Ms Meehan relied on Mr Roberts' evidence to the effect that the staff who cover duties at Subway, and the garage are all of Asian origin. She asked the Tribunal to reject the respondent's evidence that they still retained their Nigerian employee.

121. In relation to the disability discrimination claim, Ms Meehan confirmed that as identified at the beginning of this Hearing, this claim is brought under Section 15 of the Equality Act 2010.

122. Her submission was to the effect that it was alleged the respondents threatened the claimant with dismissal from July 2016 when they took over the business. She submitted that such was the level of threats from the respondents to the claimant that he and his mother went to Citizens Advice Bureau and she relied on the record of that. She submitted the respondents felt able to behave towards the claimant in such a way because of his disabilities. She submitted that they treated the claimant less favorably because of his disabilities.

123. Ms Meehan submitted that the respondents unfairly and without foundation criticised the claimant's work undermining his physical capability. She submitted the respondents told the claimant to find another job and he could not afford to employ him and in threatening the claimant in this way he was taking advantage of the claimant's vulnerability in respect of his additional learning needs. Ms Meehan submitted that the respondents felt able to treat the claimant in this way, in a continuing course of conduct which began in July 2016 because the claimant was disabled and the respondents

believed that there would be no repercussions for their actions. Ms Meehan submitted that because the claimant was disabled, he was vulnerable to criticism and he would have believed that his work was not up to standard (capability) because of his physical disability. Because of his learning difficulties he would not have complained about the way in which he was being treated by the respondents.

124. The claimant gave evidence that he had been a cleaner for 15 years in total and during 10 years with BP Connect there had been no issue with his capability. The claimant also gave evidence that the manner in which he was treated by the respondents frightened him and prompted him to seek prior legal advice prior to dismissal on 9 January 2017 about the respondent's threats of dismissal.

125. Ms Meehan asked the Tribunal to accept the CAB note as evidence of the respondents discriminatory behaviour towards the claimant in a course of the conduct which began in July 2016 and culminated in the claimant's dismissal in January 2017.

126. Ms Meehan made submissions in relation to the quantification of the claim.

127. In relation to the race discrimination element she submitted that the claimant should be awarded an "*end of career loss*" in relation to future loss as it was unlikely he would find another job, and she made submission in relation to the figure issued by the Scottish Government which was produced in the bundle (although not spoken to in evidence) at page 63.

128. She submitted the claim had two types of impairment, being physical cerebral palsy and learning difficulties. She also submitted he may fall under a third category of disability, because of the mental health issues he developed since his dismissal.

129. Ms Meehan submitted the claimant had done everything to mitigate his loss and she relied on the evidence of the Support Worker produced in an email at page 62 of the bundle. In addition to wage loss the claimant had also lost over £100 per week in tax credits. An uplift of 25% was sought in respect of the respondent's failure to follow the ACAS Code.

130. In relation to compensation for injury to feelings Ms Meehan referred to the revised **Vento** bands, and asserted the claimant's case was one of the exceptional cases in that it featured the following :-

(1) The respondents conduct began in July 2016 and was sustained until the final act of discrimination in January 2017.

(2) The claimant was frightened throughout this period. The claimant had two disabilities and may have developed a third disability as a result of the discrimination suffered.

(3) The claimant claimed end of career compensation as well as compensation for stigma damages as it is believed that employers will be put off employing the claimant as a result of his claim to a Tribunal for complaints relating to his disabilities (**Chagger -v- Abbey National Pic [2009] EWCA Civ 1202 CA**).

131. Ms Meehan sought awards for each of the protected grounds as each is a separate head of damages (**Al Gurnard -v- Clyde Leisure Ltd [2008] IRLR 347**). In this connection Ms Meehan clarified she was seeking a separate award for each of the claimant's impairments, in addition to a claim for race discrimination. Ms Meehan submitted that such awards would properly compensate the claimant within the guidelines of **Vento -v- The Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102**. She submitted the sums sought were invested with him earning £6,000 per annum, and an interest rate of 1.5% being the claimant's annual income.

Respondents Submissions

132. Mr Howison also addressed the Tribunal on the issue of credibility and reliability of the witnesses. He accepted there were inconsistencies in the dates provided by the respondents in relation to the claimant's unauthorised leave of absence, but he relied upon the fact that the narrative provided by the respondents had been consistent throughout, in contrast to the claimant and he pointed out the inconsistencies in the dates provided by the claimant as to when he attended work, and the reasons for his non-attendance, and he submitted that in addition the claimant had been inconsistent throughout the course of his evidence, as to when he had attended work, and when he had been absent.

133. Mr Howison dealt with the Access to Work forms, and submitted it was clear that the forms had been preprinted, and were not, as suggested by the claimant stamped by his employer, in order to validate the dates the claimant travelled to work for week beginning 2 January 2017.

134. Mr Howison submitted that in all likelihood, the claimant was unhappy with his job once the new Manager took over, and ultimately had decided to leave. It was this unhappiness which in all likelihood had caused the initial CAB visit and Mr Howison pointed to the fact that Mr Akilan had contacted the CAB, as recorded in their records, to make it clear the claimant had not been dismissed, and that was at an early stage, before there was any suggestion the claimant would embark on litigation.

