EMPLOYMENT TRIBUNALS

Claimant: **Mr Z Patel**

Respondent: **AECOM limited**

Heard at **Sheffield Employment Tribunal (by CVP)** **On:** **24, 25 and 26 October 2022**
3 November 2022
(in chambers)

Before: **Employment Judge Brain**
Members: **Mr P Kent**
Mr K Smith

Representation

Claimant: **In person**
Respondent: **Miss C Rooney, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. Those parts of the claimant's complaint which related to matters arising between September 2020 and January 2021 were presented to the Employment Tribunal outside the relevant time limit provided for in section 123 of the Equality Act 2010.
2. Those parts of the claimant's complaint which related to matters arising between September 2021 and January 2022 inclusive were presented to the Employment Tribunal within the relevant limitation period in section 123 of the 2010 Act.
3. It is just and equitable to extend time until 15 March 2022 to vest the Tribunal with jurisdiction to consider the issues referred to in paragraph 1.
4. The claimant's complaints that he was unfavourably treated for something arising in consequence of disability fail and stand dismissed.
5. The claimant's complaints that the respondent was in breach of the duty to make reasonable adjustments fails and stands dismissed.

6. The claimant's complaint that he was subjected to harassment related to the protected characteristic of disability fails and stands dismissed.
7. The claimant's complaints of victimisation fail and stand dismissed.
8. The complaint that the respondent made an unauthorised deduction from the claimant's wages stands dismissed.

REASONS

Introduction

1. The Tribunal heard this case over three days on 24, 25 and 26 October 2022. After we had heard each party's case and received helpful submissions from them the Tribunal reserved judgment. We now give reasons for the judgment which we have reached.
2. By way of background, the respondent is a global infrastructure consulting firm delivering professional services upon civil engineering projects. The respondent employs around 6700 employees across the UK and Ireland. The respondent's organisation is divided into four business units. These are called *"end markets"* which are assigned to a section for internal organisation purposes. Employees are assigned to an end market, each of which has its own management and team structure, budgets and HR support.
3. The claimant is employed by the respondent as an engineer. He is assigned to the civil infrastructure end market within the rail, bridges and structures section. He commenced work for the respondent on 3 April 2017 as a graduate engineer. He remains in the respondent's employment.
4. The claimant brings several complaints pursuant to the Equality Act 2010 and a compliant under the Employment Rights Act 1996. The claim arises out of events from around September 2020 to February 2022.
5. The matter benefited from a case management preliminary hearing which came before Employment Judge Rostant on 17 May 2022. He identified the issues in the case and gave case management directions. We shall consider the issues in further detail later in these reasons. The headlines are that the claimant complains that:
    5.1. He was unfavourably treated for something arising in consequence of disability.
    5.2. The respondent failed to comply with their duty to make reasonable adjustments.
    5.3. He was subjected to harassment related to disability.
    5.4. He was subjected to victimisation.
    5.5. The respondent made an unauthorised deduction from his wages.
6. The Tribunal heard evidence from the claimant. On behalf of the respondent, the Tribunal heard evidence from:
    6.1. Tony Wales. He is employed by the respondent as regional director, transportation.

6.2. David Wilkinson. He is employed by the respondent as an associate director in the rail, bridges and structures sector.

6.3. Sinead Cahill. She is employed by the respondent as an employee relations partner in the human resources department.

6.4. Greg Rutherford. He is a director of the respondent in the rail, bridges and structure sector in the civil infrastructure end market.

6.5. Stephen Baron. He is employed by the respondent as a technical director.

7. The Tribunal shall firstly make our findings of fact. We shall then go on to consider the issues in the case and the relevant law. We shall then go on to reach our conclusions by applying the relevant law to the findings of fact in order to arrive at our determinations upon the issues.

8. Before making our findings of fact, we need to record that the relevant disability for the purposes of the claimant's complaints is ulcerative colitis. The respondent accepts that the claimant has this impairment and that he meets the definition of a disabled person within the meaning of section 6 of the 2010 Act.

Findings of fact

9. As has been said, the claimant joined the respondent in April 2017 as a graduate engineer. He was interviewed for the role on 5 January 2017. The interview panel consisted of Mr Wales and Harry Coates, principal engineer in the Leeds team.

