



# EMPLOYMENT TRIBUNALS

**Claimant:** Olaf Olenski

**Respondent:** University of Essex Campus Services Ltd

**Heard at:** East London Hearing Centre

**On:** 1, 2, 3, 4, 8, 9, 10, 11, 18 March 2022 and 12, 13 April 2022

**Before:** Employment Judge Burgher

**Members:** Mrs G Forrest  
Mrs A Berry

## Representation

**For the Claimant:** In person  
**For the Respondent:** Ms R Thomas (Counsel)

## JUDGMENT

1. The Claimant's claims that the Respondent unlawfully harassed the Claimant relating to disability are struck out on grounds of having no reasonable prospects of success.
2. The Claimant's claims that the Respondent discriminated against the Claimant arising from his disability fail and are dismissed.
3. The Claimant's claim that the Respondent failed to make reasonable adjustments in relation the timing of the grievance procedure succeeds.
4. The Claimant's claim that the Respondent failed to make reasonable adjustments in relation to the probationary termination succeeds.
5. All of the Claimant's other claims relating to failure to make reasonable adjustments fail and are dismissed.
6. A remedy hearing is listed to take place on and 6 and 7 July 2022

# REASONS

## Preliminary matters

1. There were a number of preliminary matters that arose in this case.
2. On the first day of the hearing there was a tube strike which meant that the Claimant had difficulty in attending Tribunal. Consequently, the Tribunal convened a telephone case management on the afternoon the first day where the following matters were discussed.
3. The first matter was the absence of a witness statement from the Claimant. The Claimant stated that he did not know that he had to provide a witness statement, he did not have access to lawyers to be able provide a fully drafted witness statement and that there would be much more he would like to say if he was permitted to draft and submit a statement at this time. The Respondent countered that they did not have a witness statement from the Claimant, despite several requests, in order to deal with the case that it had to meet and if there was going to be a further witness statement it could have an effect on the timing and progress of the Tribunal hearing.
4. The Tribunal considered the parties competing representations and concluded that it was in accordance with the overriding objective for the Claimant to be limited to the statements dated 17 December 2020 that he made in proceedings at pages 48 to 76 of the bundle. We considered that these statements outlined his concerns in a clear and structured way and specified the allegations he was making and why he was making them.
5. We also concluded that the Respondent had sufficient notification and opportunity to engage with statements the Claimant had made at pages 48 to 76 of the bundle as they were.
6. The Claimant maintained that was very unhappy about being limited in this way as there was much more he would have wished to say and we note his unhappiness and objections in this regard.
7. The second matter related to the transcripts of meetings that the Claimant had attended when at the Respondent. The Claimant objected to the Respondent being able to rely on the transcripts at the hearing as they had not been provided to him when requested during his employment and shortly after his employment had been terminated. The Claimant had access to the recordings but stated that he did not have the mental capacity to listen to them all and create his own transcripts at the time. The Respondent stated that the transcripts were relevant evidence of meetings that had happened, and it would be appropriate for the Tribunal to consider them.
8. The Tribunal decided to allow reference to the transcripts for the relevant context of the meetings only but we would not refer to the full transcripts of the meetings, only the relevant parts of the transcripts would assist the Tribunal in determining matters.

9. The Tribunal did not have any direct contact with the parties on the second day. The Respondent attended the Tribunal and waited for the Claimant to attend. The Claimant did not attend the Tribunal on the second day of the hearing. Emails and contact to the Tribunal clerk on that day demonstrated that he was anxious and stressed in travelling to the Tribunal and there were difficulties with the aftermath of the tube strike. The Tribunal waiting for the Claimant and at 3pm the Respondent was informed by the Tribunal clerk that the hearing that the hearing would not proceed on the second day.

10. The Tribunal spent the first day and the second day of the hearing reading through all the statements provided by the Claimant and the Respondent. The parties attended on the start of the third day. There was also a tube strike on this day and the Claimant attended.

#### Harassment complaints

11. The Tribunal considered the most appropriate way to case manage the matter bearing in mind the hearing time that had been lost. The Tribunal considered to be in accordance with the overriding objective to ensure that the matter could be dealt with dealt with fairly in time allotted The Tribunal expressed its observations on the Claimant's claims in relation his disability related harassment complaints, which related to matters with his then line management Ms Attwood, Ms Wastell and Mr Merrick. The Tribunal queried with the Claimant how his allegations against them amount to harassment related to disability for the purposes of establishing harassment complaint. In summary the Claimant stated that he was disabled and that things occurred as part of his work that created a hostile environment for him.

12. Having considered the Claimant's responses, the Respondent's representations and following detailed consideration of the content of the respective witness statements the Tribunal considered that it was in accordance with the overriding objective to strike out the Claimant's unlawful harassment complaints pursuant rule 37 of the 2013 ET rules on the basis that they have no reasonable prospect of success. In doing so we had full regard to the public policy militating against striking out fact sensitive discrimination and harassment complaints. We struck these claims out having reviewed the evidence in relation these matters and the legal requirements to establish the complaints. In summary, the Tribunal concluded that the Claimant had no reasonable prospect of successfully establishing that any of the allegations he made whilst working at Buffalo Joe's and the teams conduct towards him or failure to act related to disability.

13. We also observed that the allegations relating to working at Buffalo Joe's and Zest took place over a defined period up to July 2019. The Claimant did not return to work at those locations but brought his claims in this regard on 22 June 2020 and on the face of it were prima facie out of time. We fully accept that the Claimant had significant mental health issues including a serious incident in August 2019. However, he was able to return to work November 2019 and no claim in respect of that period was presented to the Tribunal.

14. When taking the draconian step to strike out the harassment complaints we also had regard to the overriding objective, in particular to seeking to ensure that the claims were determined without further delay that would arise and the need for finality for both the Claimant and the Respondent's witnesses. Consequently, we concluded that it was appropriate to strike out the Claimant's harassment disability related complaints and these are dismissed

### Hearing management

15. In respect of the proceedings themselves the Claimant made it clear that he was on medication and it was clear to the Tribunal, especially during the afternoons that the Claimant's concentration waned and he stated a number of times that he had brain fog affecting his concentration. The Tribunal adjusting proceedings to accommodate this when appropriate and enforced breaks every 40 minutes. Notwithstanding this the Claimant was still tired and highly anxious and the Tribunal finished early on most days to accommodate his depleting concentration and increasing anxiety levels.

16. We record that that this matter was a very stressful process for all concerned, especially the Claimant given his health issues and we make no adverse findings against the Claimant in respect of the aggressive manifestations of his anxiety that arose from time to time during the hearing, following which the Claimant usually apologised.

17. We are grateful for the perseverance of the Claimant and the patience of the Respondent's representative in both assisting the Tribunal to ensuring that all the evidence and submissions could ultimately be heard in the time allotted.

### **Issues**

18. Following discussion and review by the Tribunal of the claims, a number of the Claimant's claims were relabelled from discrimination arising from disability to reasonable adjustment complaints. In view of this and resolution of the preliminary matters the claims and witness statements the issues for determination were as follows:

#### Disability

1. By email dated 2 February 2022 the Respondent conceded that the Claimant was disabled by reason of mental impairment of depression.
2. The Respondent accepted that it had notice of the Claimant's disability from 8 April 2019.
3. Therefore, issues as to whether the Claimant have the protected characteristic of disability as defined in section 6 Equality Act 2010 ("EqA 2010") is no longer live.
4. As an aside the Tribunal is critical of the time it took for the Respondent to concede disability in view of the claim being presented 22 June 2020 and the content of the Respondent's occupational health reports dated 30 May 2019 and October 2019.

