Case No: 1309155/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr P Callis

Respondent: Crowther Contract Carriers Limited

Heard at: Midlands West

On: 1, 2, 3 and 4 February 2022
17 and 18 March 2022 (in chambers)
20 May 2022 (for judgment)

Before: Employment Judge Faulkner
Ms M Stewart
Mr K Hutchinson

Representation:
Claimant - Mr M Anastasiades (Solicitor)
Respondent - Mr G Mahmood (Counsel)
- Mr T Wood (Counsel, on 20 May only)

JUDGMENT

1. The Respondent did not contravene section 39 of the Equality Act 2010 by:

1.1. directly discriminating against the Claimant because of his race, religion and belief or disability;

1.2. discriminating against the Claimant by treating him unfavourably because of something arising in consequence of his disability;

1.3. failing to comply with the duty to make reasonable adjustments in relation to the Claimant; or

1.4. victimising the Claimant.

2. The Respondent did not contravene section 40 of the Equality Act 2010 by harassing the Claimant.

3. All of the Claimant's complaints are therefore dismissed.

REASONS

The Judgment in this case was given orally, with Reasons, on 22 May 2022. The Claimant requested written reasons at the conclusion of the Hearing on that date.

Complaints

1. The Claimant's complaints were of direct disability discrimination, direct race discrimination and direct religion and belief discrimination as defined by section 13 of the Equality Act 2010 ("the Act"), discrimination arising from disability as defined by section 15 of the Act, failure to make reasonable adjustments as defined by sections 20 and 21 of the Act, harassment as defined by section 26 of the Act and victimisation as defined by section 27 of the Act.

Issues

2. The issues we were required to decide on the question of liability were essentially determined at a Case Management Hearing before Employment Judge Flood on 5 June 2020 and refined further by agreement on day 1 of this Hearing. They were thus as set out in the attached Schedule. The Claimant did not wish to pursue a complaint of breach of contract.

Hearing

3. It was agreed we would hear all of the parties' evidence together and deal with disability as one of the liability issues rather than as a preliminary issue. It was plain to the Tribunal panel that given the number of issues to decide, we would not be able to deliberate and deliver judgment in the originally allotted time, something both parties' representatives should have drawn to our attention. As it was, the evidence and submissions were not concluded until late into the final day of that initial allocation.

4. We considered written statements and oral evidence given by the Claimant and, for the Respondent, Nick Lucas (Site Manager, Coventry), James Ball (HGV Driver) and Mike Proctor (Shift Manager). The parties agreed a bundle of 224 pages and we were also provided with a 311-page additional bundle of medical documents. To enable us to conclude the evidence and submissions within the allotted four days, we made clear that we would only have regard to those documents we were taken to explicitly, even if a document was mentioned in a statement, noting in particular that the medical bundle was only made available to us on the first afternoon of the Hearing when we had completed our pre-reading and started to hear evidence. Our findings of fact below are made on the balance of probabilities having considered the evidence presented to us in this way. Page references are references to the main bundle. Alphanumeric references are references to witness statements, for example PC5 would be paragraph 5 of the Claimant's statement and NL10 paragraph 10 of Mr Lucas' statement.

5. The Claimant made an amendment application on day 3 to add further complaints of victimisation. It was abandoned once he had heard the Respondent's submissions opposing it and so we need say nothing further about that.

Facts

Disability

6. The Claimant is a type 2 diabetic, as the Respondent accepts. He was diagnosed in 2010 or 2011. The dispute was whether this impairment had at the relevant times a substantial adverse effect on his ability to carry out normal day to day activities and whether that effect was long-term.

7. The Claimant has taken metformin and other medication since 2011. He took metformin at 500mg (per tablet, taken 4 times per day) in the relevant period to which his complaints relate and has continued to do so since, having started in 2011 at 250mg. He avoids sugary foods and drinks, and eats little and regularly, otherwise he is at risk of a hypoglycaemic attack. He has annual eye screening and regular blood sugar level screening and also has an annual appointment with a diabetes nurse. His medical records show that in 2018 and 2019 he did not attend on his GP for an annual eye check, but we accept he got the check done by an optician instead.

8. The Claimant described in his statement the following symptoms of his condition: queasiness, becoming sweaty/clammy and stomach cramps. He says in the statement that these symptoms affect concentration, social activities, interaction with colleagues and keeping to a timetable or shift pattern. The Claimant accepts that this did not mean that he had to stop working; he made no declaration to the DVSA of any restriction in respect of his driving.

9. The Claimant's oral evidence, as to 2018/19 and the present, is that he experienced the following:

9.1. A regular need to use the toilet – the Claimant thinks this was because of metformin, but we note that he also said in his statement that he would need to urinate a lot if his condition was not controlled.

9.2. He was prevented from riding a motorcycle as a result.

9.3. He always had to keep a toilet in sight, for example having to think and plan carefully if walking in the countryside, because of the need to defecate.

9.4. The condition affected his social activities, because he would have to visit the toilet in longer conversations.

9.5. He was regularly fatigued and would have to shut his eyes for a few minutes as a result – this experience varied, but on average it arose every other day.

9.6. A couple of days per week he would have difficulty concentrating, especially towards the end of the week, and so would need to rest.

10. We were not shown any medical evidence as to the effects of the impairment without medication, regular food and drink and regular breaks. The Claimant says he could get a hypoglycaemic attack if it were not controlled by diet and medication. He told us he would deteriorate quite quickly if he stopped his medication, because his blood sugar would go very high. He knows this through testing himself regularly with equipment provided by his GP. He would get blurred vision, excessive stomach cramps, and very quickly become fatigued. He

believes that if he did not take his medication at all, he would die within a few weeks. Mr Lucas, who also has type 2 diabetes, said it would "not be a lot of fun" if he stopped his medication, though he told us his condition does not affect him at all.

11. Although not set out in such detail in his statement, we accept the Claimant's evidence of the effects of his condition as just summarised; we were not taken to any evidence that called it into question. We return in our analysis to his views of what would happen without medication. We briefly add our own observations of the Claimant. Some care is needed in this regard, but it is fair to the Respondent to note that the Claimant did not ask for a break to go to the toilet during the Hearing, though we had a short break around every 90 minutes in any event. It is very difficult for us to draw any conclusions about whether the Claimant appeared tired. He seemed able to give his evidence satisfactorily, but of course for long periods of the rest of the Hearing he was simply observing.

12. The Claimant told us his vision has got worse in the last couple of years; he carries two pairs of spectacles. He told us his blood sugar level varies considerably. He said it ranges from 7 to 8 up to, during this Hearing, 14.9 (because of the stress of it). He told us in unchallenged evidence that 3 or 4 is usual for someone who is not diabetic.

Background

13. The Respondent is a haulage company. It employed the Claimant from August 2018 as an HGV driver, based at its site in Coventry, where at the relevant times it had around 65 employees. The Respondent has equal opportunities, bullying and harassment and grievance policies – pages 120-133. We were not taken to them during the evidence. At present at least, it employs people of Eastern European race, people of Pakistani origin and people of Asian and African ethnicity – Mr Lucas says he is proud of this diversity. The only record kept of an individual's race or nationality is their driving licence. In the Claimant's case his application form (see below) recorded "Full UK licence". No record is kept of religious practice, though Mr Lucas and Mr Ball know one or two employees are Muslims because of requests for time off around Ramadan.

14. The Claimant says he is of Jewish origin. We heard nothing to lead us to question that. He has in more recent years practiced Shabbatt, and Kabbalah, a mystical form of Judaism. The Respondent did not dispute that his beliefs fall within section 10 of the Act.

15. The Claimant says in his statement that he takes his Jewish faith very seriously, has prayed at the Wailing Wall, wears a red string at all times for protection and says the Ben Porat Prayer, though no-one asked about the string whilst he was employed by the Respondent. He is studying the Torah and other related literature, though he does not follow any religious dietary laws or belong to any synagogue or similar community. He practices his religion in his own way, essentially individually rather than collectively with others.

16. Mr Lucas interviewed the Claimant. He says he was unaware of the Claimant's race or religion until these proceedings, did not know the meaning of Kabbalah, and says the Claimant had not told him he practised Judaism of any kind. The Claimant says in his Further Particulars (page 71) that when interviewed by Mr Lucas for the role, he made reference to Shabbatt, a common

Jewish greeting on Fridays, and said to Mr Lucas that his shifts meant he would not be able to make Shabbatt with his family. He said in oral evidence that Mr Lucas asked him what Shabbatt meant. Mr Lucas denies any mention of Shabbatt and did not know what that meant either, until this case was underway.

17. In the Claimant's statement he also says that he spoke at the interview about working on a farm in Israel. He could not explain the difference between that account and what is in the Claim Form. Mr Lucas accepts that there must have been some reference to farming at the interview, as the Claimant knows that Mr Lucas has himself a farming background but cannot recall a reference to Israel. The Claimant also says he spoke about Israel with multiple other colleagues in everyday conversation, who would often ask if he was Jewish. This, he says, included Mr Ball. Mr Ball told us he would never ask about such matters and that this never came up. There is no reference to these broader discussions in the Claimant's statement, Claim Form or Further Particulars. Neville Stanhope, another of the Respondent's employees who had also worked with the Claimant elsewhere before, said in a statement given to the Respondent (page 171) that he was not aware of the Claimant's Jewish faith or race.

18. We conclude that the Claimant did not make broader references to his race or religion and belief in the workplace. This was a late addition to his evidence, as we have noted, it being entirely absent from his Claim Form, Further Particulars and statement. Had it been the case, it would have been mentioned in one of these documents at least. As to what was said at interview, again the Claimant's evidence was not consistent. Mr Lucas was willing to accept that there must have been some discussion about farming. In the light of this frank concession and the Claimant's inconsistent testimony, we find that he said no more than that he had worked on a farm in Israel in the past.

19. The Claimant's application form for the role is at page 107. When asked to specify "any hours which you would not wish to work", there was no comment.

20. At page 106 is a medical questionnaire. The Claimant declared that he was prescribed metformin. He accepts that there is a spectrum of effects of type 2 diabetes, i.e., that it affects different people in different ways. He also accepts he was always fit to work, without adjustments.

21. On the form, the Claimant answered "no" to the following questions: Are you currently receiving treatment for any physical condition? Do you suffer from any injury, illness, medical condition or allergy that might affect your ability to perform your duties? Do you consider yourself to have a disability?

22. On a driver's questionnaire – page 108 – the Claimant circled that he had one of the conditions listed in one of the questions (which included diabetes) and had informed the DVLA.

23. Mr Lucas agrees (NL33) that he said at interview he took metformin himself, for his own type 2 diabetes, but says no adjustments were mentioned as being required for the Claimant, which we accept given the contents of the questionnaires and that the Claimant does not say any adjustments were discussed. Mr Lucas says that he did not pass on any of the medical information about the Claimant to Mr Proctor (NL38). The Claimant says Messrs Lucas and Proctor worked in the same office so that Mr Proctor would have known the information. We are prepared to accept Mr Lucas's evidence; given that diabetes

was not an issue for the Claimant at work, there would have been no reason for him and Mr Proctor to discuss it. Mr Lucas accepts that he was aware the Claimant had type 2 diabetes from the date of the interview, because although he says the Claimant did not say as much, he knew he had it from the mention of metformin. He understands that the drug is taken to avoid a hypoglycaemic episode, and that it controls sugar levels.

24. At the relevant times, Mr Ball drove the 6.00 to 13.00 shift. The Claimant was the later shift driver, working 13.00 to 22.00 Monday to Friday and every third Sunday. As already indicated, he therefore had to give up practising Shabbatt though he would say prayers in his cab at sunset. We are happy to accept that this was his practice. Each day he drove four runs to and from Nuneaton (around 7 miles each way) and a final run to a warehouse, Ponsonby's, in Washwood Heath, about 35 to 40 minutes away (absent roadworks), for which he would usually set off at around 19.30, having returned from Nuneaton for the last time usually around 18.45. At Ponsonby's he would wait to be loaded up, then return to Coventry, wait for goods to be offloaded to onward freight, then leave work. Mr Proctor says (MP60) that at any point whilst waiting to be loaded, the Claimant could rest, though not always at Nuneaton if performing vehicle checks. At Ponsonby's, the Claimant always had around an hour's rest, leaving between 21.00 and 21.30. He was not required to work during these breaks, even though they were not official breaks, and could eat during these periods if he had food with him. This was unchallenged evidence.