10. Mr Wales and Mr Coates were sufficiently impressed with the claimant to offer him a role. Mr Wales says in paragraph 8 of his witness statement that before the claimant started, the respondent's *"onboarding team contacted me to let me know that Zakir had indicated on his onboarding candidate information form that he had a disability as he suffered from ulcerative colitis, which I understand is an inflammatory bowel disease. I was concerned when I found out about his condition. I wanted to support him and ensure that he felt able to perform his role. I discussed the best approach with our HR team and we agreed that I would meet with Zakir when he started work to discuss his condition and whether any adjustments needed to be made to his role to support him."* Mr Wales goes on to say in paragraph 9 that part of the claimant's role involves *"some physically intensive work, including working on the weekend and at night, shift working, lifting equipment and sometimes walking long distances to and from sites."* He adds that the claimant was made aware of all the job requirements during his interview.

11. Mr Wales says in paragraph 10 of his witness statement that he met with the claimant on his first day which was 3 April 2017. The physical demands were outlined to him. Mr Wales was assured by the claimant that his condition was *"not a big issue as he only had a flare up on average once a year so it didn't affect him day to day."*

12. The Tribunal accepts Mr Wales' evidence about the claimant's recruitment and early days in his role. It is opportune perhaps now to mention that the claimant challenged very little of what was said by any of the respondent's witnesses. This is to make no criticism of the claimant. The Tribunal acknowledges that the claimant was unrepresented. Therefore, we do not hold against the claimant that a lack of challenge equates to the acceptance of the respondent's evidence (as may be the case where he had been represented by a qualified lawyer). That said, the Tribunal sets store by the fact that the claimant's witness evidence did not

advance a contrary account as to what was said by Mr Wales to the claimant when he commenced his career with the respondent.

13. The offer letter is dated 20 January 2017 (pages 101 and 102 of the bundle). The contract is in the bundle commencing at page 103.

14. The claimant was recruited to work 40 hours per week between Monday and Friday. He was based in the Leeds office. Mr Wales was his line manager until 1 July 2019. From that date, he was line managed by Mr Wilkinson. Then on 25 January 2022 his line management reverted to Mr Wales.

15. During the first seven months of his employment between April and October 2017, the claimant took 15 days of absence. The relevant documentation is at pages 148 to 161. The claimant ticked the box on the self-certificate forms to indicate that he considered the absence to be disability related. A fit note was obtained from his GP for a period of eight days of absence between 10 July 2017 and 18 July 2017 which was because of *"ulcerative colitis flare up".*

16. He was then certified as unfit for work between 18 January 2018 and 13 February 2018. The cause of his unfitness was certified by his GP as *"exacerbation of ulcerative colitis".*

17. There were intermittent absences during 2018 and then up to May 2019. Mr Wales says in his witness statement (in paragraph 11) that, *"I kept a record of his sickness absence on file (148 to 208)."* (It is perhaps unfortunate that the respondent did not create for the benefit of the Tribunal a schedule of sickness absences). Most if not all of the absences were attributable to ulcerative colitis.

18. On 19 October 2017 Mr Wales was sufficiently concerned to seek advice from the respondent's human resources department about the frequency of the claimant's absences. As Mr Wales says in his email (page 120). at that stage the claimant had had 15 sick days (including one hospitalisation for over a week which is the absence in July 2017 to which we have referred). Mr Wales says in the email that he met with the claimant on 18 October 2017. He was informed that the claimant was going to have a new trial of medication in the hope of suppressing his immune system. Mr Wales expressed concerns that the claimant's performance was *"not quite up to expected standard".* He went on to say that "*his physical condition may not be suited to this type of work (carrying equipment to site, climbing ladders, not working in the most sterile of conditions)."*

19. All of the work undertaken within the rail, bridges and structures sector by the civil infrastructure end market is for Network Rail. As Mr Wales explained in paragraph 4 of his witness statement, *"Our work on the civils assessment framework agreement (CAFA) project involves bridge inspection and assessment work."* The team undertaking this work is made up of around 50 people across multiple offices.

20. The claimant, as we have said, was recruited to work in the rail, bridges and structure sector exclusively on the CAFA projects.

21. This system of work for the CAFA team is described in some detail in paragraphs 5 and 6 of Mr Wales' witness statement. We shall not set these out in full here. Suffice it to say that, in summary, the work involves bridge inspections and then three phases of report writing once a bridge has been inspected. Mr Wales concludes (paragraph 5) by saying that the claimant has *"been involved in some*

site inspection works [but] he contributes much less to site inspections compared to other team members, mainly due to his health condition …".