UNLAWFUL HARASSMENT RELATED TO DISABILITY (s26 Equality Act 2010) (These claims were struck out)

5. ~~Did the Claimant receive the following unwanted conduct from the Respondent? The unwanted conduct relied on by the Claimant is:~~

~~5.1 — that his unit manager (Hoda Attwood) incited the Claimant's co-workers to make complaints about him. (The co-workers concerned are Ian Merrick, Gareth Roberts, Rebecca Wastell, Matynas Mikaluaskas and Stella Matsouka and the complaints were made in July 2019)~~

~~5.2 — that Hoda Attwood used these reports from co-workers to place the Claimant on a Performance Improvement Plan in April 2019~~

~~5.3 — that the Performance Improvement Plan was used (by Hoda Attwood (line manager), Tim Morris (Deputy Director UECS) and HR) as a way of furthering a campaign of harassment against the Claimant, to construct and pursue disciplinary action him on 12 July 2019~~

~~5.4 — that Hoda Attwood copied the PIP to Tim Morris, Deputy Director of UECS, who distributed it to other parties and departments, including HR, without the Claimant's knowledge or authority, without adjusting it to reflect the Claimant's actual performance over time, giving the impression that the problems remained and that the Claimant had made no progress or improvement~~

~~5.5 — that Hoda Attwood failed to act on complaints which the Claimant made to her about co-workers (prior to end of July 2019). These complaints were about:~~

~~5.5.1 — Martynas Mikalauskas (that he was behaving strangely around the till and in the office)~~

~~5.5.2 — the Claimant's wallet being stolen~~

~~5.5.3 — Stella Matsouka (causing the cross-contamination of food)~~

~~5.5.4 — the restaurant being dirty and that Rebecca Wastell had been aggressive when the Claimant asked her to clean it~~

~~5.6 — that Hoda Attwood incited co-workers (Rebecca Wastell; Stella Matsouka; Ian Merrick; Gareth Roberts) via end-of-shift and weekly email reports to make complaints about the Claimant in July 2019 which led to disciplinary allegations being made against the Claimant~~

~~5.7 — that Darren Tyers ignored the Claimant's report of a fire and explosion risk made by the Claimant by email on 18 June 2019 and that there was an explosion 3 weeks later~~

~~5.8 — that on 13 July 2019 Hoda Attwood shouted at the Claimant in front of co-workers and customers about putting apples on the counter~~

~~5.9 — that the Claimant's requests to HR, by email in July 2019, for a transfer to another department of the Respondent was denied and that the Respondent transferred the Claimant to another unit instead~~

~~5.10 — That the Claimant's PIP was cut and pasted to use as the basis of conduct potentially meriting disciplinary action~~

~~5.11 — that Elisa Aylott refused, over the weekend of 27 and 28 July 2019, to allow the Claimant to attend a doctor's appointment on 29 July 2019~~

6. ~~Was that unwanted conduct related to disability?~~

~~7. Did any unwanted conduct related to disability have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant or violating his dignity?~~

~~8. Did any unwanted conduct related to disability have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant or violating his dignity and is it reasonable for such actions to be regarded as having that effect?~~

DISCRIMINATION ARISING FROM DISABILITY (S15 Equality Act 2010)

9. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability?

10. The alleged "something arising in consequence of" the Claimant's disability and the alleged unfavourable treatment received because of that are (the Claimant accepts that the matters in italics should be considered as part of his reasonable adjustment complaints as opposed to section 15 EqA complaints and the Tribunal, having invited submissions from the Respondent, considers them as such):

*10.1 that the Claimant needed additional time to recuperate after each shift worked and the Claimant was treated unfavourably by being rostered to work 6 continuous back to back shifts over a continuous period between February and July 2019*

*10.2 that the Claimant needed additional time to recuperate after each shift worked and the Claimant was treated unfavourably over a continuous period between February and July 2019 by not being rostered on a working pattern which allowed him two consecutive days off*

*10.3 that the Claimant needed not to be overburdened during shifts because he would tire more easily and was treated unfavourably in Easter 2019 by being rostered to work the entire Easter weekend in 2019 without other managers/supervisors being present*

*10.4 that the Claimant needed not to be overburdened during shifts because he would tire more easily and was treated unfavourably over the Easter weekend in 2019 by being required to work with insufficient staff to serve food*

10.5 that the Claimant needed to avoid stressful changes to predictable work regimes and was treated unfavourably by Elisa Aylott changing the Claimant's shift without consultation in July 2019

*10.6 requiring the Claimant to attend a lengthy formal meeting without breaks on 10 and 17 February 2020*

10.7 that the Claimant was on sick leave in order to recuperate and was treated unfavourably by Respondent not seeking the Claimant's agreement that Daren Tyers would visit him in Harwich Medical Rehabilitation Unit while the Claimant was recuperating there, in August 2019, which the Claimant regards as a breach of his privacy

11. At the material time or times, did the Respondent know, or should the Respondent reasonably have been expected to know, that the Claimant had the disability of depression (if such disability is established)

12. If the Respondent did treat the Claimant unfavourably because of something arising in consequence of his disability, was that treatment objectively justified? The objective justification relied on by the Respondent is:

12.1 In relation to paragraphs 10.1 to 10.4, the legitimate aim of ensuring sufficient and appropriate staffing to meet operational needs, having regards to the availability (including agreed leave) and working arrangements of relevant employees

12.2 In relation to paragraph 10.5, the legitimate aim of ensuring sufficient and appropriate staffing to meet operational needs, having regards to the availability (including agreed leave) and working arrangements of relevant employees, including in the context of the Claimant transferring to a different unit

FAILURE TO MAKE REASONABLE ADJUSTMENTS (S21 Equality Act 2010)

13. Did the Respondent apply a provision criterion or practice (a PCP) to the Claimant? Having regard to the reassignment of section 15 EqA to this head of claim (underlined) the PCPS relied on are:

13.1 providing the Claimant with on the job training, from various colleagues, in his role as Catering Supervisor between February 2019 and July 2019

13.2 allocating the Claimant a shift pattern of 6 days' continuous working between February 2019 and July 2019 that the Claimant needed additional time to recuperate after each shift worked and the Claimant was treated unfavourably by being rostered to work 6 continuous back to back shifts over a continuous period between February and July 2019

13.3 that the Claimant needed additional time to recuperate after each shift worked and the Claimant was treated unfavourably over a continuous period between February and July 2019 by not being rostered on a working pattern which allowed him two consecutive days off

13.4 that the Claimant needed not to be overburdened during shifts because he would tire more easily and was treated unfavourably in Easter 2019 by being rostered to work the entire Easter weekend in 2019 without other managers/supervisors being present

13.5 that the Claimant needed not to be overburdened during shifts because he would tire more easily and was treated unfavourably over the Easter weekend in 2019 by being required to work with insufficient staff to serve food

13.6 calling the Claimant to a formal meeting without prior notice or opportunity to be accompanied by a representative on 12 July 2019

13.7 requiring the Claimant to attend a lengthy formal meeting without breaks on 10 and 17 February 2020

13.8 informing the Claimant in August 2019, in writing, that his probation was extended, without delaying the decision or speaking to him directly

13.9 progressing the disciplinary process against the Claimant before his grievance had been concluded. The grievance hearing was held on 12 February 2021; the disciplinary hearing was held on 10 February 2020 and 17 February 2020)

13.10 appointing managers within UECS to hear the Claimant's disciplinary and grievance cases. (These appointments were made In January 2020)

13.11 terminating the Claimant's employment without further extension of his probationary period, on 20 March 2020

13.12 requiring the Claimant to pass an interview in order to be redeployed to a Library Assistant role (December 2020)

13.13 requiring the Claimant to meet the essential criteria for an assistant Student Welfare role in order to be able to apply for it (January 2020).