25. In the first month of his employment, August 2018, the Claimant wrote to the Respondent (page 138). He said that on returning from Ponsonby's, he was having to wait for unloading, then having to move lorries around, as a result "finishing too late for my current circumstances at home". Mr Lucas recalls the Claimant mentioning something about his wife's working hours (she too is a driver). The Claimant agrees that is essentially correct; he did not want to go beyond his contracted hours. He said to us he wanted to get home to celebrate Shabbatt with his wife, but agrees there was nothing of that nature in his communication and given the essential agreement on the evidence on this point, we find that he did not mention this to the Respondent at all on this occasion. The issue was that he believed he was contracted to finish at 21.00, not 22.00. As Mr Proctor put it, the Claimant regarded having to wait on return to base as a waste of time.

26. Mr Proctor says that after getting the Claimant's letter, he spoke to the contractor, ByBox, who agreed to make a designated bay available and it was thus agreed that the Claimant would not need to work beyond 22.00; he could park up and leave immediately on return from his last run (to Ponsonby's) each day. The Claimant says his discussions were with the ByBox manager, but it is clear Mr Proctor was involved in resolving the issue. Mr Proctor says he spoke with the By Box manager first, they agreed the change in practice, and it may have been the ByBox manager who then spoke with the Claimant. We find it inherently unlikely Mr Proctor was not involved in this discussion, both because it concerned the Respondent's employee and because it concerned a critical customer. The Claimant was content with the new arrangement and withdrew his resignation. Mr Lucas says that the Claimant made no mention then of any adverse impact of type 2 diabetes. Mr Proctor (MP30) says that for his part, he did not know of the Claimant's type 2 diabetes until March 2019. We accept what they say. There is no evidence that the Claimant gave any explanation for his dissatisfaction with work at this point other than the situation he found on

returning to the yard at the end of his usual shift, which delayed him getting away.

27. The Claimant said for the first time in oral evidence that there was also an agreement from around this time, notified to him by Mr Proctor, that he would pick up whatever was already loaded at Ponsonby's on his arrival, without waiting around, so that he could get back to base on time, with another vehicle to pick up anything further later, though he could only recall three times in just under one year of employment that a second vehicle was sent in this way. Mr Lucas told us there was no such agreement, as this would have entailed paying two people to do the Claimant's job. Mr Proctor says that he is 100% certain there was no such agreement. We strongly prefer the Respondent's evidence on this point for two reasons. The first is the absence of this matter from the Claimant's Claim Form, Further Particulars and statement, which again gives rise to a credibility issue in respect of this aspect of his evidence. Secondly, as the Respondent says, the arrangement simply would not have made commercial sense. There was no such agreement.

28. One of the Claimant's complaints is the lack of flexibility in his shift pattern, in relation to which he says the Respondent should have made reasonable adjustments. He said in evidence it was waiting at Ponsonby's that was the issue, because it forced him into unpaid overtime. He accepts the Respondent could not control how quickly he was loaded up at Ponsonby's, but says he should have had a scheduled break at a fixed time, which he accepts is a different case to the one he was pursuing before us.

29. The Claimant's medical records show that at a previous employer, before his diabetes diagnosis, he had an arrangement to leave work promptly. We accept that this was related to caring for his very sick wife.

November 2018

30. The Respondent used mainly DAF or MAN lorries, which have three steps to access the cab. From September 2018, a Mercedes lorry was brought in as a short-term replacement to cover any breakdown. It had four steps. It is agreed that the Claimant did not like the Mercedes truck, because it was more difficult to exit, being higher. His views were evidently no secret. Mr Ball says the Claimant called it "Hitler's Revenge", which Mr Ball understood was because it was a German-branded vehicle and the Claimant did not like the extra step. Mr Ball says the Claimant used the phrase several times, when Mr Ball told him the truck was being used as they did their shift handover, never calling it anything else. Mr Lucas says he too heard the Claimant say, on a few occasions, that he was, "Back in Hitler's Revenge again". We note that Mr Lucas did not say this in his witness statement. The Claimant says he never gave any vehicle a name.

31. The Claimant says he fell out of the Mercedes truck in October 2018. It is not clear whether the Respondent accepts that this happened, and we do not have to decide whether he did, but it is agreed that he was off sick for a number of weeks around this time and that Mr Ball certainly believed this is what had happened. Mr Ball believes he had built up a friendly relationship with the Claimant, so that they were on good terms and exchanged WhatsApp messages. The Claimant agrees that he regularly chatted with Mr Ball, but says it was mainly about work. Just before the Claimant's return to work, Mr Ball – aware that the Claimant would be coming back – produced at home a cartoon (page 165) depicting Kaiser

Wilhelm II standing next to Adolf Hitler, who is seated reading a newspaper, "Hitler's News" and laughing. It was evidently a stock image found online, but Mr Ball changed whatever the newspaper headline was, to "Pete fell out of the Mercedes". At the foot of the picture there was a caption, "Kaiser – I laughed at this in 1914, too".

32. Mr Ball is adamant he was not aware of the Claimant's race or religion at this point, or indeed until these proceedings. We accept that. As we have already found, the Claimant did not share any information about his race or faith with his colleagues. Those colleagues included Mr Ball. As we have also said, the Claimant's practice of his faith was essentially private, for example marking sundown on the Sabbath in his cab. No-one asked him about the significance of the red string. In addition, he was working hours that explicitly coincided with the Jewish Sabbath so that again there would have been no indication that this was something the Claimant wished to mark. We also note that Neville Stanhope knew the Claimant in two working contexts and he did not know this information either, that there is no central record of race or religion held by the Respondent (not that Mr Ball would have been party to that), and that unlike some of the Respondent's employees who were Muslims, the Claimant did not at any point request particular arrangements to accommodate his religious observance. In summary, we find that none of the Respondent's employees knew the Claimant was Jewish or practised a form of Judaism, nor that any of its employees perceived either of those things. This included Mr Ball and Mr Lucas. As we have said, Mr Lucas knew no more than that the Claimant had worked on a farm in Israel many years before.

33. Mr Ball handed the cartoon to the Claimant on his first day back, in November 2018. Mr Ball says the Claimant laughed and said, "That's brilliant" and that he would put it on his Facebook page. Mr Ball also says that there was only one copy, and that it was not given to anyone else. At JB27 he says that the point was the Claimant's nickname for the truck; it was for the Claimant's personal amusement. The Claimant says Mr Ball handed over the cartoon at their shift changeover and was laughing; Mr Ball says he was smiling. The Claimant says he felt numb, horrified and humiliated, and could not believe such anti-Semitism still existed. He denies saying he would post the cartoon on Facebook, saying to us that it would be illegal to do so. At PC15 he says the cartoon was "all about me falling out of the Mercedes". In his oral evidence he said he took it as more than that.

34. Mr Ball says he can understand how Hitler is racist, but not the cartoon, because it was the meaning of the words that mattered. He was shocked to read in the Claimant's statement how the Claimant says he felt about the image. In Mr Ball's oral evidence, he described Hitler as "not being keen" on the Jews and Hitler not being the Jews' "favourite person". When asked about that language seeming somewhat light-hearted for such a serious issue, he said he hoped it was not, and that the atrocities perpetrated by Hitler were horrendous. He said that the Claimant falling from the lorry was not funny; they were good friends, who had a good laugh together, and this was just ribbing. He denies the Claimant's description of his reaction to receiving the cartoon, and says he would have been mortified had the Claimant told him that is how he felt. He says that the Claimant was not someone who was afraid of saying if he was unhappy with something, for example when Mr Ball had not refuelled a truck.

35. Mr Ball has not apologised to the Claimant, saying that they have had no

contact since the Claimant's employment terminated. He said in this Hearing that if the Claimant was upset, he apologises, but there was no sign of upset at the time. He has very little understanding of anti-Semitism, but describes racism as making fun of someone because of their colour or culture; this could include in relation to Jewish people, if the person knows the other is Jewish.

36. The Claimant at no point presented a grievance about the cartoon or at any time referred to it in writing. He says that this was because he was concerned a complaint would make things worse. He says that he did however take it straightaway to show to Mr Lucas – which the Claimant says was a protected act for victimisation purposes – who brushed it off saying, "people should have better things to do with their time", or (PC12), "You think they would have better things to do with their time". No action was taken against Mr Ball and there was no investigation at that point. At PC31, the Claimant says he felt that he could not carry on working with such a racist organisation. He says he felt upset every day thereafter until he left in late July 2019, some eight months later.

37. Mr Lucas described the Holocaust as "disgraceful on every level". He said that if the matter of the cartoon had been raised with him, he would have called Mr Ball in to find out what was going on, but insists it was not raised with him. He is adamant about that (NL49), saying (NL50) that he did not see the cartoon "until these proceedings". In oral evidence, he agreed he saw it with the Claimant's solicitors' letter on 11 October 2019 (page 164) – he says he thought that this letter counted as part of the proceedings. Upon its receipt, the Respondent's Managing Director, David Crowther, asked him if he had seen it before, to which Mr Lucas replied that he had not; Mr Crowther said it needed to be investigated, and Mr Lucas agreed.

38. Mr Lucas does not know whether the Respondent replied to the solicitors' letter, saying it would have been referred to the Respondent's own solicitors. It appears the Respondent did investigate the matter in February 2020, from various statements it collected; Mr Lucas agreed the investigation should have been done sooner. He was the person who collected the signatures of thirty-four employees – including Mr Proctor – who were asked if they had seen the image before – see pages 166-7. All said they had not. Mr Proctor asked Mr Lucas if he knew who had completed the picture, and was told he did not. Aimee Crowther, of HR, appears to have interviewed Mr Ball, Mr Proctor, Mr Stanhope and Mr Lucas, which resulted in the statements just referred to. She told Mr Lucas she accepted Mr Ball's evidence that the image was intended as a joke.

39. A further list, related to other matters raised in the Claim Form, namely references to gas chambers and Auschwitz (see below), was produced in June 2020 (page 172). Twenty employees signed to say they had not heard any such references. Mr Lucas denies any others would have wished to give a different answer, even though fewer were on this list than that collected previously. He and Mr Proctor say that the reason there were fewer signatories was that fewer employees were present when Mr Lucas went around asking about this issue. It may have been a clumsy way of going about an investigation, but we accept that explanation and draw no adverse inference from the difference in numbers – we had no evidence to lead us to conclude that there were numbers of, or indeed any, employees who would have indicated that they had heard such comments: to do so would be entirely speculative on our part.

40. As Mr Lucas says (NL62), the Claimant did raise other complaints by email –

see page 138 raising in August 2018 the issue referred to above about waiting on return from Ponsonby's and page 159 in July 2019 – see below.

41. Mr Ball says that there was no change in the relationship between him and the Claimant after the cartoon was handed over (Mr Proctor shares that view from his own observations in the yard). Mr Ball says that once it was handed over, that was the end of it, until he made a statement after the Claimant brought this Claim. Mr Ball's statement is at page 169 and is consistent with his witness statement. He says that on realising the Claimant is Jewish, he accepts the cartoon was in bad taste.

42. Also in November 2018, but after the cartoon incident, the Claimant was invited to join a WhatsApp group with Mr Ball and Mr Stanhope, and did so. They discussed arranging a curry night – page 144 – the Claimant saying to Mr Ball, "Ok ill ave a look ta mate". The Claimant says "mate" does not mean they were friends; he just wanted to end the discussion quickly. It is agreed the curry night did not take place in the end because they could not settle on a date. Mr Ball says he and the Claimant also continued to speak at handovers, including chatting about motorbikes. Mr Ball described himself, the Claimant and Mr Stanhope as a "happy little team". It is unclear whether the Claimant continued to participate in the WhatsApp group.

43. The Claimant by contrast says that he and Mr Ball were friends before Mr Ball produced the cartoon but not afterwards. He says he complained about Mr Ball again on 5 January 2019 and that Andrew Hammond (another of the Respondent's employees) suspended the Claimant for doing so. The complaint was about Mr Ball not refuelling a vehicle correctly. Mr Lucas says at NL66-68 that Mr Hammond reported to him that the Claimant had complained about Mr Ball leaving a lorry unfuelled, using obscene language in doing so when Mr Hammond told him to get on with the job. Mr Lucas says the Claimant was not suspended, as Mr Hammond does not have authority to take that decision. On balance, we prefer the Respondent's evidence; there is no record of any suspension and we accept Mr Lucas's evidence about authority to suspend.

44. Our conclusions about the Claimant's reaction to the cartoon are as follows:

44.1. The nature of the relationship between the Claimant and Mr Ball before the cartoon was handed over was one of friendship – the Claimant agrees that they were friends.

44.2. We note too that they appeared to have had a continuing friendship afterwards, based on what was evidently a friendly WhatsApp exchange and Mr Ball's and Mr Proctor's evidence that nothing appeared to have changed.