22. This is because adjustments were made to the claimant's role in October 2017. It was agreed that he was to carry out a reduced number of site inspections and instead to focus on the office base aspects of the role. As Mr Wales says in paragraph 11 of his witness statement this *"included preparing interim and draft reports for structures which had been inspected by other personnel in the team."*

23. Miss Cahill explains in paragraphs 13 and 14 of her witness statement that the respondent's attendance management policy (at pages 849 to 860) contains a trigger point after which action may be taken against an employee who has five separate occasions of sickness absence within a 12 month rolling period. No action has been taken by the respondent against the claimant pursuant to the attendance management policy.

24. In February 2018, the claimant was registered with the Institution of Civil Engineers upon the ICE training scheme. Details of the scheme are to be found in the literature within the bundle at pages 884 to 920. Mr Wales says in paragraph 14 of his witness statement that the respondent *"expects that its graduate engineers will take part in this so they can work towards chartered status. Nearly all of AECOM's graduate engineers are on the ICE training agreement."* Mr Wales sets out in paragraph 14 the requirements of the scheme. This entails uploading evidence of professional development coupled with the preparation of a yearly development action plan. Mr Wales said that he never received any evidence from him of progress towards the claimant's ICE training. The claimant accepted this to be the case during evidence given under cross-examination. Indeed, matters culminated in Mr Wilkinson agreeing with the ICE regional co-ordinator that he (Mr Wilkinson) would complete *"a partial completion certificate"* for the ICE training. Mr Wilkinson informed the claimant on 11 November 2021 that he would need to contact the respondent should he wish to re-commence and conclude the training agreement. The relevant email is at pages 685 and 686.

25. Notwithstanding the issues around the ICE training, the claimant performed well at work such that he was rated *"strong"* in 2019 and thus eligible for a salary increase. We refer to paragraph 16 of Sinead Cahill's witness statement.

26. Mr Wales gave evidence in paragraph 12 of his witness statement that performance concerns had in fact been raised with him in February 2018. He was informed of issues by Mr Coates. It will be recalled that in October 2017 Mr Wales had before that expressed some concern about the claimant's performance. There was no evidence that any informal (let alone formal) action taken against the claimant by the respondent around the performance concerns of Mr Wales and Mr Coates in late 2017 or early 2018. That no such action was required is demonstrated by the *"strong"* performance rating which the claimant achieved in 2019. (We should say that the respondent's performance year runs from 1 October to 30 September).

27. From July 2020, the engineers in the Leeds CFA team were required to provide weekly updates on an online progress tracker. Mr Coates introduced this initiative in an email sent around on 9 July 2020. The claimant was included in the circulation (which was addressed to **"***Bridge Lovers***"**). Mr Coates said that he, Colin Freeburn, a senior engineer in the team and Andy Duff (another senior engineer) were having difficulties keeping up to date with individual progress on work allocations. He said that, *"From now on we propose that every Thursday*

afternoon an email will be circulated prompting a response detailing a % completion for each allocated work item you have. We will then be able to better plan when items will require checking and also when you will be requiring additional work." The employers were then given guidance as to how to complete the percentages.

28. Mr Wales explained in paragraph 6 of his witness statement that the claimant and other engineers of the team were allocated their work by email. This was known as an *"allocation email"*. Miss Rooney accepted that the system of allocation emails did not in fact start until December 2020. She also conceded that within the bundle there was no evidence that deadlines were set for the completion of work albeit that there was an expectation upon employees that they would progress projects with reasonable expedition.

29. That there was such an expectation was evidenced by Mr Wales in paragraph 23 of his witness statement. The claimant also fairly accepted during cross-examination that the projects were subjected to deadlines albeit no specific deadlines were communicated to him. Miss Rooney fairly accepted on behalf of the respondent that there was a lack of clarity upon the issue of deadlines. She also prayed in aid the material at page 387 of the bundle. This was part of an investigation report prepared by Mr Wilkinson. As we shall see, this was undertaken by him in advance of a disciplinary hearing involving the claimant which took place on 11 December 2020. There is an acknowledgement within page 387 (being the claimant's input into Mr Wilkinson's investigation) of the existence of a deadline for a particular piece of work.