14. Did those PCPs place the Claimant at a substantial disadvantage in comparison with persons who were not disabled?

15. At the material time or times, did the Respondent know, or should the Respondent reasonably have been expected to know, that the Claimant had the disability of depression (if such disability is established)

16. At the material time or times, did the Respondent know, or should the Respondent reasonably have been expected to know, that the alleged PCPs placed the Claimant at a substantial disadvantage in comparison with persons who were not disabled?

17. Did a failure on the part of the Respondent to implement one, some or all of the following steps amount to a failure to comply with the Respondent's duty to make reasonable adjustments to avoid the relevant disadvantage:

17.1 providing the Claimant with a structured training course for his role as Catering Supervisor (rather than on the job training) to enable the Claimant to learn all the requirements of the role

17.2 providing additional support to the Claimant in areas where the Claimant was struggling or where Hoda Attwood considered that the Claimant was underperforming in his role as Catering Supervisor

17.3 allocating the Claimant a shift pattern which enabled the Claimant to recuperate before his next shift

17.4 avoiding calling the Claimant to a formal meeting on 13 July 2019 without prior notice and allowing him to be accompanied by a representative

17.5 offering the Claimant regular breaks in the formal meeting on 13 July 2019 to enable the Claimant to access medication

17.6 delaying any decision on the Claimant's probation until it could be communicated to the Claimant face-to face

17.7 pausing the disciplinary procedure pending the outcome of the Claimant's grievance

17.8 appointing a wholly independent person, not involved in the events concerned, to decide the Claimant's grievance and the disciplinary allegation against the Claimant

17.9 providing the Claimant with a mentor so that the Claimant could discuss the situation with that person to receive support and guidance

17.10 providing written documents in the form of Standard Operating Procedures to support learning in a structured and timely fashion

17.11 extending the Claimant's probationary period to allow the Claimant a better opportunity to prove himself while at work

17.12 appointing Claimant to the Library Assistant role

17.13 appointing the Claimant to a Student Welfare role



TIME LIMITS

18 Are any of the claims made by the Claimant brought outside the normal time period for commencing proceedings in the employment Tribunal?

19 If so, would it be just and equitable to consider any complaints presented out of time?

REMEDY

20. If the Claimant's claims, or any of them, succeed, what compensation or other remedy should the Tribunal award?

**Evidence**

19. The Claimant gave evidence on his own behalf, and as mentioned above he was limited to pages 49 to 76 of the hearing bundle

20. The Claimant's partner, Mr Philip Berners, gave evidence in support of the Claimant. He was interposed during the Respondent's evidence to accommodate his availability. Mr Berners is employed by the Respondent's parent company the University of Essex

21. The Respondent called:

21.1 Hoda Atwood Retail Assistant Operational Manager and Claimants immediate line manager at Buffalo Joe's restaurant;

21.2 Chantal Mills, senior employee relations advisor;

21.3 Eliza Aylott, Head of catering services and Claimants line manager was working at Zest;

21.4 Ian Merrick, catering supervisor working at Buffalo Joe's;

21.5 Rebecca Wastell, catering supervisor at Buffalo Joe's;

21.6 Linda McCanna- Doyle, Deputy Director of Services and the grievance officer;

21.7 Darren Tyers, Retail Operations Manager and Hoda Attwood's line manager;

21.8 Emma Wisher, Assistant director user engagement. She considered the Claimant's application for the assistant - librarian role. She gave evidence by video as part of a hybrid hearing. There was a delay of over an hour on the 8<sup>th</sup> day due to technical difficulties to facilitate her Cloud Video Platform attendance;

21.9 Tim Morris, Deputy director of operations and disciplinary and dismissal officer;

21.10 Chris Oldham - Director of estates and dismissal appeal officer, The Claimant's questions to Mr Oldham were curtailed despite the Claimant asserting he had many more questions in order to ensure that Mr Oldham, who was of marginal relevance could be completed on the day. The Tribunal considered that the Claimant had asked Mr Oldham the relevant questions of background and his involvement in the dismissal appeal.

21.11 Karen Braybrook - HR operations manager who assumed responsibility of HR in in June 2019;

22. All witnesses subject to cross-examination questions from the Tribunal.

23. The Tribunal was also referred to relevant pages in an agreed bundle consisting of over 1000 pages.

## **Facts**

24. The Respondent is a wholly owned subsidiary of the University of Essex. The Respondent employs up to 100 staff and provides services, including conference and food services on behalf of the University of Essex. It operates 10 food outlets across the university, including Buffaloes Jules and Zest and its offering includes restaurants, street huts and cafés. The Respondent has the following service departments:

- Campus services
- Accommodation Essex
- Essex Sport
- Wivenhoe house Hotel
- Essex Food
- Event Essex
- Print Essex
- Wivenhoe Park Day nursery
- Everything Essex

25. The Respondent shares it's HR support with the University of Essex, who in turn employ about 3000 people.

26. The Claimant is Polish and has had periods of employment in Poland and the United Kingdom. He has experience of customer service through working in call centres offices and catering establishments. The Claimant worked at Harrods in Knightsbridge where is duties included stock control, customer service engagement and cash handling. The Claimant stated and we accept that he received extensive and intensive structured training to undertake his role at Harrods.

27. The Claimant is disabled by virtue of mental impairment of depression. He was diagnosed in 2016. Despite proceedings being presented on the 22 June 2020 and the content of the Respondent's occupational health records dated 30 May 2019 and 23 October 2019, it was not until the 2 February 2022 that the Respondent conceded that the Claimant was disabled by virtue of the Equality Act 2010. The Respondent

accepts that the Claimant informed Ms Atwood on the 8 April 2019 that he had depression.

28. The Claimant commenced working for the Respondent as a catering supervisor on the 27 February 2019 having been interviewed by Ms Atwood and Mr Tyres. The job description for catering supervisor included, amongst other things organising the catering team the task schedules and information meetings and cash handling.

29. The Claimant signed his contract of employment dated 27 February 2019. His contract has the following relevant clauses:

**2 Probationary period**

Confirmation of employment is subject to satisfactory completion of a six month probationary period. This may be extended by a period of up to three months, subject to agreement of the Business unit manager in conjunction with Human Resources. An employee who has already satisfactorily completed probation period in a similar post within University of Essex Campus Services would not normally be expected to complete a further period of probation of employment.

**3 Hours of work**

Your hours of work are as required to perform the duties of your role, for full-time employee this is normally 38 hours per week on a 5 days from 7 days shift pattern. Your manager will agree your normal work pattern with you. You may be expected to work outside your normal pattern on occasion as requested and as is reasonable by your line manager and the following consultation with you.

**4 Location**

Your normal place of work will be Colchester campus. You may be required to work at either UECS premises whether on a temporary or permanent basis as the Company shall from time to time direct.

**9 Employment policies of regulations**

Your employment will be subject workplace policies and procedures issued from time to time by the Company. There are no collective agreements applicable to your employment. Policies will be regularly updated and made available from human resources.