44.3. There is no evidence that the Claimant felt saddened and upset every day thereafter apart from his assertion to that effect. We find it inconceivable that he would have put up with employment with the Respondent for so long had he felt so strongly about the cartoon. We note that it was apparently not difficult to get driving work elsewhere, as the Claimant himself showed on leaving the Respondent many months later.

44.4. As we will come to, the Claimant considered going back to work for the Respondent after he left, knowing Mr Ball would be there.

45. On balance, whilst we do not think it is necessary to conclude whether or not the Claimant said he found the cartoon funny and would post it on Facebook – that is a conflict of evidence that is difficult to resolve as it is simply one word against another – for the reasons just given, we conclude that, overall, the Claimant's reaction was nearer to what Mr Ball described to us than to what the Claimant described to us. Specifically, we find that he did not show any sign to Mr Ball then, or subsequently, that he was in any way upset. We are fortified in that conclusion by the fact that the Claimant clearly was not averse to raising things he was unhappy with, whether at the start of his employment, its conclusion or indeed in between.

46. In resolving the conflict of evidence between the parties as to whether the Claimant took the cartoon to Mr Lucas, we have taken account of the following:

46.1. He raised less serious things with the Respondent – his not being able to leave promptly at the end of his shift (raised as early as his first month of employment), his unhappiness with Mr Ball not refuelling a truck in early January 2019 and – admittedly at the time he had decided to leave – his communications that we will come to in July 2019.

46.2. With that in mind and on the Claimant's own account that this was something so serious, we find that being the individual he is, he would not have let the matter rest if he had taken the cartoon to Mr Lucas and got the response he alleges; we are satisfied that would not have been the end of it.

46.3. The Claimant says he did not want to raise a grievance because he did not want to make things worse but, as the Respondent says, that is contradictory to the fact that he expected something done about it, as well as being inconsistent with his willingness to complain generally.

46.4. He did not raise the matter on leaving the Respondent's employment, until the solicitors' letter in October 2019.

46.5. We did not think it significant that Mr Lucas saw the letter before action as part of the proceedings, that being the point at which he says he first saw the cartoon.

46.6. We also note that Mr Lucas's evidence that he told Mr Crowther he had only seen the cartoon on getting the solicitors' letter. It would be quite a risk for Mr Lucas to give evidence to us of a conversation with the owner of the business if it were not accurate.

46.7. The Respondent did investigate the matter, and so was willing to do so once it was brought to its attention, albeit after some delay and after a threat of proceedings.

46.8. We note that Mr Proctor also says that when he asked Mr Lucas who had prepared the cartoon, after the solicitors' letter was received, Mr Lucas said he did not know.

46.9. Finally, we note that the solicitors' letter itself did not say anything about the cartoon being drawn to the Respondent's attention previously.

47. As ever, the Tribunal panel members were not there at the time, so that we can never be sure. We can only weigh up the evidence presented to us. We consider it somewhat unusual that the Respondent does not seem to have replied to the solicitors' letter in October 2019 regarding the cartoon (see below), and we have noted the delay in carrying out the internal investigation, but there may be all sorts of reasons for that, not least given that ACAS Early Conciliation was started shortly after the letter, and in any event this is not sufficient of itself to suggest to us that the Respondent felt it had anything to hide, when weighed against the other evidence we have summarised. Indeed, it was not put to us otherwise. The Respondent did carry out the investigation subsequently, albeit as we have said and as Mr Lucas recognises, somewhat slowly. The balance of the evidence firmly suggests that the Claimant did not take the cartoon to Mr Lucas eleven months earlier. That is our conclusion.

48. We turn next to our conclusion on whether the Claimant gave the name, "Hitler's Revenge" to the Mercedes truck. We have taken into account the following:

48.1 Mr Anastasiades (though not the Claimant) said a Jewish person would never do such a thing. The Claimant simply said he would never name a vehicle.

48.2. Mr Ball was clear that the Claimant did give it this name. Mr Lucas' evidence was to the same effect, though we attach little weight to that because it was not something mentioned in his statement.

48.3. It is clear the Claimant did not like the truck, so that it is by no means inconceivable he would have spoken ill about it.

48.4. The truck was of a German make, and any reference to Hitler clearly could be a reference to Germany, albeit an ill-advised one. DAF trucks, we understand, are Dutch, though MAN trucks are also German, but the Claimant liked those.

48.5. We think the name was used – neither party argued that it was not. Given Mr Ball had no aversion to the truck, it is less likely that he named it.

48.6. Given also that we have found Mr Ball did not know the Claimant was Jewish or practised a Jewish faith (or any faith), the cartoon would not have been the so-called "joke" Mr Ball intended without some pre-existing reference to Hitler.

This has not been a straightforward conflict of evidence for us to resolve, but for those reasons we conclude on balance that it was the Claimant who gave the truck this name.

49. The Claimant also alleges that it was an act of discrimination that the cartoon was circulated. He accepts he cannot say that it was, but he believes it would have been. This is evidently entirely speculative on his part. Accordingly, and given the evidence of the signatures of staff saying that they did not see it, Mr Ball's evidence that he only made one copy is accepted. Furthermore, it was, as he says, a personal matter between him and the Claimant.

50. The Claimant also alleges that it was victimisation that Mr Lucas did not carry out an investigation. He told us an investigation is what he expected. At PC25

he says he did not present a grievance as this might have made things worse, saying “I felt frightened and disturbed”. When it was suggested these two positions are irreconcilable, the Claimant said that when Mr Lucas brushed his concerns away, he had nowhere to go. The confusion in the Claimant’s evidence confirms our view that he did not show the cartoon to Mr Lucas.

March 2019

51. On 6 March 2019, the Claimant stopped off at services on the M6 at 21.51 hours, to purchase a small amount of food. He stopped for 35 minutes. At PC39-40 he says he ran out of food and needed to urinate. He also says he had stomach pains and was feeling sweaty and clammy. The Respondent did not challenge that this was reason the Claimant stopped, and so we accept his evidence.

52. Shortly after stopping, the Claimant was called by Mr Hammond. Although part of his case is that it was direct disability discrimination for Mr Hammond to call, he accepted in evidence that Mr Hammond did the right thing by doing so. Either that evening or the next day, Mr Hammond told Mr Lucas that the Claimant had stopped to get food.

53. Both Mr Lucas and Mr Proctor say (NL85/MP78) that on a regular day for the Claimant he had almost as much waiting and resting time as driving time. The Claimant took no other unscheduled break at any time during his employment. His tachograph records at page 149 (which we accept are an accurate record, though the Claimant says he had not seen such a document before) show that on the day in question, he had 119 minutes of scheduled breaks, plus a period of inactivity of 48 minutes just 30 minutes before the unscheduled stop. The Claimant agrees he had plenty of breaks on that day. He says at PC38 that his main break was at 1840, when he stopped for some food in Coventry. The breaks at 1355 and 1440 were at Nuneaton where there are no facilities to purchase food. He generally took enough food with him but ran out on this day. He arrived back at base, sometime after 2230, 13 minutes after setting off from the service station.

54. When the Claimant arrived at work the next day, 7 March 2019, Mr Lucas asked him for a word. Mr Lucas says he needed to be able to say to the customer that he had spoken to the Claimant. It is agreed that the return journey from Ponsonby’s was time critical, as onward freight connections were waiting for the Claimant. It is not disputed that the customer had raised the delay with the Respondent and the Claimant accepts that accordingly, it was right for Mr Lucas to raise the matter with him, but he says that how it was dealt with was “disgusting”.

55. The Claimant explained to Mr Lucas that he had stopped for food as he was feeling somewhat unwell. He says that in response Mr Lucas gave him a verbal warning, reprimanding him for stopping. At PC49 he says that he felt Mr Lucas was picking on him because of his complaint about the cartoon. At PC51 he goes on to say that Mr Lucas called him a liar, said there was nothing wrong with him and that he could have carried on to the depot. The Claimant alleges that Mr Lucas told him, "You would not have died if you had not eaten or stopped", calling him a liar several times, because he did not believe him that he did not have food with him. The Claimant says Mr Lucas told him, "I have had a bollocking from a customer so it's been passed down to you". He told us Mr

Lucas said not to do it again, and that when the Claimant asked for a witness or union representative to be present, Mr Lucas refused.

56. None of that detail was in the Claimant's Claim Form or Further Particulars and Mr Lucas denies it; indeed, the reference to the union and not being permitted a witness is not in the Claimant's statement either. Mr Lucas says he is never aggressive to any of his drivers. If the Claimant had to stop, he says he accepted it. Mr Ball has never seen Mr Lucas behave aggressively, but has not been called to chat to Mr Lucas when he has been late arriving back to site himself, because he always calls even if there is only a 10-minute delay. The Respondent then speaks to the customer to find out the reason. Mr Proctor says that it is easier for Mr Ball to catch up any delays as he works the morning shift.

57. Mr Lucas's evidence is that no warning was given, telling us it would have been recorded if it had been. He denies shouting or being aggressive and could not recall calling the Claimant a liar (he says that saying he did not recall is the same as saying he did not say it) nor could he recall refusing the Claimant the opportunity to have a union representative or witness present. He says the meeting took no more than a minute, the Claimant saying he needed to stop at the service station because he felt "iffy", Mr Lucas saying, "OK" and adding that communication is key and that the Respondent must be told if he was going to stop. At NL97-98, he says that he "would have" told the Claimant that he was sympathetic, but that he had taken enough scheduled breaks and should not need additional ones if he was suitably organised. He accepts that he mentioned the Claimant having had other breaks already, needing to say this because it had caused an issue, but says he accepted the Claimant's explanation, as did the customer. Mr Lucas told us drivers have to stop for all sorts of reasons; what matters to him is them communicating it.

58. The Claimant contacted the DVSA on the next day, 8 March 2019 – page 221. He explained that he was a driver with diabetes, taking metformin. He said he had stopped for 30 minutes at around 22.00 because he needed food as he had eaten all of his lunch. He said he was called by the Respondent, and then on the next day given a warning. He asked the DVSA if he was covered by disability legislation. In a reply on 14 March 2019, it was suggested that he contact the CAB. The writer stated, "The Equality Act protects people with type 1 diabetes, and requires reasonable adjustments, e.g., short break to treat a hypo". The Claimant did not appeal or challenge the alleged warning, saying that any appeal would have been brushed under the carpet. He did not make any reference to the matter in any written communication to the Respondent.

59. Our conclusions as to what was said by Mr Lucas on 7 March 2019, including specifically whether a warning was given, take into account the following:

59.1. It is agreed that there was nothing untoward about Mr Lucas wanting to speak to the Claimant – we also entirely accept Mr Lucas needed to be able to give an explanation to the Respondent's customer for the delay that had occurred.

59.2. The Claimant's evidence that Mr Lucas said he could not bring a union representative to the meeting lacks credibility because it was only mentioned in oral evidence.

59.3. There is no evidence of the Claimant going to the union about the matter,

which he could have been expected to do if that had been said. Furthermore, our impression is that Mr Lucas would have been careful about contravening arrangements that the Respondent had agreed with the union.

59.4. There is no record of an oral warning, the Claimant did not appeal or raise it internally. For these reasons, we find that no warning was given.

59.5. The Claimant nevertheless clearly felt he had been told off – hence his email to the DVSA, which is the most contemporaneous record of the event we have. We think that email was a fair reflection of what took place except as to the warning.

59.6. There were no other complaints about Mr Lucas being aggressive, so that we find there was no shouting on his part. We do find that Mr Lucas made clear some displeasure, because on his own evidence he made clear to the Claimant that he had taken sufficient breaks and needed to be better organised. In short, he accepted the Claimant's explanation that he needed to stop – it is clear Mr Lucas individually and the Respondent collectively would not expect their drivers to take risks – but he was unhappy the Claimant had allowed it to happen and had not communicated it before Mr Hammond had contacted him from base. Mr Lucas was giving the Claimant the message that he needed to be better organised and make sure he communicated any such incidents to the Respondent immediately in future.

59.7. We conclude Mr Lucas did not call the Claimant a liar or say the Claimant would not have died. That was not in the Claim Form or Further Particulars (the former being a very detailed account of the Claimant's version of events), it is incongruous with Mr Lucas accepting that safety is paramount, which he clearly does, and it is also incongruous with Mr Lucas himself being a type 2 diabetic.

60. Those are our conclusions as to the events of 7 March 2019, in which we are fortified by the several other difficulties with the Claimant's evidence generally, referred to above and below. The Claimant could not say who else, other than Mr Lucas, knew about his diabetes, either at this point or otherwise, saying he would expect the information to be kept confidential.