30. When she had the opportunity of re-examining him, Miss Rooney asked Mr Wales about the issue of deadlines. He said that the task list of structures is obtained from Network Rail in January of each year. From that, the respondent works out their programme. He said that there are *"no hard and fast programme for Network Rail until September."*

31. Mr Wilkinson was asked about this issue by the Tribunal. Mr Wilkinson said that, *"each job has a budget and deadline. The claimant would know that. Managers need to impose internal deadlines to move the project on."*

32. From all of this, the Tribunal concludes that there is no evidence that the claimant was told about specific deadlines for specific projects. However, we accept the respondent's case and evidence that there was a general awareness amongst the civil engineers to progress matters. It would of course be untenable to suggest that matters could be left indefinitely, and projects allowed to proceed at a snail's pace.

33. At around the time of the introduction of the online progress tracker, Mr Wilkinson became the claimant's line manager. He took over this role on 1 July 2019 (as we have seen). Mr Wilkinson says, in paragraph 11 of his witness statement, that he was aware of the claimant's medical condition. He acknowledges in paragraph 12 that adjustments had been made for the claimant to do a reduced number of site inspections and that the claimant's role was primarily office based. Mr Wilkinson said (in paragraph 11) that the claimant *"very rarely mentioned his condition to me, usually only when he was returning to work from sickness absence, and he would only provide limited information. When he was at work, I was not aware that he was affected by his condition, and he did not mention this."*

34. On 9 September 2020, the claimant submitted a formal flexible working request. He sought to reduce his working hours from eight hours a day, 40 hours a week to four hours a day, 20 hours a week. This was approved by the respondent. The arrangement came into effect from 14 September 2020. The flexible working request is at pages 236 and 237 of the bundle. The respondent's letter recording the new arrangements may be found at pages 238 and 239. We can see from the latter document that the claimant was required to work four hours each day between Monday and Friday inclusive. The arrangement was to be for a period of six months from 14 September 2020. In the event, the claimant (with the respondent's consent) continued to work 20 hours per week until 11 October 2021.

35. The claimant was not required to work set hours each day. The expectation was that the claimant would inform Mr Wilkinson when he started work each day so that the rest of the team would know of the claimant's availability. The claimant fairly accepted in cross-examination that his reduced hours increased the burden upon others in the team. He recognised the efforts made by the respondent to balance his needs and theirs.

36. In March 2020, of course, the coronavirus pandemic broke out in the UK. The claimant gave unchallenged evidence in paragraph 2 of his witness statement that, *"At the start of March 2020 Covid-19 lockdowns were introduced. I had to go into isolation due to my condition which required me to take immunosuppressant medication. I received a letter from the NHS requiring me to shield myself. I was isolated from family and friends, this made my condition worse and caused negative implications to my mental health. I lost family during that period and again causing me to spiral downwards. I decided I had to reduce my hours to mitigate stress and work (please see bundle – pages 236 to 239). I needed to focus on improving my health due to my disability. I planned to reduce for six months or until my health improved."*

37. During the early autumn of 2020, complaints were received by Mr Wilkinson from Mr Coates and Mr Freeburn. Mr Coates told Mr Wilkinson that he had spoken to the claimant on 23 September 2020. There was concern on Mr Coates' part about a lack of progress upon two projects upon which the claimant was working. Further, the claimant had offered no explanation for the lack of progress.

38. Mr Freeburn had asked the claimant for some drawings on a project on 24 July 2020. The claimant replied that he would have them ready during the course of the next week. Mr Freeburn had replied that there "*was no rush".* Mr Freeburn then chased the claimant on 11 August 2020 and again on 26 August 2020. No progress had been made.

39. On 24 September 2020 Mr Coates sent to Mr Wilkinson email correspondence about the claimant about the lack of progress on two projects. We refer to page 276.

40. On 24 September 2020, Mr Freeburn sent to Mr Wilkinson evidence that the claimant was failing to update the online progress tracker. Mr Freeburn was also concerned, having reviewed the claimant's work, that the claimant was overestimating the percentage of the project which had been completed and recorded upon the tracker. This plainly begged the question as to what the claimant was doing as the number of recorded hours did not match progress upon the projects. The relevant documentation pertaining Mr Freeburn's concerns may be found at pages 269 and 270 of the bundle.

41. In evidence given under cross-examination, the claimant acknowledged that the respondent had legitimate concerns about his performance. He acknowledged that the respondent was not chasing him each day for a progress report. This was an appropriate concession from the claimant. Indeed, Mr Freeburn's timeline demonstrates this as the claimant was not chased after 24 July 2020 until 11 August 2020 and, as we saw in paragraph 38, he was assured that there was no rush upon the former date.