**13 Equality and diversity**

The Company celebrates diversity, challenges inequality and is committed to sustaining an inclusive and diverse community that is open to all who have the potential to benefit from membership and which ensures equality of opportunity for all its members. We expect staff, students and visitors to be treated, and to treat each other, with dignity and respect and solely on the basis of merit, ability and potential regardless of age, disability, gender assignment, marriage and civil partnership, pregnancy maternity, race, religion or belief, sex, sexual orientation, social economic background, political beliefs and affiliations, family circumstances or other irrelevant distinction. The Company is committed to a program of action to ensure this policy is fully effective.

30. There was an issue before the Tribunal as to what role the Claimant was applied for. We accept the Respondent's evidence that the role was for Catering supervisor at a Buffalo Joe's, which is one of the busiest restaurants within the Respondents

catering facilities. The Claimant did not object to working in Buffalo Joe's an appointment or express concerns about this at the outset.

31. On appointment the Claimant was required to undertake online module as part of induction which resulted in an online assessment and a certificate of successful completion. The Claimant obtained certificates for safe food handling, food allergy and fire safety essentials.

32. The Respondent has an induction and welcome pack for new staff which ordinarily it expects its employees to complete. There was a dispute before us as the extent to which the Claimant was trained in accordance with the requirements of the Respondent's induction checklist. The Claimant expressed serious concerns about the quality, structure and assessment of the training that he was provided by Ms Attwood and the alleged mentors that were assigned to him who were said to be Ian Merrick and Rebecca Westall. The Claimant stated that he was simply shown what to do and not formally trained as had been his experience at Harrods.

33. As far as mentors are concerned, the Claimant disputed that Ian Merrick and Rebecca Westall were his mentors. However, the induction checklist states that on the first day with when arrive on campus to be welcomed by your new manager in introduced to your induction mentor.

34. The Tribunal accept that when the Claimant commenced employment he was introduced to Ms Attwood and Mr Merrick and Ms Westall as his fellow supervisors and mentors. They were the Claimant's fellow supervisors who could initially show him what to do.

35. We accept, and take as read, that the manuscript notes in the induction pack as accurately representing what was being discussed about the Claimants performance and needs for the period 27 February 2019 through to 18 April 2019.

36. Having said, on the evidence, the Tribunal find that there were shortcomings in the training provided to mentors and supervisors, they seemingly had an organic approach towards the way in which staff work form trained about their duties and responsibilities and there was no formal support given to managers or supervisors in respect of how to be a mentor, provide encouragement and support or how to formulate performance improvement plans.

37. On 8 April 2019 the Claimant had a meeting with Ms Attwood, Mr Merrick and Ms Westall. In that meeting Claimant stated that he had depression. He was asked if he would like to be referred occupational health but said it was not necessary at the moment as his depression was controlled by drugs that he has to take just before sleeping. He stated that he would keep the offer open should it be necessary later. The Claimant proceeded to highlight problems with the training given and an action plan was drawn up consisting of:

37.1 further till training to be given to the Claimant;

37.2 Mr Merrick to draw up a more detailed procedures sheet to include such features entering data into the takings book preparing monies;

- 37.3 supervisors and managers observing the Claimant during 5pm cash ups when available; and
- 37.4 the Claimant to be given further training regarding turning on fryers in the morning.

38. Between 19 April and 22 April 2019, the Claimant worked over the bank holiday weekend. The rota shows that the Claimant worked and two of the four days without another supervisor present and he was also required to work the late shift. The shift rota shows that for this period that there were adequate staff rostered but the Claimant asserts that some staff that did not turn up and this increased the pressure on him. It is significant that this was the first time the Claimant was required to close late for work on his own but by this stage he was supervisor for over 8 weeks. He had taken two consecutive days off the previous week on the 16 and 17 April and was rostered to take two days off the following week.

39. Separately, but in this context, we find that the during week commencing 21 July 2019 the Claimant worked six consecutive days without a break. This was graduation week, which was an exceptionally busy period for the Respondent and as such all available staff were required to work. The Claimant had two consecutive days break after this

40. On 23 April 2019 the Claimant was 18 April 2019 was issued with a performance improvement plan by his line manager Ms Attwood.

41. The Claimant reacted adversely to the working in the April 2019 Easter weekend and felt stressed working in the environment, and his stress and anxiety was compounded by being issued with a performance improvement plan by Ms Atwood on 23 April 2019. He went absent without leave from 28 April 2019 for a period of two weeks when he was not on rota. The Claimant was reported missing for 5 days and was found by the Police in Harwich.

42. The Claimant had a meeting with Ms Chantel Mills on 10 May 2019, he mentioned to Ms Mills that he suffered from depression, he had been on medication for 5 years, there was no structured training at Buffalo Joe's, he was working 52 hours 7 days per week and all-night shifts and Ms Attwood was intimidating.

43. The Claimant subsequently have a meeting with Ms Attwood, Mr Tyers and Ms Mills on 14 May where issues of training Claimant feeling intimidated by Ms Attwood and PIP were discussed. This meeting was constructive meeting and ended with the Claimant hugging Ms Attwood reflecting that he was content in respect of the proposed way forward.

44. The Claimant was referred to occupational health. The occupational health practitioner reported on 30 May 2019 and expressed the view that the Claimant's condition is covered by the Equality Act; that the Claimant was currently feeling well now that his recommenced prescribed medication doses have been restored following sudden cessation. One of the reasonable adjustments suggested was that the

Claimant found it difficult to be assertive and say no to requests to undertake additional tasks and there was discussion about effective priority organisation and delegation and the Claimant was advised in some tools and techniques to manage. Whilst there were specific adjustments advised it was recommended that consideration be given as to how requests were worded to ensure that the Claimant was supported with prioritisation and felt empowered to discuss work demands, which may simply be by asking open questions.

45. There was a meeting on 12 July 2019 that the Claimant attended with Mr Morris, Mr Tyers and Ms Attwood. The Respondent asserted that this was an informal meeting. However, we can readily accept from the Claimant's perspective how this would be seen as a formal meeting. The Claimant had no prior formal engagement with Mr Morris, who was a senior employee and was discussing work concerns. The invitation for the Claimant to attend this meeting we find was unreasonable. The Claimant should have been given proper notice to prepare for it, the content of the PIP also compounded the concerns the Claimant had. We note that this PIP explicitly refers to a complaint by Mr Roberts made on 11 June 2019 about the Claimant using foul language, the implication from this is that it would be dealt with by way of the PIP process not as it subsequently transpired as part of the disciplinary process. In any event at the meeting of 12 July 2019 was concluded with an instruction that Ms Attwood rewrite the PIP to have SMART objectives.

46. On 14 July 2019, the Claimant wrote a grievance letter complaining about the behaviour of Ms Attwood towards him. The Claimant stated that Ms Attwood was instructing him incorrectly, presenting his failures to department managers with PIP documentation. He referred to Ms Attwood's aggressive behaviour which was making staff leave and that she had behaved in an unacceptable manner to him. He concluded that Ms Attwood has chosen to sabotage his employment and that this is having an impact on his health and well-being. He stated that he wished for urgent and immediate action to be taken on this complaint or to transfer him to a different department.

47. Following this, further complaints were levelled against the Claimant. From the context of these complaints we could easily perceive that there was an element of coordinated orchestration of the complaints in response to the Claimant's grievance against Ms Attwood.

48. On 19 July 2019 the Claimant was moved to work at Zest, a restaurant, where he would work 9.30 to 4.30 whilst his complaints were being investigated. Ms Aylott was to be his line manager.