Later events

61. The Claimant says that because he wanted to avoid Mr Ball, on 18 February 2019 he asked Mr Proctor (and, on 22 February 2019, Mr Lucas), if he could change to what is known as the Glasgow night shift, which involves driving to Warrington, swapping trailers with a driver from Glasgow, and returning. The Claimant says this was refused. He says he gave as the reason for his request wanting to avoid Mr Ball and to avoid having to go to Ponsonby's. Mr Lucas says the Claimant did not say this was the reason. At NL73 he says it was a very brief conversation, no formal request being made. It arose during a conversation on other matters, the Claimant saying that if a trailer swap position ever became available, i.e., the Glasgow shift, he would be interested, as were many others.

62. Mr Proctor says (MP87-88) that he does not recall speaking with the Claimant about this matter at all. He explained to us that a long-term employee, Steve Hows, had just had surgery, returning to work on 13 January 2019, and it was agreed he should be moved on to that shift, so there was no vacancy. The Glasgow shift was easier work for Mr Hows, because it does not involve getting

into the trailer to move pallets. The shift commenced at 19.00 and ended around 01.00, six days one week and five another. The Claimant says no reason was given for the refusal. He says that his request for the Glasgow shift shows how desperate he was to get away from Mr Ball and that the refusal was a factor in him finally leaving over five months later, because the Respondent made no attempts to help him in this respect.

63. We certainly accept the Respondent's evidence as to why the role was given to Mr Hows. That evidence was not challenged. There was no evidence that the role was formally advertised, and so it is much more likely in our view that the Claimant expressed an interest in it than that he made a formal request for it. Given our conclusions that the Claimant did not raise with Mr Lucas or anyone what had taken place with the cartoon and our conclusions as to his ongoing apparently amicable relationship with Mr Ball, we find that he did not indicate at all that he wanted the role in order to get away from Mr Ball. It is clear throughout the evidence that the Claimant disliked having to wait at Ponsonby's and so we are happy to accept that he might have said doing the Glasgow shift might get him away from that.

64. The Claimant says that not putting him on the Glasgow shift was race or religion and belief harassment. He said in oral evidence that this was because he was already being "victimised" since the cartoon was passed around.

65. The Claimant claims that there were later racial and/or religious comments, in July 2019. At PC59, he says he tried to avoid being subjected to "the same nonsense" but felt like it was constantly in the air. He also says he witnessed a black colleague being shouted at in front of others, because of his race and poor English. The Respondent's witnesses deny any such behaviour.

66. Specifically, the Claimant says that Mr Ball, and unnamed others, regularly said, "There is a Mercedes in the yard, ha ha". The Claimant clarified that he took Mr Ball to be referring to the cartoon, to the Mercedes being a German vehicle and to how Germany treated the Jews, though he does not allege that Mr Ball made those connections himself. Mr Ball says in his statement that he does not recall specifically making any such comment, but said in oral evidence that it was said in jest because the Claimant did not like the Mercedes truck due to the extra step and had given it a nickname. When the Mercedes truck had to be used, which was only occasionally, Mr Ball told us his comment was, "Pete, the Mercedes is in the yard again" – it was said because Mr Ball knew he did not like that particular vehicle. The parties' evidence as to what was said is so similar that there is no need for us to resolve any differences between them on this point. We accept that a comment along these lines was made.

67. Amongst other things, the Respondent transported old gas meters. The Claimant says that "persons unknown" referred when near him to gas chambers and the smell of gas, as well as to Auschwitz and having "just found the gas bill from Germany". The Respondent says it has no knowledge of any such comments. Mr Ball and Mr Proctor say they never heard comments of this or a similar nature. The Claimant cannot recall the dates, but says these comments were made on a regular basis for a few months. He told us they were said in his presence, but not directly to him. As they were made in the warehouse, which was a busy place, he could not identify who said it, though some of the culprits were not the Respondent's employees. Again, none of this was raised in any internal complaint by the Claimant, nor with his union, whether at the time he

expressed an interest in the Glasgow shift or otherwise. That, plus the fact that the Claimant – who as we have said was willing to raise much less serious issues – remained employed for several months while he says this was going on, the fact that he was (as we will come to) willing later to return to work for the Respondent, the fact that these matters were not raised in the solicitors' letter sent to the Respondent in October 2019 as we will again come to shortly, all taken together with the vagueness of the Claimant's evidence – on such vile references as he alleges were made – both as to who made the comments and when they were made, let alone whether those said to have made them were aware of his race and religion (which for the reasons we have given already seems highly unlikely), all leads us to the only available conclusion, which is that these comments simply were not made. We have noted the assertion about a black employee being shouted at because of his race. We were not given anywhere near sufficient information about that matter, nor was there any evidence that he complained about it, in order to draw a conclusion that this supports the Claimant's case regarding the comments made about him. Set against it is the fact that the Respondent is evidently a multi-cultural employer. Whilst of course that is not a guarantee of the absence of discriminatory words, we noted Mr Lucas's comments about being proud of the fact and the Respondent's quite proper accommodation of religious observance. Our conclusions remain that the comments on which the Claimant relies were not made.

Resignation

68. At page 159 there is an email from the Claimant sent on Friday 26 July 2019 at 8.32 pm to the Respondent's general email address. It read, "Got to Ponsonbys at 8.00 just to be told they were on a break - 15 minutes and still nothing on trailer. What with one thing and another I will be giving my notice on Monday". The document at page 158 shows he left the Respondent's site at 22.00. At PC66 he says that "one thing and another" referred to the cartoon, the conversation with Mr Lucas on 7 March and the refusal of the Glasgow shift – all of which he says were "brushed under the carpet". He says he could not leave his employment sooner because of financial responsibilities. Mr Lucas did not think to enquire what the Claimant was referring to in his email, taking it as a general phrase in everyday use.

69. On Monday 29 July, the Claimant completed his Nuneaton runs. He says he was then given conflicting instructions by Mr Proctor and "Mick", a manager from ByBox. Mick told him that Ponsonby's were running late in loading, so he should collect whatever was ready and return to Coventry. When the Claimant told Mr Proctor about this, he says Mr Proctor told him he should go to Birmingham and wait for stock to be loaded. The Claimant told us that Mr Proctor's specific words were, "Just get on with your job, that's what you signed up for". This is not in his statement, Claim Form or Further Particulars. Mr Proctor told us he said to the Claimant that he should go to Ponsonby's, wait, and in the meantime, Mr Proctor would try to find out what the delays were and how long they would be. This is not included in his statement. He believed the Claimant would be back by 2200. He says he was calm and patient as always.

70. The Claimant says Mr Proctor's instruction would have meant waiting for an unknown period, having an adverse effect on his diabetes management. We note that waiting for an unknown period would have been the usual, or at least a very common, feature of the Ponsonby's run. The Claimant says it was the last

straw, as it was Mr Proctor wanting to make his life difficult because of his Jewish origin. When asked why he says that, the Claimant told us he was "already being victimised", that is since he had dared to complain about the production of the cartoon. When asked why he says Mr Proctor sent him to wait at Ponsonby's because of his diabetes, he said he was being set up, because there was a possibility he would be late again and so told off. Mr Proctor insists that he was unaware of the Claimant's race, religion or diabetes (he must mean any adverse effects of the Claimant's diabetes of going to Ponsonby's and waiting); he expected the Claimant would finish within his shift, the work needed doing and waiting at Ponsonby's was part of the Claimant's normal day.

71. The obvious conclusion to draw is that, as the witnesses agree, Mr Proctor said to the Claimant to go to Ponsonby's and wait for stock to be loaded. It is not necessary for us to decide whether Mr Proctor made the further comment alleged by the Claimant or the further reassuring comment Mr Proctor says he made himself.

72. The Claimant says he told Mick, "I cannot carry on, I have to go", i.e., he was unwell and would have to go home. Mick told Mr Proctor that the Claimant had gone home as he had had enough.

73. The Claimant reported in sick by text on 30 July 2019 – page 160 – saying he had had something to eat that made him unwell. In a further email on 31 July 2019 (page 162), the Claimant said that he had needed to leave suddenly on Monday (29 July) due to vomiting and stomach pain and that he was in no fit state to spend two hours at Ponsonby's with no adequate facilities. He said he had told Mr Proctor he would need to be away by 21.00, "but [Mr Proctor] got on his high horse saying I would have to stay". The vomiting and stomach pain does not seem to have been raised with Mr Proctor on 29 July itself: indeed, it is not in the Claimant's statement; what he refers to, as stated above, is that waiting would have an adverse effect on his diabetes management. The Claimant went on in the email to say, "As you are aware, I did ask if I could go on to the Glasgow for a while, only for you to put an agency driver on it. Thanks for that". This was his last day at work.

74. The Claimant says that notwithstanding the alleged earlier agreement for him to leave Ponsonby's promptly, he got later leaving there as time went on, hence his request to Mr Proctor to be away by 21.00. There was no reference in his July emails to any such agreement and no reference to any racial matters, to Mr Ball or indeed to diabetes. The Claimant told us he did not raise racism because he would not have got a job elsewhere if he had, i.e., it would have affected him obtaining a reference. He needed to work to pay off a debt, although he has now retired. On his own case he had raised the incident with the cartoon before, and as the Respondent points out, the solicitors' letters alleging race discrimination appear to have been sent before the Claimant obtained a full-time job as can be seen from his schedule of loss.

75. In a further email later the same day (page 160), in response to Mr Lucas thanking him for letting them know and confirming his last day of employment as 2 August 2019, the Claimant said, "If it wsd [sic] for Ponsonby's it would not end like this. Thank you for the fair way that you have payd [sic] me". The Claimant says the breaking of the agreement regarding Ponsonby's was one of the reasons he left – he would have left anyway, though not at this time, but this was when he was "broken". Mr Lucas was sorry to see him leave as he was good at

his work.

76. The Claimant explains his reason for leaving his employment at PC73 as being that he could no longer tolerate racism and disability discrimination. At PC80 he says that he had never encountered such despicable and disgusting behaviour and lack of care from an employer.

77. At page 191 there is an email from a recruitment agent to the Respondent, dated 11 February 2020, saying that they "can confirm [the Claimant] was booked to work for [the Respondent] back in September, I can also confirm he did say he worked for you in the past and was happy to come back and work for you". The Claimant says the recruitment agent only knew he had worked for the Respondent because he had been on the agency's books in the past. He did not go back and work for the Respondent in the end.

78. The Claimant had an interview with an agency prior to leaving the Respondent, he says after Mr Ball's cartoon. Page 184 shows he carried out some paid work elsewhere in the first day or two of August 2019 and that he had a temporary job to go to on leaving the Respondent's employment.

79. The Claimant took legal advice from Rich & Carr Solicitors by the first week in October at the latest. They wrote to the Respondent on 10 and 11 October 2019 as mentioned above – pages 163-4. The Claimant saw the CAB before then, following his email to the DVSA, regarding the diabetes issue only. His very detailed Claim Form was submitted on 16 December 2019 after ACAS Early Conciliation from 1 November to 11 December 2019. He says that the connection between the various alleged acts of discrimination was that it was open season on him after he complained about the cartoon, and because no action was taken, the Respondent's employees felt they could get away with it.

Law

Disability

80. Section 6 of the Act provides (so far as relevant) that:

(1) A person (P) has a disability if -

(a) P has a physical or mental impairment, and

(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

81. Schedule 1 to the Act provides at paragraph 2 that "*The effect of an impairment is long-term if – (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected*". Paragraph 2 goes on to say that "*If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur*".

82. Schedule 1 also provides at paragraph 5 that "*(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if – (a) measures are being taken to treat or*

correct it, and (b) but for that, it would be likely to have that effect. (2) Measures includes in particular medical treatment …".

83. Section 212 of the Act provides that "*substantial*" means "*more than minor or trivial*".

84. In **Kapadia v London Borough of Lambeth [2000] EWCA Civ**,at paragraphs 20 and 21, the Court of Appeal accepted a submission that it was for the Claimant to prove that the impairment had a substantial adverse effect on his/her ability to carry out normal day-to-day activities or to prove that the impairment would have had such an effect but for the fact that measures were being taken to treat or correct the condition. Having in mind that burden, the Tribunal's task is to look at the evidence presented to it and decide the question on the balance of probabilities.

85. **Goodwin v Patent Office [1999] ICR 302** is well-established and well-regarded Employment Appeal Tribunal ("EAT") authority for the questions to be asked in determining disability, encouraging tribunals to take an inquisitorial approach to the issue. The EAT stated that the legislation requires a tribunal to look at the evidence by reference to four different conditions. Taking account of amendments to the legislation since the decision, the questions are stated by the EAT as follows: "*(1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities ... and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?*". The EAT stated that it would be useful for tribunals to consider these questions in sequence, though it remains necessary to make an overall assessment and not "*take one's eye off the whole picture*". The EAT went on to give guidance in respect of each question. In respect of the adverse effect condition, it stated that "*the focus of attention ... is on the things that the applicant cannot do or can only do with difficulty, rather than on the things that the person can do*". As to the substantial condition, the EAT confirmed that the word "substantial" means "*more than minor or trivial*", wording which is now enshrined in section 212 of the Act.