42. The claimant said that he had spoken to Mr Coates upon a regular basis to give him updates. We agree with Miss Rooney when she suggested that the claimant was unlikely to pick up the phone and speak to such a senior figure within the organisation upon receipt of an email. We also consider it against the probabilities that such senior figures as Mr Coates and Mr Freeburn would omit mention of the claimant regularly speaking to them in their reports to Mr Wilkinson if that were the case.

43. Further, the claimant said (both in his printed witness statement and in evidence given under cross-examination) that he, unfortunately, was becoming withdrawn and isolated from others. He said in evidence under cross-examination that at around this time he "*wasn't really speaking to anyone".* He acknowledged that he was not making good progress at work at around this time but was doing what he could. Given his acknowledgement (in his evidence in chief in his witness statement) that he had withdrawn from family and friends we consider it against the probabilities that he would proactively communicate with senior figures within the respondent. There was nothing in his witness statement that he was regularly speaking with Mr Coates.

44. We accept the respondent was not unsympathetic to the claimant. We find the respondent allowed the claimant some latitude. The Tribunal has every sympathy for the claimant who doubtless was experiencing a difficult time during the pandemic given his need to shield. Nonetheless, as the claimant himself accepted, the respondent harboured legitimate concerns in the autumn of 2020 such as to warrant the taking of action. Accordingly, Mr Wilkinson invited the claimant to an informal meeting to discuss the concerns which had been raised. This was held on 24 September 2020. The meeting was held on Microsoft Teams.

45. It was agreed at the meeting that the claimant would send to Mr Wilkinson a daily update in the morning if he was going to work that day setting out his plans and then would send an email in the evening updating him as to progress. This arrangement became known as the *"AM/PM emails".* Mr Wilkinson suggested that the claimant should email by 9.30 in the morning and before 6 o'clock in the evening.

46. Mr Wilkinson acknowledges in paragraph 32 of his witness statement that the claimant did operate the AM/PM email system. However, on a number of occasions the morning emails were sent after 9.30am. Mr Wilkinson gives a number of examples of these in paragraph 32 of his witness statement. He also observed with some justification that the communication from the claimant was brief. The examples which we see give a minimum amount of information as to what the claimant was doing. The respondent took no action against the claimant when he failed to send an email by 9.30 in the morning. The claimant acknowledged that the respondent allowed some flexibility in the reporting requirements.

47. In addition to the AM/PM emails, Mr Wilkinson reiterated to the claimant that the latest iteration of project documentation upon which he was working should be saved on to the SharePoint site at the close of each day. These arrangements were to pertain until 9 October 2020 at the earliest.

48. The respondent did not seek medical advice from occupational health (or any other medical advisor) at this stage. This may be thought surprising given the knowledge of the claimant's two line managers and other senior managers of the claimant's condition which had, up to the autumn of 2020, required the adjustments to the claimant's working hours and duties and had led to significant periods of absence.

49. In the claimant's annual performance review for the performance year ended 30 September 2020 (in the bundle commencing at page 306), Mr Wilkinson noted the informal performance meeting of 24 September 2020 and that this had resulted from a deterioration in his performance encompassing a lack of progress upon the projects being worked upon. Mr Wilkinson acknowledged the claimant's health issues before going on to observe that the claimant *"needs to significantly improve his communication skills and I believe this is at the root of his lack of performance".* There was room on the form for the employee's comment. The claimant fairly acknowledged (at page 310) the need to improve upon his communication and collaboration skills *"by being more verbal and in contact with the team in general and support in the graduates."* The claimant was rated by Mr Wilkinson as *"underperforming".* This precluded him from enjoying a salary increase although in the event (with a few exceptions) nobody received a pay rise anyway because of the economic impact of the pandemic.

50. Mr Wilkinson directed the claimant to continue with the practice of sending the AM/PM emails. We refer to the instructions of 12 October and 29 October 2020 (pages 356). The claimant gave evidence in paragraphs 4 and 5 of his witness statement that around this time he was suffering from flare ups. This rendered it difficult for him to communicate in the morning.