135. Mr Howison dealt with the race discrimination claim, and submitted that the claim was without foundation. Consideration of the list of employees as at January 2017 demonstrated that the percentage of white employees as at 17 January 2017 was higher than Asian employees, and of the employees recruited by the respondents after they took over the business, the percentage of white employees was higher than Asian employees.

136. In connection with the disability discrimination claim, the discriminatory conduct claimed by the claimant was denied by the respondents, and it was denied there was any discrimination under Section 15 of the Equality Act 2010.

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137. Mr Howison also made submissions on remedy, submitting that it was fanciful to suggest that this was an exceptional case. There was no justification for a career ending award. No evidence had been heard, and the Tribunal only had a submission from Ms Meehan, in which she referred to statistics said to have been produced by the Scottish Government. In addition, this was a claimant who had worked previously, and there was no reason why he could not obtain another job.

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138. Mr Howison submitted that Ms Meehan's assessment of injury to feelings was entirely unrealistic, and did not reflect the *Vento* guidance at all.

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### Consideration

#### Unfair Dismissal Claim

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139. Section 94 of the Employment Rights Act 1996 states that an employee has the right not to be unfairly dismissed by his employer.

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140. Section 95 describes the circumstances in which an employee is dismissed. Section 95(1) (a) provides that an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice).

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141. It was the claimant's position that he was dismissed in terms of Section 95(1) (a) on 9 January 2017.

142. It was agreed in connection with the unfair dismissal claim the single issue was whether the claimant had been dismissed under Section **95(1)(a)** by Mr Akilan, on 9 January 2017.

5 143. In the circumstances where dismissal is not admitted, as in this case, the burden of proof falls on the employee to show a dismissal. The standard of proof to be applied is the balance of probabilities. The Tribunal must consider whether it was more likely than not that the contract was terminated by dismissal.

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144. For the reasons outlined above the Tribunal was satisfied that Mr Akilan told the claimant to go home on 9 January 2017 as he had arranged cover for his shift that day, but to return to work the following day, and for the rest of the week. The Tribunal did not conclude that such words were capable of  
15 being interpreted as an express dismissal. In these circumstances, the Tribunal did not conclude that the claimant had been dismissed by Mr Akilan.

145. Even if the claimant was mistaken as to what was intended by Mr Akilan,  
20 that error on his part was not capable of rendering what Mr Akilan said to the claimant on 9 January 2017 a dismissal. In any event there was no case before the Tribunal to the effect that ambiguous words had been spoken by Mr Akilan, which could objectively have been interpreted as words of dismissal. There was a factual dispute as to what Mr Akilan said.  
25 It was the claimant's case that he was dismissed by being told to go home, and that he no longer worked at the garage, and this was denied by Mr Akilan.

146. In the circumstances, the Tribunal did not conclude that the claimant was  
30 dismissed, and the complaint of unfair dismissal does not succeed.

147. It follows from this that the claim of breach of contract also fails.

Race Discrimination Claim

148. The race discrimination claim was brought under Section 13 of the Equality Act 2010 on the grounds of direct discrimination. The act of discrimination is said to be dismissal, however, given the Tribunal's conclusion on this point, this claim also fails.

Disability Discrimination Claim

149. This was a claim under Section 15 of the Equality Act 2010. Section 15 of EQA provides as follows:-

*“(1) A person (A) discriminates against a disabled person (B) if-*

*(a) A treats B unfavorably because of something arising in consequence of B's disability;*

*(b) A cannot show that treatment is a proportionate means of achieving a legitimate aim (2) subsection (1) does not apply if (a) shows that A did not know, or could not reasonably have been expected to know, that B had the disability.”*

150. The two acts of unfavorable treatment alleged by the claimant were (1) dismissal and (2) failure to follow a fair procedure prior to dismissal.

151. The Tribunal notes that in submission Ms Meehan attempted to suggest that the claimant had been subjected to a continuing course of conduct on the grounds of his disability, culminating in his dismissal. Firstly, this was not the case before the Tribunal. The only claim before the Tribunal is under Section 15, and is in respect of the two alleged acts of discrimination set out above. There was no notice in the ET1 of claim that the claimant had been subjected to a continuing course of conduct which amounted to disability

discrimination. Such a claim was not identified at the PH in June, or at the commencement of this Hearing. There was no amendment to include a claim beyond the ambit of Section 15 claim identified at the commencement of this Hearing, as set out above.

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152. Secondly, in any event, the only matter which was put to Mr Akilan in cross examination was that he told the claimant at some point around December 2016 that he would have to find a new job. It was not put to him that he that he subjected him to a continuing course of conduct by criticising him or his work.

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153. In the circumstances where the Tribunal found that the claimant had not been dismissed, the claim of discrimination under Section 15 where the acts of discrimination alleged are dismissal, and failure to follow a fair procedure prior to dismissal, must fail, and this claim is accordingly dismissed.

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Employment Judge: Laura Doherty  
Date of Judgment: 26 September 2017  
Entered in register: 29 September 2017  
and copied to parties

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