86. As indicated above, Schedule 1 paragraph 5 of the Act requires consideration of how an impairment would affect day to day activities if medical treatment ceased. According to the House of Lords decision in **SCA Packaging v Boyle [2009] ICR 1056**, what must be asked is what the effect of the impairment would be if treatment stopped. Whether it is likely that the impairment would have the required effect in that situation means it "could well happen". The EAT in **Fathers v Pets At Home Ltd and another [2013] UKEAT/0424/13** said that "relatively little evidence may in fact be required to raise this issue", in other words to require a tribunal to consider and address the point of the effects in the absence of medical treatment. Of course, what a tribunal makes of the evidence before it on this issue very much depends on the individual case.

87. As to whether the required effects of an impairment were long term, again the **SCA Packaging** judgment makes clear that where a tribunal is required to assess whether those effects are "likely" to last for at least 12 months, this means that it "could well happen". As paragraph 2 of Schedule 1 to the Act says, and paragraph C7 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability confirms, it is not necessary for the effect to be

the same throughout the period being considered. What has to be considered is whether the effects were "likely" to recur, that word again meaning "could well happen".

88. The long-term question has to be assessed as at the time of the alleged discriminatory treatment. The Court of Appeal said in **McDougall v Richmond Adult Community College [2008] ICR 431** that in assessing likelihood in both respects, tribunals should only consider the evidence available at the time of the discriminatory acts. The assessment thus requires a prophecy of future events at those points, rather than recourse to actual evidence of subsequent events. This is reflected in paragraph C4 of the Guidance. In similar vein, on the question of whether the required effect had lasted 12 months, the EAT in **Tesco Stores Limited v Tennant [2019] UKEAT/0167/19**, held that it is the date of the alleged discriminatory act(s) at which this must be assessed, with the question being whether at that point there has been "12 months of effect".

89. In **Royal Bank of Scotland PLC v Morris [2012] UKEAT/0436/10**, the EAT upheld an appeal against the tribunal's decision in that case that the Claimant was a disabled person. On the question of the effect of medication (what is sometimes known as "deduced effects"), the EAT found there was no explicit evidence and stated, "This is just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence". Similarly, "it would be difficult for the Tribunal to assess the likelihood of [the risk of recurrence of the required effects under paragraph 2(2) of Schedule 1] or the severity of the effect if it eventuated, without expert evidence". The EAT concluded, "The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted".

90. In **Metroline Travel Ltd v Stoute (debarred) [2015] IRLR 465** the EAT held that type 2 diabetes by itself or where largely if not entirely controlled by diet is not necessarily a disability. It referred to paragraph B14 of the Guidance to the effect that where adverse effects of an impairment are controlled by minor adjustments, the question to be considered is whether those are things the person could reasonably be expected to do to mitigate the effects. The starting point is whether something is a measure under paragraph 5(1).

91. **Mart v Assessment Services Inc [2019] ICR 1414** dealt specifically with a sight impairment being correctable by spectacles, contact lenses or in other prescribed ways. The EAT held that the tribunal in that case was entitled to have regard, in assessing disability, not only to whether the prescribed measure resolved the impairment but also to whether it brought with it unacceptable adverse consequences or side-effects.

Burden of proof

92. Section 136 of the Act provides as follows:

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

(2) If there are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

93. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Career Guidance) [2005] ICR 931,** updating and modifying the guidance that had been given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

94. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

95. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

96. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic.

97. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the relevant protected characteristic. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

Direct discrimination

98. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)— … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; //(c) by dismissing B; //(d) by subjecting B to any other detriment*".

99. Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The protected characteristics relied upon in this case are disability, race and religion and belief. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

100. The Tribunal was therefore required to consider whether one of the sub-paragraphs of section 39(2) was satisfied, whether there had been less favourable treatment than one of the actual or hypothetical comparators, and whether this was because of the Claimant's relevant protected characteristic (it did not have to be more than one such characteristic for a complaint to succeed).

101. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as he was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Disability, race or religion or belief being part of the circumstances or context leading up to the alleged act of discrimination is insufficient. Usually, the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator(s) to act as they did. Establishing a decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator(s) and the surrounding circumstances. In determining why the alleged discriminator(s) acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be a significant influence on the decision, in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**). It follows of course that it cannot be a more than trivial influence, indeed an influence at all, if the alleged discriminator does not know of the relevant protected characteristic or perceive the person to have the protected characteristic.

102. As for comparators, as the Equality and Human Rights Commission Code of Practice on Employment expressly states, the circumstances of the Claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the Claimant's treatment are the same or nearly the same for the Claimant and the comparator – paragraph 3.23.

103. In **Hewage v Grampian Health Board [2012] ICR 1054**, it was stressed that the question of whether the situations of the Claimant and his comparators are comparable is one of fact and degree. In **Kalu v Brighton and Sussex University Hospitals NHS Trust and ors EAT 0609/12**, Mr Justice Langstaff suggested that another way of determining what circumstances are relevant in

any particular case is to identify the purpose of the comparison, or what proposition the comparison is intended to address. Sometimes a tribunal can go straight to the question of determining the reason for the impugned conduct, but if it does identify a comparator, it is permissible to determine which circumstances are relevant by reasoning backwards from the reason for the treatment accorded to the complainant.

104. The usual questions arise in relation to constructive dismissal cases, in the discrimination context as much as in the unfair dismissal context – were acts or omissions of the Respondent a cause of the Claimant's resignation, if so was the Respondent by those acts or omissions in fundamental breach of the Claimant's contract of employment, and if so had the Claimant affirmed the contract after such a breach. In **De Lacey v Wechseln Limited t/a The Andrew Hill Salon [2021] UKEAT/0038/20**, the EAT considered the question of deciding whether a constructive dismissal is discriminatory. It said that where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. This is a matter of degree. The last straw not being itself discriminatory does not automatically mean that the constructive dismissal was not discriminatory.

Discrimination arising from disability

105. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others.

106. What caused the unfavourable treatment requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators' conscious or unconscious thought processes to a significant extent (**Charlesworth v Dronsfield Engineering UKEAT/0197/16**). By analogy with **Igen**, "significant" in this context must mean more than trivial. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes.

107. The approach to complaints of discrimination arising from disability was considered in detail by the EAT in **Pnaiser v NHS England [2016] IRLR 170**:

> "*(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B*

unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises …

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act … the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

…

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

108. We draw the following principles from the relevant case law concerned with whether the unfavourable treatment can be said to be a proportionate means of achieving a legitimate aim (justification for short):

108.1. The burden of establishing this defence is on the Respondent.

108.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

108.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ **in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

108.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

108.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

108.6. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Reasonable adjustments

109. Section 20 of the Act provides:

"*(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 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".

110. Section 21 provides:

"*(1) A failure to comply with the first, second or third requirement is a failure to comply with the 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".

111. Substantial" in this context means "more than minor or trivial" – section 212(1) of the Act. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that puts the Claimant at the alleged disadvantage. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage. The disadvantage must relate to the Claimant's disability.

112. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

113. In **Environment Agency v Rowan [2008] IRLR 20,** the EAT restated guidance on how an employment tribunal should approach such a claim (albeit under the old legislation). Accordingly, the Tribunal must identify:

> "(a) the provision, criterion or practice applied by or on behalf of an employer, or;
> (b) the physical feature of premises occupied by the employer;
> (c) the identity of non-disabled comparators (where appropriate); and
> (d) the nature and extent of the substantial disadvantage suffered by the claimant."

114. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J emphasised the importance in all cases of the tribunal focusing on the words of the statute and considering the matter objectively. He held:

> "*The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through*."

Knowledge

115. Paragraph 20 of Schedule 8 to the Act provides, in wording akin to section 15(2):

"*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

116. The burden is on the Respondent to show that it did not have knowledge – certainly that is clear enough in relation to section 15 given the express wording of section 15(2). The EAT held in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** that what this provision requires is that the employer know (or could reasonably be expected to know) that an employee was suffering from an impairment, the adverse effects of which on their ability to carry out day-to-day activities were substantial and long-term, that is the various constituent elements of the definition of disability in section 6 of the Act – though as made clear in **Gallop v Newport CC 2013 EWCA Civ 1583** it is knowledge of the facts of the Claimant's disability that is required, not an understanding by the Respondent that those facts meet the statutory definition.

117. If the employer did not know and could not reasonably be expected to know the Claimant was disabled, knowledge of disadvantage does not arise.

118. What is reasonable for the Respondent to have known is for the Tribunal to determine and will depend on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result (**A Ltd v Z EAT 0273/18** reflecting paragraph 5.15 of the EHRC Code on Employment (2011)).

Harassment

119. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic, and //(b) the conduct has the purpose or effect of //(i) violating B's dignity, or //(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account - //(a) the perception of B; //(b) the other circumstances of the case; //(c) whether it is reasonable for the conduct to have that effect".

120. The Tribunal is thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to disability.

121. It is clear that the requirement for the conduct to be "related to" the relevant protected characteristic entails a broader enquiry than whether conduct is because of that characteristic as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to the characteristic, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

122. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of the alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on him (he must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the remark, and all the surrounding context. That much is clear from section 26 and was confirmed by the EAT in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724.** The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr. Justice Underhill, as he then was, said in that case:

> *"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …*
>
> *"…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"*

123. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If he does, then it is plain that the Respondent can have harassed him even if it was not its purpose to do so, though if something was done innocently, that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created

by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that it is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

Victimisation

124. Section 39(4) of the Act says that:

"*An employer (A) must not victimise an employee of A's (B): … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service … (d) by subjecting B to any other detriment*".

125. Section 27 defines victimisation as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because - //(a) B does a protected act, or //(b) A believes that B has done, or may do, a protected act.*

126. A protected act is defined in section 27(2) and includes making an allegation (whether or not express) that the employer or another person has contravened the Act.

127. No comparator is required for the purposes of a victimisation complaint, but the protected act must be the reason or part of the reason why the Claimant was treated as he was – **Greater Manchester Police v Bailey [2017] EWCA Civ. 425.** This requires consideration of the mental processes of the decision-makers and the protected act need not be the primary reason for the detriment, though it must be more than a trivial influence on that decision.

Time limits

128. For reasons which appear below from our analysis, it is not necessary for us to set out the law in relation to time limits.

Analysis

129. We begin our analysis with the (as it may seem, trite) observation that it is well-established that a tribunal has to decide the case put to it (by both parties), not the case it thinks should or might better have been made. We have been careful to work through each issue and complaint as presented to us, by reference the evidence to which we were taken.

Disability

130. We have set out the statutory definition above. It is accepted that the Claimant had a physical impairment at the relevant times, namely type 2 diabetes. We turn next therefore to the question of whether the impairment had a substantial adverse effect on his ability to carry out normal day to day activities.

131. Type 2 diabetes is not automatically a disability – that is the effect of the decision in **Stoute**. It was accepted in evidence in the case before us that there is a spectrum as to the impact of the impairment and it is well known that not everyone with type 2 diabetes requires medication, many people controlling it by diet and exercise. The burden was on the Claimant to establish the requisite effect, a question we had to decide based on the evidence we were given and on the balance of probabilities.

132. The first question is whether the impairment had a more than minor or trivial effect on the Claimant's ability to carry out normal day-to-day activities at the relevant time – taken at its broadest, August 2018 to July 2019 – whilst he was taking medication.

133. It is to be noted that the Claimant's statement was somewhat lacking in detail on this point, and we were not taken to his medical records in any detail either, but case law makes clear that tribunals can take an inquisitorial approach to elicit evidence on this question and, as already noted, we accept the Claimant's oral evidence on this subject as we have recorded it. It was not suggested that his condition was different in 2018/19 to what he described more generally: he said that it was unchanged from 2018/19 to the present, which we accept.

134. We noted first the questionnaire the Claimant completed on joining the Respondent in which he recorded that he did not have a disability, but of course that is not determinative of the issue. The Claimant is not a lawyer and neither is it likely he was thinking about the position he would have been in without medication (which we will come to); he did say expressly on the form that he was taking metformin.