49. On 22 July 2019 Mr Morris informed Claimant of the number of complaints received about the Claimant's behaviour.

50. The Claimant heard nothing further about his grievance against Ms Attwood although we find that this was being investigated by Ms Aylott questioning relevant employees.

51. On 27 July 2019 Ms Aylott emailed the Claimant and stated that there would be a requirement to work at Canteen the following week from 8.30. This was different to

what he believed was agreed, that he would be working at Zest between the 9:30 and 4.30. However, the Claimant did not object to his but stated the would rearrange time to accommodate other commitments he had already had. The Claimant subsequently discovered that he would be required to work on a same shift with Mr Roberts at the Canteen and was concerned given that Mr Roberts had made a complaint about him. However, Ms Aylott was not involved in assigning Mr Roberts to the rota as he was kitchen staff.

52. By 31 July 2019, the Claimant still had not heard anything about the progress of his grievance. However, Ms Aylott handed the Claimant a letter that explained he would be subject to disciplinary investigation in relation to allegations against him.

53. The Claimant felt overwhelmed by these events which led him to decide to end his life and he walked into the path of a lorry on the A12. The Claimant was hospitalised with serious injuries.

54. On 6 August 2019 Mr Berners informed Ms Mills that the Claimant was safe. On 15 August 2019 Ms Mills, not knowing that the Claimant had attempted to end his life, sent the Claimant a letter to extend his probationary period. Ms Mills accepted that in hindsight had she known the extent of the Claimant's situation she would not have sent this letter.

55. On 2 September the Claimant was transferred to from the Colchester General Hospital to a rehabilitation unit in Harwich. On this day Mr Tyers went to the Mayflower Medical Centre to collect a prescription. He was with his daughter remained in the car whilst Mr Tyres quickly went to the medical centre. As he was enroute and he saw the Claimant at the entrance of the rehabilitation centre which shares the same entrance as the medical centre, Mr Tyers saw the Claimant sat outside and said a quick hello but that he had to hurry because his daughter was in the car and he had to take her to a dance club. The Claimant's version of events was that Mr Tyers saw him and he was clearly embarrassed and flustered. We find that this was a coincidental meeting this was not contrived or planned. We can accept from the Claimant's perception how it was unfeeling but Mr Tyer who not expected to see the Claimant and had to rush to take his daughter to dance class.

56. The Claimant was discharged from hospital the end of September 2019. He was unable to drive or take the bus, he did not have movement in his arms and was expected regain for mobility following physiotherapy. It was anticipated that because of his injuries he may not be fit to return work until around mid-November 2019.

57. The Claimant had a HR meeting on 22 October 2019. This was a long and difficult meeting, and the Claimant was clearly anxious. This manifested itself in aggressive behaviours. The Claimant clearly stated that he could not go back to work at Essex Foods. He made it clear that he tried to kill himself three months ago because the team had not listened to him and that he would like to move to a different department.

58. The Claimant saw occupation health again on 22 October 2019 and a report was provided on 23 October 2019. It was recorded that the Claimant:

- 58.1 reports that the attempt on his life came following the number of events at work including the nature of how a process improvement plan (PIP) was issued, which he states was incorrect and feels should not have been issued, being shouted at by his manager, being transferred to the canteen and being handed a complaint which had been raised about him. The Claimant stated that the pressure of these situations left him feeling unable to carry on and led to him deciding to take his life.
- 58.2 stated that he was fit to return to work as a supervisor, although does not wish to return to Essex Food due to concerns that his mental health will be further compromised.
- 58.3 was motivated to work and would welcome the opportunity for redeployment into an alternative role within the university and for early resolution of his grievance he raised in stock play stated that he has experience in other areas of work including gardening, events and customer call service/call centres.
- 58.4 has an underlying medical condition of depression and it is imperative that his grievances are resolved in a timely fashion to reduce the likelihood of further exacerbation of symptoms of depression.
- 58.5 was fit to undertake his role as a supervisor although he should refrain from returning to Essex Food until outstanding issues have been investigated and outcomes identified.
- 58.6 could undertake temporary redeployment or secondment. If this was not a practicable option then the Claimant should refrain from work due to risk of his mental health being adversely affected if he returns to his existing role within Essex Food.

59. On 24 October 2019 Emma Kelly wrote to Ms Mills on the 24th of October introducing herself as an employment specialist working for NHS trust foundation trust she stated that her role was to work with mental health conditions Claimant and the employer to ensure that his current role is a sustainable as possible and her role was to be supported to both the Claimant and the Respondent. She stated that she could advise on his reasonable adjustments such as a phased return to work, redeployment assisting the Claimant with self-referral to access to work receiving assessment of his needs flexible working if applicable one-to-one sessions liaising and attending meetings with management team H on occupational health to work with the Claimant to create a workplace action plan that can be used to identify stressors and triggers consider Claimants well-being throughout the process into provide information and advice to the Respondent about mental health conditions. The Respondent was remiss in not seeking fuller input from Ms Kelly.

60. On 1 November 2019 the Respondent sent the Claimant a letter stating that they had been able to secure time-limited and temporary solution for the Claimant to work as a housekeeper until the investigating outcome. The Claimant was asked to



attend to work at the following Monday 4 November 2019 at 9am and undertake at least 24 hours a week work. This letter also referred to the Claimant's probationary period being extended and that there would be another three months which would end on 28 February 2020.

61. The Tribunal find this was an infelicitous letter. The reason given for the extension of probation was for the Claimant to meet the required standards but it was clear to all concerned that the Claimant would not be going back to work at Essex Food without this being seriously detrimental to his health. Given the breakdown in the relationship that had been acknowledged by Claimant and HR with Essex Foods at that time and the effect on the Claimant's health, it was clear that there was no prospect of the Claimant being able to return to his substantive role from 23 October 2019.

62. Further, in relation to the performance concerns that were raised in relation to the Claimant's work at Essex Food, we find these were academic in the circumstances because it was clear from 23 October 2019 that the Claimant would not be able, due to his health, to return to Essex Foods as supervisor to demonstrate the standards required.

63. The Respondent did seek temporary redeployment, leaving the parallel grievance and disciplinary processes. In respect of the housekeeping role the Claimant stated that was unable to do that role due to physical limitations and as such she remained on full pay whilst alternative roles were pupils identified.

64. The Claimant expressed an interest in an assistant librarian role. He raised concerns that he was not simply assigned to the role as he was the housekeeping role. The Claimant was required to have an interview. Ms Wisher, Assistant director user engagement, expressed initial reservations about the Claimant's ability to do the job due to physicality and offering the role a temporary basis. However, we accept the evidence of Ms Wisher that her concerns overcome when she spoke to HR and accepted their advice in relation to this. However, Ms Wisher did not that accept the Claimant had reached at minimum competencies for the role when he was interviewed and unfortunately, as far as she was concerned the Claimant did not demonstrate that he met the essential criteria of:

- 64.1 Experience of working in a customer orientated environment with a commitment to excellent customer service;
- 64.2 Excellent digital skills, including the ability to learn new systems;
- 64.3 Excellent communication skills;
- 64.4 Excellent team working skills;
- 64.5 A flexible and positive attitude with the ability to use our own initiative;
- 64.6 A commitment to continue service improvement and continue professional development;

64.7 commitment to equality diversity and inclusivity.

65. Ms Wisher provided full reasons and factual basis for her views and whilst the Claimant disagrees we find that she genuinely held these views and observations following the interview and do not criticise her observations, she was able to see from the Claimant's performance.