51. Regrettably, there continued to be concerns about the claimant's performance. On 3 November 2020 Mr Coates emailed Mr Wilkinson (page 315). He said that Mr Freeburn had asked the claimant to upload all of his work on to the SharePoint. The work was reviewed by Mr Freeburn. He noted that 36 hours had been booked upon one particular project but with very little evidence of work to show for it. Mr Coates spoke to the claimant. He reported to Mr Wilkinson that the claimant told him that he was working slowly. The claimant attributed the slow pace of his work to the fact that he was struggling with his work and also with his health. He acknowledged the need *"to communicate more and improve on that."* Mr Coates informed Mr Wilkinson that the situation was *"not good".* He went on to say that *"we can't be having someone that is not producing, not communicating, but having a major financial impact on our deliverables."*

52. Mr Freeburn reported in a similar vein to Mr Wilkinson (page 317). Mr Freeburn observed that communication was *"minimal"* aside from the AM/PM emails. Mr Freeburn informed the claimant (also on 3 November 2020) that the respondent expected better communication. He said that, "*at the very minimum we would expect a bit more detail as to the exact work you've completed each day, and it will be helpful if you confirm that it is due to illness that you're not working a particular day, rather than having us assume."* We refer to page 514.

53. In consultation with Sinead Cahill it was resolved that Mr Wilkinson would conduct an investigation in order to determine whether disciplinary action was needed and

whether the capability procedure also needed to be followed. There was some discussion between Mr Wilkinson and Miss Cahill as to whether the situation was a conduct issue (that the claimant was not prepared to do the work) or a capability issue (that the claimant could not do so). Mr Wilkinson expressed the view that this was a conduct issue. We refer to paragraph 44 of his witness statement.

54. Miss Cahill says in paragraph 19 of her witness statement that Mr Wilkinson told her that the claimant *"is perfectly capable of performing his job; instead it seemed that the issues stemmed from the fact that he was not making the effort to communicate with his team or with him. I explained that the next step in the disciplinary procedure would be to carry out an investigation into the issues. I suggested that, as part of this, Dave should investigate whether there were also performance issues; if so, both the disciplinary and capability procedure could be followed.*

55. It is difficult to see how conduct and capability may be divorce in circumstances where there was an underlying health condition such as to warrant both the conduct and a capability process. In practical terms, the Tribunal wonders how the two processes would have run along side by side. Again, it is perhaps unfortunate that the respondent did not seek occupational health advice at this stage.

56. Be that as it may, Mr Wilkinson proceeded with his investigation. He obtained statements from Mr Freeburn, Mr Coates and Mr Duff. These are at pages 361 to 383.

57. Mr Duff says (at page 361) that at the outset he was made aware of the claimant's ongoing health issues. He then goes into some detail about his concerns around the claimant's performance and in particular lack of communication. He acknowledges there to have been some improvement after the informal warning whereupon matters then deteriorated. He acknowledged the claimant's abilities. (We should point out that no one within the respondent questioned the claimant's competence as an engineer or the quality of his work).

58. A detailed analysis of the work progress tracker was prepared by Mr Freeburn (commencing at page 364). Mr Freeburn updated his analysis of 24 September 2020 on 19 November 2020. His conclusions were in much the same vein. Following that analysis, Mr Coates wrote a report on 20 November 2020 offering the opinion that only around 5% (as opposed to the claimant's estimate of 35%) of one of the projects had been completed.

59. The claimant was interviewed as part of Mr Wilkinson's investigation on 24 November 2020. The allegation put to the claimant related to *"consistent lack of performance over recent months when assessed against what would be expected of an engineer with Zakir's experience."* Mr Wilkinson referred the claimant to the fact that he had received evidence from Mr Coates, Mr Freeburn and Mr Duff. The contents of their statements were discussed with the claimant. (It is not clear whether the claimant was given copies of them at this stage). The claimant was invited to submit his own statement to aid Mr Wilkinson's investigation.

60. Mr Wilkinson recorded (at page 386) that it was tentatively agreed to move away from the claimant being able to work four hours a day whenever he could to a work pattern of either 12 noon to 4 o'clock pm or 10 o'clock am to 2 o'clock pm Monday to Friday. Following the meeting, a 12 noon to 4pm work pattern was agreed upon.

61. The claimant's statement is at pages 387 to 395. The claimant went through the projects in some detail. Mr Wilkinson says in paragraph 47 of his witness statement that the claimant "*failed to provide any explanation for the issues, and he did not state that his medical condition was having an effect on his performance."* This is an observation well made as the claimant's focus was entirely upon the progress of the projects.