135. Secondly, in his oral evidence, the Claimant referred to three things. The first was the need to regularly use toilet facilities and the fact that this affected his countryside walking and social activities. The Respondent points out that he was driving for a living, though we note that the driving was only ever over short distances and that the Claimant had regular breaks, such that this was not a material factor in our assessment one way or the other. It was the Claimant's diabetes medication which meant at least in part that he had to use the toilet more frequently. **Mart v Assessment Services** was decided in the specific context of whether a sight issue was correctable, but it is notable that the EAT in that case decided that a tribunal could take account of whether a lens correcting a sight issue had unacceptable consequences. By analogy, we think that where medication is unavoidable, as seems to be accepted is the case here, it would be wrong to discount the effects of that medication in determining the effect of the impairment on normal day to day activities. We also note that the Claimant said it was not just the medication that created toileting issues; he would have to urinate regularly if the impairment were not controlled.

136. All of that said, whilst walking and socialising are clearly normal day to day activities, the gist of the Claimant's evidence was that he would have to keep an eye out for toilets, whenever he was out and about. What he did not say, for example, was that he was having to use toilet facilities with any particular frequency, for example, every hour. We also note that he was willing to go on to the Glasgow run, which on face of it is likely to have required longer times in the cab. It is clear that the Claimant's diabetes was well-controlled, as shown for example by the fact that his diabetes checks were annual. We conclude that we

have not been given enough evidence to show that his normal day-to-day activities were affected more than trivially in this respect whilst he was taking medication. We will come back to what the position would have been if medication was disregarded.

137. The second effect the Claimant described was fatigue. Again, we do not think it to be determinative against him that he was working as a driver, as he only drove short distances. Albeit over many hours, it is accepted that he had ample scope for rest breaks. We do accept the Respondent's submission however that what the Claimant specifically described, namely closing his eyes for a few minutes, cannot be said to be a more than minor or trivial effect on daily activities.

138. Thirdly, the Claimant referred to issues with concentration. He made general references to reading and computer work, but he did not give us enough evidence to show that any adverse effect was more than minor or trivial.

139. The Claimant has not therefore established on the evidence a more than minor or trivial impact on his ability to carry out normal day to day activities whilst taking medication. We must therefore turn to the question of modifications to the Claimant's lifestyle and the position he would have been in without the use of medication.

140. As to modifications, we agree of course with the EAT in **Stoute** that diet control – and the same could be said of eating regularly – is a reasonable modification which can be discounted as part of the assessment of impact on day-to-day activities and is also therefore not something which falls into corrective measures which we must ignore in determining that impact. That said, the Claimant was still taking medication at the relevant times even with those modifications – he had by then been taking 500 mg of metformin for some time. We have therefore considered what the position would have been in the absence of that medication, in line with Schedule 1, paragraph 5 of the Act quoted above. "Likely" in this context means "could well happen", and so the question for us is if the Claimant had not been taking Metformin in 2018/19, could it well have happened that there would have been a more than minor or trivial effect on his ability to carry out normal day to day activities.

141. We were not taken to any medical evidence on this question. As a result, it has been important in our analysis to exercise some caution and not to place ourselves in the position of attempting to be medical experts or apply medical expertise. We have noted the caution about determining deduced effects without medical evidence set out in **RBS v Morris**, but that caution relates expressly to mental impairments, where it is often very difficult to say whether anxiety and depression for example has the requisite substantial adverse effect. We do not read the decision in that case as setting up an invariable rule that the deduced effects question always requires medical input. Whilst of course avoiding carrying out our own medical research, in our judgment it was plainly possible to take a common-sense approach to that question in this case based on the evidence before us.

142. There is nothing especially surprising about the Claimant's own conclusions on this point and, in our judgment, he has established an arguable case even in the absence of expert medical evidence. It is well known that many people have type 2 diabetes without knowing it, but the Claimant has been diagnosed, his

blood sugar levels fluctuate as we have noted, well above normal levels, and the events of 6 February 2019 show that he suffers consequences from a change in sugar levels. Mr Lucas's own evidence, anecdotal as it is, that it would not be fun for him if he abandoned his medication is supportive of the Claimant's position.

143. The Claimant said his sugar levels would have risen significantly, creating blurred vision and increased fatigue. We have to assess the position as if he had missed not only a day or two of medication but as if he had not taken medication at all, and whether there would then have been a more than minor or trivial impact on activities such as walking, socialising, driving and the like. We are satisfied that there would have been such an effect, and in all likelihood that it would very soon have become much more serious than minor or trivial. That would clearly have been the case in 2018 and 2019, as much as it would be now. On that basis, we are satisfied that the Claimant has established that there was a substantial adverse effect on his ability to carry out normal day to day activities at the relevant times.

144. The final question is whether that effect would have been long term in the absence of medication. By 2018 the Claimant had been taking metformin for much more than 12 months and had been having regular diabetes checks by then as well. The requisite effect does not have to be constant. We are content as a matter of common sense, even in the absence of expert medical evidence, based on the evidence we have referred to, that without medication, the substantial adverse effects would have lasted, or at the very least been likely to last (which again means that it could well have happened) for 12 months, indeed for the Claimant's lifetime. In summary, we find that he was a disabled person as defined by the Act, at the relevant times.

Knowledge of disability

145. Turning to the question of knowledge of disability the first question is what the Respondent actually knew, noting of course that we are concerned with its corporate knowledge, not that of one individual. The main points for us to note in answering that question seemed to us to be as follows:

145.1. At the start of his employment, the Claimant declared himself not to be disabled, but that is by no means determinative of the question of knowledge any more than it is the question of disability.

145.2. The Respondent knew he took metformin.

145.3. Specifically, Mr Lucas, the Site Manager, knew that and knew the Claimant had type 2 diabetes from the outset. Mr Lucas had the same condition.

145.4. The Respondent knew the Claimant had informed the DVLA that he had type 2 diabetes. It also knew he had a driving licence.

145.5. The condition appeared well-controlled, and the Claimant could do his job.

145.6. The Respondent knew the Claimant was interested in a job that would involve longer periods of driving.

146. In terms of actual knowledge therefore, the Respondent knew the Claimant had the physical impairment, but particularly given that he was controlling his

condition with medication, it knew nothing further. Specifically, it could not be said on the basis of the knowledge we have just summarised that it knew the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day to day activities, which was long-term, whilst he was taking medication.

147. Turning to constructive knowledge – what the Respondent should reasonably have known – the first question is whether there were reasonable steps it should have taken in relation to the Claimant's declaration of the impairment of type 2 diabetes.

148. We were not told that the Respondent checked the Claimant's self-declaration that he had informed the DVLA of his condition, nor that it checked whether the DVLA were satisfied for him to work as a lorry driver. In all likelihood, the Respondent assumed that given that he had a licence, the authorities were satisfied as to his fitness to drive. It seems to us however that in a safety critical role such as driving, it would have been more than reasonable to make some enquiry as to the Claimant's condition and his management of it, on the commencing his employment, if not of the DVLA, then of the Claimant himself or of a medically qualified professional.

149. What would those enquiries have revealed? They would have revealed that because of medication and modifications, the impairment was under control and that any medical interventions were routine. We do not think it likely that any such enquiry would have expressly addressed what the Claimant's position would have been without medication. There would have been no need to address that question or for the Respondent to ask it.

150. Accordingly, that enquiry of itself would not have revealed to the Respondent that the Claimant was a disabled person. There is a further question however, which is whether the Respondent knew anyway, or should reasonably have known anyway, the position the Claimant would have been in if he had stopped taking his medication altogether. In our judgment, that can be answered straightforwardly. At the very least, Mr Lucas knew, or if he had applied his mind to it, would have known, that if the Claimant stopped taking his medication, the position in respect of the impact on his ability to carry out normal day to day activities would have been as we have described it in our concluding that the Claimant was a disabled person. Mr Lucas's own evidence on the point pretty much said so.

151. We therefore find that the Respondent knew – whether because of the generally known consequences of not taking metformin or because of Mr Lucas's personal knowledge of the same – that the Claimant was a disabled person at the relevant times, or it should reasonably have known that to be the case throughout his employment.

152. We now turn to the substantive complaints. Rather than dealing with each instance of direct discrimination in turn, followed by each allegation of harassment, and so on, we deal with each factual issue in turn and in doing so address the various ways the Claimant's complaints about that issue were put to us.

Mr Ball making the cartoon and handing it to the Claimant

153. We deal with the making and the handing over of the cartoon together, although we were very much aware they were separate allegations.

Direct race/religion and belief discrimination

154. The Respondent takes responsibility for Mr Ball's conduct in this regard, as his employer – it did not in the end seek to pursue the statutory defence. The first question therefore is whether the Respondent by this action subjected the Claimant to a detriment.

155. We are driven to the conclusion that it did not. We are conscious that the question is only whether a reasonable person could reasonably consider what happened to be a detriment, and we note that the Claimant has said in great detail in this litigation that he was deeply upset by what took place. We also remind ourselves that his solicitors wrote to the Respondent in October 2019 about the matter. That was however the first time the matter was raised by the Claimant, on our findings of fact, and it was almost a year later. We have already said we find it inconceivable that he would have left matters so long, and indeed countenanced coming back to work with the Respondent (including Mr Ball), had he felt about it as he describes. As we have also set out, nothing seemed to change in the relationship between the Claimant and Mr Ball. For those reasons, even in the absence of the Claimant laughing and saying he would put the cartoon on Facebook, it is plain to us he did not encounter what happened as detrimental to him.

156. That means the complaint of direct discrimination must fail. We have nevertheless gone on to consider whether if it was a detriment, it constituted discrimination as alleged.

157. The Claimant did not argue that making and handing over such a cartoon was inherently discriminatory, i.e., that in answering this question we do not even need to consider the conscious or unconscious thought processes of Mr Ball or indeed the question of any comparator. We do not think in any event that a cartoon picture of Hitler, in as poor taste as it is, can be said to be in some way a proxy for reference to Jewish people or those of Jewish faith. It is obvious that the same poor humour could be used with someone who did not have either of those protected characteristics. We have therefore considered the usual questions.

158. First, the comparator. The list of issues identifies Neville Stanhope. We agree with the Respondent that he is not an appropriate comparator, given that he did not dislike the vehicle, fall out of it, or – it appears – engage in banter with colleagues about it. Mr Ball himself is not the correct comparator either, as he did not fall from the truck or dislike it. The Respondent may think somewhat generously to the Claimant, we have nevertheless gone on to consider how a hypothetical comparator would have been treated. It seems to us highly likely Mr Ball would have made the same poor taste cartoon for someone of a different race or religion and belief who disliked the Mercedes truck, gave it the name Hitler's Revenge or something similar, and (as Mr Ball believed) fell out of it. Those are the necessary similar circumstances to make the required comparison under section 23.

159. Secondly, we have considered whether questions of race or religion and belief consciously or unconsciously affected Mr Ball's decision-making in compiling the cartoon and handing it over. Given that he did not know of or perceive the Claimant's relevant protected characteristics, they could not have. Whilst we have noted Mr Ball's somewhat unusual way of putting his oral evidence about the relationship between Adolf Hitler and the Jews, and the fact that he has not sought to apologise to the Claimant since he became aware of how the Claimant says he felt about the matter, we accept his evidence that he would have been mortified had the Claimant mentioned either protected characteristic on the cartoon being handed over. What was plainly in Mr Ball's mind was the fact that the Claimant had fallen from the vehicle: as the Respondent's counsel said, that was the only thing Mr Ball changed on the cartoon he found on the internet, and it is clear therefore that this is what he had in mind in making it. The Claimant himself said, at PC15, that the cartoon was all about his fall, though he resiled from that somewhat in oral evidence. It is plain to us for all the reasons just given that the "reason why" in this case was not the Claimant's race or religion and belief.

160. For all of the above reasons, the Claimant has not established the facts which were necessary to pass the burden of proof to the Respondent, or even if he had, it is clear that the Respondent has provided a wholly non-discriminatory explanation for what took place.

Harassment

161. On the same basis that we found the making and handing over of the cartoon not to be a detriment, there was nothing in our factual conclusions to lead us to decide that the conduct was unwanted at the time it took place, or at all until the solicitors' letter after termination of the Claimant's employment. The complaint of harassment fails on that basis.

162. Again however, we have gone on to consider the other constituent parts of the test for harassment. As to whether Mr Ball's conduct was related to race or religion and belief, it was not inherently so for the reasons we have given. Further, Mr Ball did not have the requisite knowledge or perception, and as he and the Claimant himself say, making the cartoon and handing it over were related to the Claimant's fall from the vehicle – in other words, not to his race or religion and belief.

163. Did the conduct have the purpose of violating the Claimant's dignity or creating the requisite environment? It did not because Mr Ball's plain purpose was to have a fleeting joke – as he saw it – with a colleague with whom he was on friendly terms and who took a particular view of the vehicle. Did it have either of those effects? The fact that the Claimant did not raise the matter (as someone well capable of raising matters he was not happy about) and that we have rejected his evidence as to how it made him feel at the time, inevitably leads to the conclusion that it did not.