66. The Claimant gave evidence that he was independently approached in relation to a vacant role as an event at supervisor at the Wivenhoe House Hotel. However, he stated that he was awaiting the outcome of the Assistant Librarian interview before accepting the hotel role. He stated that the event supervisor role was at a higher level than the assistant librarian role and he was offered a trial shifts but declined them because he wanted the library role as he thought it would be less physically demanding. The Respondent's evidence in this regard was that they were not aware of the Wivenhoe House Hotel vacancy or offer of trial shifts. Their position was that that ordinarily its departments would inform HR of vacancies that they had which they would then notify employees. We find that the role at Wivenhoe House Hotel was not notified to the Respondent in accordance with usual practices and once the Claimant had declined the trial shifts any vacancy was subsequently filled.

67. The Claimant expressed an interest in a Student Welfare role. He was informed that he would be given the job pack for the role in February 2020 but this was overtaken by events as there were concerns about future recruitment due to the Covid 19 pandemic and there was recruitment freeze which led to recruitment programs being paused.

68. As mentioned above, the Claimant commenced his grievance on 14 July 2019. Ms Aylott held investigation meetings with other staff on 23 July 2019 and 24 July 2019. On 7 November 2019 the Claimant met with Ms Aylott and expressed concerns about why his grievance not been addressed. He sought to extend his grievance against Ms Aylott. The Claimant's grievance was not progressed and on 15 January 2020 the Claimant provided details of his concerns against Ms Aylott in respect of preventing him attending an urgent Doctors appointment and changing the rota forcing him to work alongside and Mr Roberts.

69. The grievance hearing took place with Ms McCanna-Doyle on 12 February 2020 and the Claimant was notified of the outcome of this grievance on 26 February 2020. His grievance was not upheld. The Claimant appealed against this and he was informed on 8 July 2020 that his appeal was unsuccessful.

70. In respect of the disciplinary process, the Claimant was handed a letter of investigation letter on 30 July 2019 that he was going to be subject to disciplinary investigation. Disciplinary investigation meetings took place where the disciplinary investigation officer, Ms Newman, took statements from 12 employees between the period 5 August 2019 to 6 September 2019.

71. The Claimant able to attend a disciplinary investigation meeting on 19 November 2019. This meeting lasted over three hours long and no break was provided. A disciplinary meeting was then held on 10 February 2020 which lasted

1.5 hours and a break was offered during the meeting. The disciplinary meeting was reconvened on 17 February 2020 and lasted 20 minutes. The Claimant left the meeting early.

72. By letter dated 21 February 2020 the Claimant was informed that the disciplinary allegations against him were made out and he was issued with a first written warning. The Claimant was informed that on the balance of probabilities Mr Morris concluded that the Claimant had conducted inappropriate behaviour and refused the following instructions. We observe that one of the allegations of inappropriate behaviour was the allegations of Mr Roberts made on 11 June 2019 which was part of the PIP. There was nothing in Mr Morris's letter that indicated that the Claimant's mental health issues had been considered whether as part of the allegations or by way of mitigation. The Claimant appealed against the disciplinary outcome and this was rejected on 3 June 2020.

73. Mr Tyers wrote to the Claimant relation to arrange a probation extension meeting on 10 March 2020. The Claimant did not attend on 10 March and the meeting was arranged for 17 March 2020. The Claimant and did not attend on 17 March and despite being aware that the Claimant was to be due to be on leave on that day Mr Morris proceeded with the probation extension meeting in the Claimant's absence. It was decided the Claimant had failed to successfully complete his probationary period due to a combination of his poor performance and conduct which resulted in disciplinary action, and a belief that a further extension of this probation would not benefit. Therefore, the decision was taken to dismiss the Claimant with notice. The Claimant appealed against this decision to dismiss and Mr Oldham upheld the dismissal by letter dated 5 August 2020.

## **Law**

74. The following statutory provisions of the Equality Act 2010 (EqA) are relevant:

### **15 Discrimination arising from disability**

- (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.

### **20 Duty to make adjustments**

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

- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
  - (a) removing the physical feature in question,
  - (b) altering it, or
  - (c) providing a reasonable means of avoiding it.
- (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
  - (a) a feature arising from the design or construction of a building,
  - (b) a feature of an approach to, exit from or access to a building,
  - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
  - (d) any other physical element or quality.
- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

## **21 Failure to comply with duty**

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

75. Para 20(1) of Schedule 8 of the EqA requires the Respondent to have knowledge both of the disability and that the employee is likely to be placed at a disadvantage by the PCP. The Tribunal consider firstly whether the Respondent had knowledge of the disability and that it would place the Claimant at the disadvantage and if not whether it ought to have known both of the disability and the substantial disadvantage *Secretary of State for Work and Pensions v Alam* [2010] ICR 665.

76. The matters we must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments was restated in *Environment Agency v. Rowan* [2008] IRLR 20 namely:

- 76.1 the provision, criterion or practice applied by or on behalf of an employer, or the physical feature of premises occupied by the employer;
- 76.2 the identity of non-disabled comparators (where appropriate); and
- 76.3 the nature and extent of the substantial disadvantage suffered by the Claimant.
- 76.4 What reasonable steps could have been taken to avoid the disadvantage.

77. The purpose of reasonable adjustments is to allow an employee to do their job or remain in employment.

78. The ECHR Code of practice states at para 6.10

*“The phrase [PCP] is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, or qualifications including one-off decisions and actions.”*

79. However, where the PCP relied upon is a practice the EAT has held that there must be some element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators *Nottingham Transport Ltd v. Harvey. In Fox v. British Airways Plc*, the EAT applying *Harvey* found that a one-off act of dismissal could not amount to a practice (or a provision or criterion).

80. The question of what amounts to a PCP was also considered by the Court of Appeal in *Ishola v Transport for London* [2020] EWCA Civ. 112. Where Simler LJ observed:

*“37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to*

*make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.”*

81. In respect of time limits section 123 EqA states:

**“123 Time limits**

- (1) *Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*
  - (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
  - (b) *such other period as the employment Tribunal thinks just and equitable.*
- (2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*
  - (a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*
  - (b) *such other period as the employment Tribunal thinks just and equitable.*
- (3) *For the purposes of this section—*
  - (a) *conduct extending over a period is to be treated as done at the end of the period;*
  - (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
- (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
  - (a) *when P does an act inconsistent with doing it, or*
  - (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

82. The Tribunal’s discretion to extend time is wide but emphasises that, as Auld LJ observed in *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434 at [25]:

*“there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule”.*

83. Sedley LJ remarked in *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 at [31] and [32] that there is “*no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised*” and that whether

to grant an extension *“is not a question of either policy or law”* but *“of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it”*.

## Conclusions

84. Having considered the relevant facts and law our conclusions are as follows.

Discrimination arising from disability (S15 Equality Act 2010)

10.5 that the Claimant needed to avoid stressful changes to predictable work regimes and was treated unfavourably by Elisa Aylott changing the Claimant's shift without consultation in July 2019

85. The Claimant's first allegation of disability arising discrimination arising from disability is as follows he needed to avoid stressful changes to predictable work resumes and was treated unfavourably by Ms Aylott change in the Claimant shift without consultation on in July 2019. When considering the evidence clear that the Claimant was moved to zest for a shift patterns 9:30 to 4:30 pm on a temporary basis whilst the Respondent investigated his complaint against Ms Attwood. This shift pattern continued. However, on 27 July 2019 Ms Aylott asked the Claimant to work in Canteen with a start time of 8:30. The Claimant wrote saying that he would like his rota to be adjusted as he had early commitments already and working in the Canteen was fine because it was a noon start. Miss Aylott responded that she could not change the rota for the Monday but would have a look if you could change it.