164. For the above reasons the Claimant has not established facts from which we could conclude in the absence of an adequate explanation that the Respondent harassed him.

Victimisation

165. This complaint also fails on the facts, because there was no protected act, given that we have found the Claimant did not complain about the cartoon. In any event, the alleged detriments – the making of the cartoon and being handed it – came before the point at which the Claimant says he complained about it, as logically must be the case. On that basis, any detriment could not have been because of a protected act.

166. The Claimant has not proved the requisite facts to establish a prima facie case of victimisation.

Dissemination of the cartoon

167. This allegation can be dealt with much more briefly. It fails on the facts. Our conclusion on the balance of probabilities was that the cartoon was not given to anyone other than the Claimant, so that there could not be any act of direct discrimination or harassment in that regard.

Failure to investigate the Claimant's complaint about the cartoon

168. This was a complaint of victimisation only. It also fails on the facts. We have concluded on the balance of probabilities, on the evidence presented to us, that the Claimant did not bring the cartoon to Mr Lucas's attention at the time it was handed to him or at any time during his employment. Accordingly, whether at that time as alleged or at any later stage during his employment, the Claimant did not do the required protected act of complaining about discrimination. Again, therefore, he has not proved the requisite facts to establish a prima facie case of victimisation.

Mr Hammond calling the Claimant on 6 March 2019

169. This is a complaint of direct disability discrimination and relates of course to the occasion on which the Claimant made an unscheduled stop at a motorway service station.

170. It fails for the following reasons:

170.1. The Claimant agrees Mr Hammond was right to call him and we heard no evidence at all of anything in Mr Hammond's conduct in doing so to which the Claimant took objection. It is difficult to see therefore how Mr Hammond calling the Claimant could properly be viewed as a detriment.

170.2. It was absolutely clear to us that the Respondent runs its operations to tight timescales and regards compliance with them as critical to its business, so that if a driver without diabetes – which was the Claimant's disability – whether Mr Ball or someone else, had made an unscheduled stop and not immediately notified the Respondent, Mr Hammond would have called them too. There was accordingly no less favourable treatment of the Claimant in relation to the required comparator.

171. The Claimant has not therefore proved that there are facts from which we could conclude, in the absence of an adequate explanation, that he was discriminated against in this regard. Even if he had done so, such as to shift the

burden of proof to the Respondent, it is abundantly obvious that the reason for the call was in no sense whatsoever that the Claimant was disabled but because he had stopped, and Mr Hammond wanted to know why.

Mr Lucas giving the Claimant a warning on 7 March 2019

172. This followed the unscheduled stop of course. The complaint was ultimately put in three alternative ways.

Victimisation

173. The first was victimisation. The Claimant said in this Hearing that Mr Lucas was picking on him because of his complaint about the cartoon. That fails on its facts of course, but more to the point this was not a pleaded complaint. As already noted, a tribunal can only decide the complaints that are properly presented to it.

Discrimination arising from disability

174. We have concluded that whilst Mr Lucas was unhappy the Claimant had not organised things to avoid the need for an unscheduled stop and had not communicated it before Mr Hammond had contacted him from base, giving him the message that he needed to be better organised and make sure he communicated such matters to the Respondent in future, there was no warning. We have also found there was no aggression or shouting, and that Mr Lucas did not call the Claimant a liar or make a comment to the effect that he would not have died if he had continued driving rather than stopping – although those were not allegations for us to decide as such anyway.

175. We make clear again, as we did at the outset of this Hearing, that our task is to decide the case put to us, here that the Claimant was given a warning. It is not the Tribunal's role to decide an alternative case that was not put to us, nor would that be fair to the Respondent.

176. The Claim Form says in terms that the Claimant "was issued with a verbal warning" and goes on to say why he did not "appeal against it" i.e., that it would have made no difference to the outcome. In his oral evidence, which we have rejected, the Claimant also referred to requesting the presence of a union representative and this being denied. All of that very clearly particularises the complaint as the Claimant having been given a formal warning, as reflected in the list of issues. The Claimant has not made out the unfavourable treatment on which he relies. The complaint must fail on that basis.

Direct disability discrimination

177. The direct discrimination complaint must fail on the same ground. The detriment on which the Claimant relies has not been made out on the facts.

178. For completeness, we have considered whether Mr Lucas would have treated in the same way a driver who did not have diabetes but who made an unscheduled stop and did not report it immediately. We are again dealing with a hypothetical comparator as Mr Ball does not seem to us to be an appropriate actual comparator. He had not had a 35-minute delay (which it is agreed was unusual), had not made an unscheduled stop, worked on a somewhat less time-

pressured shift, and habitually told the Respondent about any delay, even if only of a few minutes.

179. We are clear that given the time-sensitivity and crucial importance to the Respondent of meeting customer requirements, Mr Lucas would have spoken to another driver – whether Mr Ball or, as we think more appropriately, a hypothetical comparator in materially similar circumstances – who did not have type 2 diabetes and who, as the Respondent could legitimately conclude in relation to the Claimant, on the face of it had had sufficient breaks during the course of the normal working day and had made an unscheduled stop, particularly when the customer had raised a question about it. For the same reasons, not only would Mr Lucas have spoken to that person, but he would also have made the same requirements clear in the same firm way – the need to be better organised and to communicate. Mr Lucas said repeatedly in evidence, "it's all about communication". The Claimant would not have established less favourable treatment and therefore the burden of proof would not have passed to the Respondent.

180. Even if it had, the reason why Mr Lucas spoke to the Claimant and did so as we have described, was plainly not because the Claimant was disabled, but because of the need to discover what took place, to be able to report back to the customer and to take steps to ensure that an uncommunicated stop did not happen again and that the Claimant did his utmost to ensure a stop was not needed in the first place.

181. The Claimant has not shown that there are facts from which we could conclude in the absence of an adequate explanation that he was discriminated against or victimised.

The Glasgow shift

182. The Claimant's complaints in this respect are of race and religion and/or belief harassment.

183. Our factual findings were in summary as follows:

183.1. The Claimant did not make a formal request for the role, but simply expressed an interest in it.

183.2. He did not say he wanted to get away from Mr Ball.

183.3. He is likely to have said that it would get him away from the frustration, as he found it to be, of waiting at Ponsonby's.

183.4. The Respondent had good reasons for Mr Hows retaining the shift which he had been doing since his return from surgery.

184. Given those facts and the evidence put to us, there was no conduct of the Respondent in this regard which the Claimant identified as unwanted in the sense required by section 26. Even if one were to say that the unwanted conduct was the Respondent not putting him on the Glasgow shift, it was not related to race or religion and belief for the following reasons:

184.1. First, neither Mr Lucas nor Mr Proctor, who the Claimant says did not

accede to his wish, were aware of or perceived his race or religion and belief.

184.2. Secondly, not putting the Claimant on the shift related solely to the fact that it was already occupied by Mr Hows.

184.3. Thirdly, the Claimant himself said in evidence when asked why what he alleged was an act of harassment, that he was already being victimised because the cartoon had been passed around. We accept it is difficult for lay people, even when represented, to use the correct legal terminology, but it is nevertheless telling that this explanation does not amount to a connection to his race or religion and belief as such, but to his complaint. In any event, we have decided neither Mr Lucas nor Mr Proctor had seen the cartoon at this point.

184.4. Further, not putting the Claimant on the shift plainly did not have the requisite purpose, nor can it be said that there was any evidence before us that it had the requisite effect. Subjectively, the Claimant did not raise the matter with the Respondent at all until more than 5 months later, and then said no more than "thanks a lot". Objectively, this passing incident could not be said to have had the required effect either.

185. The Claimant has failed to establish that there are facts from which we could conclude in the absence of an adequate explanation that the Respondent harassed him.

The "Mercedes in the yard" comments

186. Factually, we have accepted that, on a few occasions, words were said – by Mr Ball at least – to the effect, "Pete, the Mercedes is in the yard again". The Claimant's case was somewhat unclear until his oral evidence, when he said that he inferred Mr Ball was linking this to the cartoon, a German vehicle and how Germany treated the Jews. Mr Ball did not make those comments himself. The complaints about this matter are again threefold.

Direct race/religion and belief discrimination

187. In respect of direct race/religion and belief discrimination, the first question is whether the Respondent subjected the Claimant to a detriment. Given the name the Claimant gave to the vehicle, given that he made abundantly clear he did not like it, given the nature of his relationship with Mr Ball, and given our findings that he did not complain about the cartoon, we find that he has not established that it did.

188. In any event, the Claimant has not established less favourable treatment. Again, we agree with the Respondent that Mr Stanhope is not an appropriate comparator because he did not make known any dislike for the truck nor fall out of it. Furthermore, given the friendly relationship between them – which we have found continued after the cartoon had been handed over – it is clear Mr Ball would have made the same comment to someone with whom he was on good terms, who disliked the truck and who he believed had fallen out of it, namely a hypothetical comparator constructed in accordance with section 23 of the Act.

189. Again therefore, the Claimant has not satisfied the initial burden on him. Even if he had, the reason why Mr Ball made the comments is clear. It was the fact that the Claimant did not like the truck, not his race or religion and belief.

Moreover, those protected characteristics cannot have been an influence on Mr Ball's thought processes in making the comments because he did not know about or perceive either. It was suggested others made a similar comment. We were not given sufficient details of the same in order to properly adjudicate on a complaint about that, but had they been made the complaint would have failed on a similar basis.

Harassment

190. As to harassment, we are not satisfied that the comments amounted to unwanted conduct. The Claimant was vocal about disliking the truck and gave it the name, "Hitler's Revenge". He never asked Mr Ball to stop making the comments.

191. The comments were not related to race or religion and belief but solely to the Claimant's vocal dislike of the vehicle and Mr Ball's belief that he had fallen out of it.

192. The comments plainly did not have the requisite purpose. This was a case of two friendly work colleagues both engaging with the issue of the Claimant's aversion for the vehicle. Further, there is no evidence it had the required effect either. The Claimant at no point complained about the comment, and it seems clear his relationship with Mr Ball remained unaltered. Given its context, namely the Claimant's very public dislike of the vehicle, expressed in part in the name he gave to it, and Mr Ball's belief as to his unfortunate experience with it, we do not think either that it would have been objectively reasonable for the comments to have had the required effect.

193. Once again, for the reasons we have given, the Claimant has not satisfied the burden of proof to which he is subject.

Victimisation

194. The complaint of victimisation must fail for the following reasons:

194.1. There was, on our findings of fact, no protected act.

194.2. Even if there had been, there is no evidence Mr Ball would have known about it, because on the Claimant's own case there was no investigation, and it was not argued by the Claimant that Mr Ball believed he would complain about the cartoon. As we have said several times already, we can only decide the case presented to us.

194.3. In any event, the reason for the comment was as we have already described and was thus wholly unrelated to any complaint even if one had been made.

Other comments

195. The other comments were the alleged references to Auschwitz, gas, gas chambers and gas bills. We have found on the balance of probabilities that these comments were not made and these complaints must therefore fail.

Shift patterns

196. This is a complaint of failure to make reasonable adjustments.

197. The PCP was the requirement that the Claimant comply with his shift patterns. There was no dispute about that.

198. The pleaded substantial disadvantages were that the Claimant did not have enough breaks to stop for food, and that he was unable to take breaks flexibly for food as required. The Claimant's case changed during the Hearing to the substantial disadvantage being that he was getting home late and should have had a scheduled break. This is a fundamental confusion in his case. On the one hand he says the Respondent should have been more flexible, permitting him breaks whenever he required them, and on the other he says that his breaks should have been fixed. We have nevertheless considered the complaint rather than simply dismissing it on that basis.

199. Whichever way it is pleaded, it is clear from the evidence and the facts as we have found them to be, that the Claimant had ample breaks and periods of rest during his everyday working patterns, as the Claimant himself agreed. Any disadvantage of not having either a fixed break or a break whenever he required it was therefore no more than a trivial disadvantage. Indeed, it is difficult to see what disadvantage there was at all. Moreover, it can be readily seen that to a large extent, the Claimant's breaks were scheduled, in that he had short breaks on his three journeys to and from Nuneaton, and then a longer break on arrival at Ponsonby's. Any disadvantage that may have existed was mitigated by the Claimant being able to take and consume his own food and planning when to eat it.