86. When considering section 15 of the EqA, the treatment must be because of something arising in consequence of the disability. The shift pattern offered to the Claimant on the 19 July was not arising from his disability, it was to ensure that he could work whilst the investigation against Ms Attwood was undertaken. We therefore do not consider that the change to work in the Canteen arose in consequence of the Claimant's disability. In any event, given the content of the email communication the Tribunal did not conclude that this was unfavourable treatment as there was communication between Ms Aylott and the Claimant trying to find a suitable compromise for the work that needed to be done. Therefore, the Claimant's claim in this regard fails and is dismissed.

10.7 that the Claimant was on sick leave in order to recuperate and was treated unfavourably by Respondent not seeking the Claimant's agreement that Daren Tyers would visit him in Harwich Medical Rehabilitation Unit while the Claimant was recuperating there, in August 2019, which the Claimant regards as a breach of his privacy

87. We have not found that Mr Tyers attendance and the medical centre in Harwich contrived. This was wholly coincidental therefore the Tribunal do not conclude this amounted to unfavourable treatment of rising from the Claimants disability.

Reasonable Adjustments

*Alleged PCP 1*

13.1 providing the Claimant with on the job training, from various colleagues, in his role as Catering Supervisor between February 2019 and July 2019

88. The Tribunal conclude that the Respondent did have a written process of induction training and mentor training between the period of February to 23 April 2019 and a PIP process thereafter. This amounted to a PCP.

89. On the evidence before us we conclude that the way in which the Respondent trained the Claimant placed Claimant at a substantial disadvantage compared to someone without the Claimant's disability. Employees without the Claimant's mental impairment would have got up to speed in respect of matters, in particular cash handling, at a much quicker pace and greater understanding than the Claimant was able to manage in the period provided.

90. The Respondent did not have knowledge of the Claimant's disability up 8 April 2019 but knew thereafter as the Claimant told Ms Attwood that he was having difficulty and suffered from depression. From 8 April the Respondent put an action plan involving further training and a more detailed sheet. Supervisors and manager agreed to observe the Claimant and have 5pm catch ups when available and the Claimant was to be given further training on the fryer. By the 8 April the Claimant had been employed for over 5 weeks and still was not understanding some basic aspects of the role such as cashing up. The Claimant specified his mental health issues and the Tribunal considers that it would have been reasonable to have for him to have had a fresh start when he was not rostered but only shadowing the supervisors for time limit period in order to ensure that he understood the basics of the supervisor as well going forward.

91. The Tribunal do not accept that detailed structured training would have been required as the role required on the job training and how to undertake the role. However, the Claimant specified his mental health issues and the Tribunal considers that it would have been a reasonable adjustment for the Claimant to have a fresh start when he was not rostered but only shadowing the supervisors for time limit period to ensure that he understood the basics of the supervisor as well going forward.

92. This allegation refers to events in April 2019 and is considered further with time limits below.

*Alleged PCP 2*

13.2 allocating the Claimant a shift pattern of 6 days' continuous working between February 2019 and July 2019 that the Claimant needed additional time to recuperate after each shift worked and the Claimant was treated unfavourably by being rostered to work 6 continuous back to back shifts over a continuous period between February and July 2019



93. The Tribunal do not conclude that the Claimant has established that the Respondent has a PCP of allocating a shift pattern of six days continuous working between February 2019 and July 2019. There was an occasion during graduation, week beginning 21 July 2019, when with the Claimant did work six consecutive days but this was an exception and not a normal practice.

94. The Claimant's claim in this regard fails and is dismissed.

*Alleged PCP 3*

13.3 that the Claimant needed additional time to recuperate after each shift worked and the Claimant was treated unfavourably over a continuous period between February and July 2019 by not being rostered on a working pattern which allowed him two consecutive days off

95. The Claimant has not established that the Respondent had a PCP of requiring staff to be rostered without two consecutive days off. There was the occasion where the Claimant worked six consecutive days on week beginning 21 July 2019 but this was the exception not normal practice. Further, the Claimant had two consecutive days off prior this six days and two consecutive days off following.

96. The Claimant's claim in this regard fails and is dismissed.

*Alleged PCPs 4 and 5*

13.4 that the Claimant needed not to be overburdened during shifts because he would tire more easily and was treated unfavourably in Easter 2019 by being rostered to work the entire Easter weekend in 2019 without other managers/supervisors being present

13.5 that the Claimant needed not to be overburdened during shifts because he would tire more easily and was treated unfavourably over the Easter weekend in 2019 by being required to work with insufficient staff to serve food

97. The Claimant was rostered to do a shift without another supervisor and was required to undertake late shift on the Easter 2019. The Tribunal conclude that this system of rostering amounted to a PCP.

98. The Tribunal conclude that the effect of the roster without another supervisor and working on late shift placed the Claimant at a substantial disadvantage when compared with someone without the Claimant's disability, in that the extra pressure created a great anxiety and inability to cope with the required responsibilities.

99. However, the Tribunal conclude that the Respondent did not know nor could be reasonably expected to know that the PCP was likely to place the Claimant at a substantial disadvantage when compared to someone without his disability. The Claimant expressed his concerns in relation to his depression in the meeting of the 8 April 2019 and stated that an occupational health referral was not necessary as it was being controlled by the pills. At this stage the Respondent had no reasonable

basis to know that the Claimant would not be able to cope with the normal shift demands and pressures that were an ordinary part the supervisor's role.

100. The Claimant's claim in this regard therefore fails and is dismissed.

*Alleged PCP 6*

13.6 calling the Claimant to a formal meeting without prior notice or opportunity to be accompanied by a representative on 12 July 2019

101. The Claimant was called to what the Tribunal consider to be a formal meeting without notice on 12 July 2019. Whilst this was an extremely poor management decision the Claimant has not established that it amounted to a PCP. Formal meetings are usually notified in advance.

102. The Claimant's claim in this regard fails and is dismissed.

*Alleged PCP 7*

13.7 requiring the Claimant to attend a lengthy formal meeting without breaks on 10 and 17 February 2020

103. The Claimant was required to attend a lengthy formal meeting on 19 November 2019. The Claimant complains that he was interrogated at this meeting for four hours without a break and this would have been a stressful meeting for anybody. Further, the Respondent knew of his mental health condition but still kept him for that length of time asking him to defend himself against allegations that he believed were false and made after his grievance was made.

104. The meeting lasted, according to the transcript, for three hours and 11 minutes and there was no indication that the Claimant was offered a break nor that one was requested. Whilst this was not a specific issue in the list of issues it was clearly the mischief of the Claimant's concern in this context. The matters were highly contested by him and the Claimant was not assisted by having matters addressed in such an intense and lengthy meeting. We accept that the circumstances required a break to be offered during this meeting and can understand how this increased the Claimant's anxiety and his answers given which impacted on the effectiveness and propriety of that investigation meeting.

105. We are very critical of how the meeting of 19 November 2019 was conducted. However, in view of how the meeting of 10 February 2020 was conducted, where a break as offered, we conclude that how 19 November 2019 was conducted amounted to an inappropriate one-off act of an impatient and ill-advised disciplinary investigator. As such it did not amount to a PCP.

106. As far as the meetings referred to in the list of issues are concerned, namely 10 and 17 February 2020, they were unexceptional in that the Claimant was offered a break on 10 February 2022 and the 17 February 2020 meeting was only 20 minutes long.

107. The Claimant's claim in this regard therefore fails and is dismissed.

*Alleged PCP 8*

13.8 informing the Claimant in August 2019, in writing, that his probation was extended, without delaying the decision or speaking to him directly

108. The Claimant has not established that the Respondent had a PCP of informing him in writing that his probation was extended without speaking directly. Further, the Respondent did not know the severity of the Claimant's injuries at the time letter was sent the letter and it could not have reasonably expected to know that this would have had any adverse impact upon him.

109. The Claimant's claim in this regard therefore fails and is dismissed.

*Alleged PCP 9*

13.9 progressing the disciplinary process against the Claimant before his grievance had been concluded. The grievance hearing was held on 12 February 2020; the disciplinary hearing was held on 10 February 2020 and 17 February 2020)

110. The Respondent progressed the Claimant's disciplinary process before his grievance process had been concluded. The Tribunal conclude that this amounted to a PCP given the time that elapsed when both processes were ongoing.

111. The Tribunal conclude that this PCP placed the Claimant at a substantial disadvantage when compared to people without his disability. The Respondent was aware from the occupational health report dated 23 October 2019 that it was imperative that his grievances were resolved in a timely fashion to reduce the likelihood of further exacerbation of symptoms of depression. The Respondent asserts that the grievance process was stalled due to the request for further information about the Claimant's grievance being extended against Ms Aylott but there was no indication to the Tribunal of when this was chased before the Claimant provided further information on 15 January 2020. By this date the Claimants grievance still had not been progressed and no explanation as to what was happening between the 1st of November and the 14 January 2020 was provided relating to his grievance. However, the Claimant had an intense and lengthy disciplinary meeting on 19 November 2019 when resolution of his grievance was imperative. The Tribunal conclude that it was inappropriate, given the occupational health assessment, to progress the disciplinary issues against the Claimant whilst his grievances remained outstanding. The Tribunal is critical of the Respondent ought to have contacted Ms Kelly for her expertise and advice about the best way to proceed in the context of the Claimant's mental health issues.

112. Further, the outcome of grievance may have affected whether or not to subsequently proceed with disciplinary allegations and, depending on the outcome, may have impacted upon the disciplinary outcome. The Tribunal observes that the disciplinary outcome does not make any reference to the relevance or otherwise of the Claimant's mental health condition in respect of the allegations against levelled against

him or any potential mitigation this could have had. On the contrary Mr Morris concluded the disciplinary hearing in the Claimant's absence believing the Claimant to be unreasonable in his approach.

113. In these circumstances the Tribunal conclude that a reasonable adjustment would have been to consider and resolve the Claimant's grievances before progressing to any disciplinary issues.

114. The Claimant's claim in this regard therefore succeeds.

*Alleged PCP 10*

13.10 appointing managers within UECS to hear the Claimant's disciplinary and grievance cases. (These appointments were made In January 2020)

115. The Tribunal conclude that appointing managers within the Respondent, as opposed to the university, to deal with the Claimants disciplinary and grievance cases amounted to a PCP. However, we do not conclude that this process placed the Claimant at a substantial disadvantage due to his mental health issues and would not have concluded that it was a reasonable adjustment for the Respondent to change its usual processes to secure people outside of the company to undertake its processes.

116. The Claimant's claim in this regard fails and is dismissed.

*Alleged PCP 11*

13.11 terminating the Claimant's employment without further extension of his probationary period, on 20 March 2020

117. The Tribunal conclude that the implementation of the probationary policy amounted to a PCP.

118. This PCP placed the Claimant at a substantial disadvantage when compared to people without his disability because mental health was such that he would not have been able to return to the substantive role to be properly assessed.

119. The Tribunal conclude that by 23 October 2019 it was clear to the Respondent, from what the Claimant and occupational health were representing, that a return to his substantive role was not viable. The Claimant had clearly expressed that he did not want to return to work at Essex Foods. This was underlined in his evidence before us. The Claimant expressed his immutable perception and deeply held suspicions that Mr Morris, Ms Aylott and Ms Attwood were working together colluding against him. The Tribunal conclude that Respondent could not have reasonably considered that, from 23 October 2019, the Claimant would return to his substantive role in order for a probation review to be properly considered.

120. In the circumstances it was artificial for the Respondent to seek to progress its subsequent probationary review relating to the Claimant in respect of his substantive role.

121. The Tribunal consider that a reasonable adjustment would have been to seek to redeploy the Claimant to a suitable available role within the Respondent, which itself could have been subject to a probationary period, instead of the artificial process of probation review for the substantive role. If there was no such role available, then the then the Claimant's dismissal for that reason would have been appropriate.

122. The Claimant's claim in this regard therefore succeeds.

*Alleged PCP 12*

13.12 requiring the Claimant to pass an interview in order to be redeployed to a Library Assistant role (December 2020)

123. The Tribunal conclude that the Respondent had a PCP for the Claimant to pass an interview to be appointed to the library assistant role. However, this PCP did not place the Claimant at a substantial disadvantage when compared to non-disabled people. Further, the Tribunal do not conclude that it would have been a reasonable adjustment to appoint the Claimant to a role that he did not demonstrate the competencies for.

124. The Claimant's claim in this regard fails and is dismissed.

*Alleged PCP 13*

13.13 requiring the Claimant to meet the essential criteria for an assistant Student Welfare role in order to be able to apply for it (January 2020).

125. The Tribunal accept that having essential criteria for the Student Welfare role would amount to a PCP. However, on the evidence before us the Claimant met the criteria and was to be sent an employment pack. Therefore, the Claimant was not subject to a substantial disadvantage. We have found that the process in this regard was overtaken by events relating to the COVID – 19 pandemic recruitment freeze.

126. The Claimant's claim in this regard fails and is dismissed.

Time limits

127. In relation to time limit, the only relevant established claim where the time limit is in issue relates to the failure by Ms Attwood to make reasonable adjustments to train the Claimant in a pressure free environment for a limited period from 8 April 2019. We conclude that the Claimant's employment at Buffalo Joe's up to 19 June 2019 was separate and distinct from the acts relating to his grievance and subsequent probation termination.

128. The Claimant contacted ACAS on 6 April 2020 and therefore any act before 7 January 2020 is prima facie out of time. The Claimant did not bring a timeous claim in respect of training that would have been a reasonable adjustment in April 2019. We fully acknowledge that the Claimant had serious mental health issues and was off work for periods between April and May 2019 and August through to October 2019. However, there was the period from April 2019 2 to July 2019 even the short period of

mental health relapse where he could have brought a claim and from first of November 19 when he could afford Claimant did not. The Claimant was making job applications, attending interviews and meetings but did not bring a claim in this regard.

129. The Claimant did not give any specific evidence why it was just and equitable to extend time and he has not persuaded us that in respect of the allegation in April 2019 that the Tribunal should extend time. That claim is out of time and is therefore dismissed.

130. In respect of the other allegations the Claimant has established, these claims are in time and succeed.

### Remedy

131. A remedy hearing is listed to consider compensation for the Claimant's successful claims. This will consider an injury to feelings award, interest and what the prospects were for the Claimant in securing any available suitable alternative roles that may have been available from 28 February 2020 with the Respondent.

**Employment Judge Burgher**

**4 May 2022**