200. It is not clear whether the Claimant relies on the events of 6 and 7 March 2019 as evidencing substantial disadvantage. For completeness, we have considered that point also. Whilst Mr Lucas expressed some displeasure at the unscheduled break on 6 March, and at it not being communicated, that is not sufficient in our judgment to amount to the substantial disadvantage for which the Claimant contends. First, it was not disputed that he continued to have ample breaks and rest times. Secondly, the whole tenor of the Respondent's operations was that safety came first: Mr Lucas's point was that the Claimant should be better organised and report in, not that he could not take a flexible break if safety required it. Even if the situation had been otherwise, the conversation on 7 March was only a passing disadvantage, and therefore no more than minor or trivial, as there was no evidence before us of the Claimant needing an unscheduled stop on any later occasion and feeling unable to take it.

201. In any event, it would not in our judgment have been a reasonable step for the Respondent to allow the Claimant to take breaks as and when he needed them, given:

201.1. First, the requirement for the Claimant to do the time-critical journeys which constituted his daily duties.

201.2. Secondly, the fact that ample breaks were already built into his daily routine – it was reasonable to expect the Claimant to manage himself accordingly.

202. As for the second step on which the Claimant relies, namely, to allow him to stop for food without being subjected to disciplinary action, we have found that he was not subject to such action or threatened with the same and so this was in effect a measure that was already in place.

203. Further, we find that the Respondent had no knowledge of the disadvantage on which the Claimant relies for this complaint. He at no point said that he was experiencing the disadvantage as a result of his shift patterns or that any change was required. His gripe was not about breaks, but in August 2018 the delay he encountered on returning to base at the end of the day, which the Respondent sorted out and, later in his employment, the delays at Ponsonby's which meant he did not get away as quickly as he would have liked. There was no evidence before us to suggest that any concern about his breaks was signalled to the Respondent nor that it should have known there was any difficulty for the Claimant in this regard given the many breaks built naturally into his normal day.

204. The Claimant has not established the facts necessary to meet the burden of proof in relation to this complaint either.

Instructions given to the Claimant on 26 July 2019

205. The facts as we have found them are essentially that Mr Proctor said to the Claimant to go to Ponsonby's and wait for stock to be loaded. The complaint about that was again put in three ways.

Direct race and religion and belief discrimination

206. The complaint of direct race and religion and belief discrimination was not one of the complaints in the list of issues, but it was put in this way in the Claim Form and so we have of course considered it. We do not need to deal with it in any detail however, because it fails on the fact that Mr Proctor did not know of or perceive the Claimant's race or religion and belief, and on the reason why he issued the instruction, which we will come to. Mr Proctor's actions in this respect were plainly not because of the Claimant's race or religion and belief.

Direct disability discrimination

207. The Claimant says two things in support of his complaint of direct disability discrimination. First, he says that Mr Proctor's instruction would have meant waiting for an unknown period at Ponsonby's, having an adverse effect on his diabetes management. Secondly, he says that he was being set up, because there was a possibility he would be late again and so told off.

208. The first point the Claimant makes strikes us as unusual, given that driving to and waiting to be loaded at Ponsonby's was, and had been throughout his employment, part of his normal duties. It is far more likely that the real issue was not that the Claimant had any concern about his diabetes management but as set out in his communication of 26 July 2019, that he simply did not like waiting. The second point the Claimant makes was raised for the first time in his oral evidence, and so we need to be cautious about it. Further, Mr Proctor was not at all likely to make any arrangement which he knew would result in the Claimant returning late – that is precisely what the Respondent ordinarily wanted to avoid. Moreover, the nature of the job was that the timings of collections were not entirely predictable, as the Claimant plainly knew.

209. We are not satisfied therefore that the Claimant has established that the Respondent subjected him to a detriment in this regard. He was simply being asked to carry out his normal duties.

210. In any event, he has not established less favourable treatment either. The correct comparator is someone who did not have diabetes who asked not to have to wait at Ponsonby's. It is not Mr Ball, because there is no evidence he asked not to have to wait to be loaded at a customer's premises. It is abundantly clear that Mr Proctor's focus was to get the job done and to avoid the cost and delay of a second run by someone else which had occasionally happened before. For those reasons we are entirely satisfied that he would have told someone without diabetes to do the same thing.

211. Again, the burden of proof does not pass to the Respondent. Even if it had, there is no evidence at all that the Claimant's disability featured in Mr Proctor's thinking, consciously or otherwise. His sole concern was for the Claimant to do his job, so that customer requirements were met, and complaints avoided.

Discrimination arising from disability

212. We find that there was no unfavourable treatment. Mr Proctor simply requested or directed the Claimant to carry out his regular duties.

213. Even if that was unfavourable treatment, the Claimant's complaint is not made out. We accept his need to eat regularly and that this was something which arose in consequence of his disability, but the way in which the Claimant's complaint was pleaded and pursued means he would have to have shown that the reason Mr Proctor gave the instruction is that the Claimant had to ensure he ate regularly to manage his diabetes. He has plainly not done so, either as a matter of logic, or on the evidence. The reason for the instruction was that Mr Proctor wanted the job done in the normal way.

214. There is no need for us to consider the Respondent's justification defence, but we would have found that the instruction was a proportionate way of managing the Respondent's operations, particularly when Mr Proctor had not been given any reason why the Claimant could not do what was asked of him.

Constructive dismissal

215. This is a complaint of direct discrimination relying on all three protected characteristics. No discrimination has been made out however, so that this complaint too must fail. We have nevertheless considered the necessary questions.

216. The first would have been whether acts or omissions of the Respondent were an effective cause of the Claimant's resignation. We find that they were not. The Claimant's emails of 26 and 31 July 2019 make that clear. The main issue raised in both emails was having to wait at Ponsonby's. He did refer to "one thing and another", but first of all that is just a common turn of phrase, and secondly, apart from not being given the Glasgow shift, none of the other issues on which the Claimant has relied before us – the events surrounding the cartoon, the events of 6 and 7 March 2019, his shift patterns and other comments – were raised, either in those emails or at any other time whilst he was employed. There can only be one interpretation of those emails. The reason he left was that he

had had enough of the delays at Ponsonby's. His August 2018 resignation supports that conclusion because he did not like waiting around at the Respondent's site either.

217. Secondly, was the Respondent by any of its acts or omissions in repudiatory breach of the Claimant's employment contract? On our findings of fact, the only thing the Claimant could reasonably have objected to was Mr Lucas's expressing displeasure and making clear what was required of him to avoid and report unscheduled stops in future. That would not in our judgment have been sufficient of itself to amount to a fundamental breach of contract, whether by way of undermining or destroying trust and confidence or otherwise.

218. Thirdly, did the Claimant affirm the contract? In our view he did, by delaying his departure, without in any way reserving his position based on any of the matters raised with us. He thus affirmed the contract prior to the alleged last straw of Mr Proctor's instruction, which was an entirely innocuous matter in any event.

219. Finally, did discrimination sufficiently influence the overall repudiatory breach so that any constructive dismissal would have been discriminatory? Evidently on our conclusions, it did not.

Conclusion

220. It is not necessary for us to consider any questions relating to time limits. All of the complaints fail on the grounds we have set out.

Employment Judge Faulkner
Date: 27 May 2022

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.

Schedule - The Issues

1. The issues the Tribunal was required to decide were agreed to be as set out below.

1. **Time limits**

1.1 Given the date the Claim Form was presented and the dates of Early Conciliation, any complaint about something that happened before 2 August 2019 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? In relation to any complaint that was out of time, the Tribunal was to decide:

1.2.1 Was the complaint made to the Tribunal within three months (plus Early Conciliation extension) of the act to which it relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the complaint made to the Tribunal within three months (plus Early Conciliation extension) of the end of that period?

1.2.4 If not, was the complaint made within a further period that the Tribunal thinks is just and equitable? The Tribunal was to decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Wrongful dismissal/notice pay**

2.1 The Claimant agreed that he did not wish to pursue any such complaint.

3. **Disability**

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events complained about? The Tribunal was to decide:

3.1.1 Did he have a physical or mental impairment, namely type 2 diabetes? This was agreed.

3.1.2 If so, did it have a substantial adverse effect on his ability to carry out normal day-to-day activities?

3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
3.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out normal day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal was to decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

3.1.5.2 if not, were they likely to recur?

4. **Direct disability discrimination (Equality Act 2010, section 13)**

4.1 Did the Respondent do the following things:

4.1.1 On 7 March 2019, in the person of Mr Lucas, issue the Claimant with a verbal warning for stopping at Corley Services on the M6 on or around 6 March 2019 to purchase food?

4.1.2 On 6 March 2019, in the person of Mr Hammond, call the Claimant about his stopping at the Services?

4.1.3 On 29 July 2019, in the person of Mr Proctor, instruct the Claimant to go to Birmingham and wait for an unknown period of time for stock to be loaded?

4.1.4 Constructively dismiss the Claimant on 2 August 2019?

4.2 If so, was that less favourable treatment?

The Tribunal was to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal was to decide whether he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than Mr Ball who he says did not have the Claimant's disability.

4.3 If so, was it because of disability?

5. **Direct race/religion or belief discrimination (Equality Act 2010, section 13)**

5.1 Did the Respondent do the following things:

5.1.1 In December 2018, in the person of Mr Ball, make and disseminate in the workplace a picture depicting Adolf Hitler relating to the Claimant's alleged accident at work?

5.1.2 In December 2018, in the person of Mr Ball, give a copy of the picture referred to at 5.1.1 above to the Claimant on his return from sick leave?

5.1.3 In July or August 2019, in the person of Mr Ball, make a comment "There is a Mercedes in the yard ha ha" and reference the fact that it was a German vehicle and linking it to the way Germany treated Jews?

5.1.4 In July 2019, by persons unknown, make remarks connecting gas meters that were being transported by the

Respondent with gas chambers and making references to the smell of gas?

5.1.5 In July 2019, by persons unknown, make a reference to Auschwitz and how they had "just found the gas bill from Germany"?

5.1.6 Constructively dismiss the Claimant on 2 August 2019?

5.2 If so, was that less favourable treatment?

The Tribunal was to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal was to decide whether he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than Neville Stanhope.

5.3 If so, was it because of race/religion or belief?

5.4 By the end of the Hearing the Respondent did not seek to rely on the statutory defence.

6. **Discrimination arising from disability (Equality Act 2010 section 15)**

6.1 Did the Respondent treat the Claimant unfavourably by:

6.1.1 On 7 March 2019, in the person of Mr Lucas, issuing him with a verbal warning for stopping at a service station on or around 6 March 2019?

6.1.2 On 29 July 2019, in the person of Mr Proctor, instruct him to go to Birmingham and wait for an unknown period of time for stock to be loaded?

6.2 Did the following things arise in consequence of the Claimant's disability:

6.2.1 The Claimant had to ensure he ate regularly to manage his Type 2 Diabetes?

6.3 Was the unfavourable treatment because of any of those things?

6.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

6.4.1 Ensuring drivers keep to their shift patterns.

6.4.2 Effectively managing operations.

6.5 The Tribunal was to decide in particular:

6.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims?

6.5.2 could something less discriminatory have been done instead?

6.5.3 how should the needs of the Claimant and the Respondent be balanced?

6.6 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? If so, from what date?

7. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

7.1 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? If so, from what date?

7.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

7.2.1 A requirement that the Claimant would comply with shift patterns set by the Respondent.

7.3 If so, did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

7.3.1 He was unable to take enough breaks during his shifts to stop for food.

7.3.2 He was unable to take breaks flexibly for food as and when he required

7.4 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

7.4.1 To allow more flexible working arrangements where breaks could be taken as the Claimant required them.

7.4.2 To allow the Claimant to stop for food when required without being subject to disciplinary action.

7.5 Was it reasonable for the Respondent to have to take those steps and, if so, when?

7.6 Did the Respondent fail to take those steps?

8. **Harassment related to race/religion or belief (Equality Act 2010 section 26)**

8.1 Did the Respondent do the following things:

8.1.1 The matters set out at paragraphs 5.1.1 to 5.1.5 above.

8.1.2 Refuse the claimant's request made on 18 and 22 February 2019 to Mr Lucas and Mr Proctor to transfer to the Glasgow night shift?

8.2 If so, was that unwanted conduct?

8.3 If so, did it relate to race/religion or belief?

8.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.5 If not, did it have that effect? The Tribunal was to take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. **Victimisation (Equality Act 2010 section 27)**

9.1 Did the Claimant do a protected act as follows:

9.1.1 In December 2018 make a verbal complaint to Mr Lucas about the picture referred to at paragraph 5.1.1 above?

9.2 Did the Respondent do the following things:

9.2.1 Fail to conduct an investigation following the complaint made to Mr Lucas?

9.2.2 The matters set out at paragraphs 5.1.2 to 5.1.5?

9.3 By doing so, did it subject the Claimant to a detriment?

9.4 If so, was it because the Claimant did a protected act?

9.5 If not, was it because the Respondent believed the Claimant had done, or might do, a protected act?