62. Mr Wilkinson concluded that the issues warranted disciplinary action and they related to the claimant's conduct and not capability. As we have seen, this was a conclusion reached without medical input from occupational health.

63. Mr Wales was asked by Mr Rutherford to chair the disciplinary process. The disciplinary hearing was held on 11 December 2020. The allegation in the letter convening the disciplinary hearing (at pages 359 and 360) was *"general poor conduct to work in recent months."* Mr Wilkinson's investigation report was sent to the claimant. We infer from this that the statements from the three managers were sent to the claimant at this stage. The claimant did not say in evidence before us that he had not got them when the disciplinary hearing took place.

64. The claimant was informed of his right to be accompanied. He was told that the outcome could be disciplinary action up to and including a final written warning.

65. The hearing notes are at pages 399 to 404.

66. Mr Wales asked the claimant whether there was any reason as to why his conduct and performance had deteriorated. The claimant responded that, *"his health problems, lockdown and shielding has made his health really bad."* The claimant observed that he had mentioned his health problems to Mr Wilkinson at the investigation meeting of 24 November 2020. The claimant acknowledged that the underlying issue was lack of communication.

67. Mr Wales considered matters and decided that the appropriate sanction was a first written warning. He sent a letter to this effect to the claimant on 18 December 2020. The letter is at pages 396 to 398.

68. The claimant was warned of the need to improve his communication. The claimant was assured that while regular and core hours were to be worked, Mr Wilkinson would be willing to be flexible. Mr Wales acknowledged in his decision that in mitigation the claimant had advanced his health concerns and the need for him to work remotely during the pandemic. Upon that issue, Mr Wales invited the claimant to consent to a referral to occupational health. The first written warning was to remain upon the claimant's file for a period of six months. The claimant was given the right of appeal.

69. While acknowledging that this is not, of course, an unfair dismissal complaint, the Tribunal observes that Mr Wales' finding that the claimant's performance was deficient primarily because of a lack of communication was plainly one which he was entitled to reach. The evidence from the three senior managers was compelling.

70. The claimant appealed against Mr Wales' disciplinary decision. The notice of appeal is dated 24 December 2020 and is at pages 426 to 429.

71. The claimant's first ground of appeal was that there were no *"SMART"* targets. SMART stands for *"specific, measurable, achievable, realistic, timed."* We have already observed that there is a paucity of evidence of specific deadlines being given to the claimant. Against that, as we have said, it is untenable for the claimant

to suggest that he was unaware of the commercial imperatives to progress the work on behalf of National Rail.

72. The claimant also complained that there was no consideration of his disability. He said, with justification, that there had been no occupational health referral. He noted that the respondent's management were well aware of his disability which has been highlighted on the sickness absence self-certification forms.

73. The appeal was dealt with by Mr Rutherford. In paragraph 6 of his witness statement, Mr Rutherford says that he was aware of the claimant's disability because Mr Wales had discussed the issue with him after he (Mr Wales) had been alerted by the onboarding team of it at the outset of the claimant's employment. He also mentions in paragraph 7 that Mr Wales assured him that the claimant had said that the condition flared up around once a year and should not present an issue with his work. This is what the claimant had said as we recorded in paragraph 11. Mr Rutherford also says (in paragraph 8 of his witness statement) that he was aware of the conduct issues which arose in the autumn of 2020.

74. The appeal hearing took place on 20 January 2021. The notes of it are at pages 487 to 489.

75. The notes record that the claimant indicated that the principal reason for his appeal was the failure to obtain occupational health advice. Upon the issue of SMART objectives, Mr Rutherford said (at pages 487 and 488) that, "*the key point is that communication is one of the main issues and this is related to conduct not capability. The time taken to complete a task is also a factor."* Mr Rutherford acknowledged the claimant's health conditions but said (at page 489) that *"there are still reasonable standards that we would expect in relation to any individual's conduct at work. When you are fit for work we would expect you to show the work ethic and commitment to work that would be reasonably expected."* He again noted that "*the process was implemented largely due to poor communication."* The claimant maintained that before going to a disciplinary hearing, other alternatives (such as training) ought to have been considered. Mr Rutherford fairly acknowledged that the quality of the claimant's work is good.

76. Mr Rutherford took time for deliberations. He decided to uphold the disciplinary decision to issue the claimant with a first written warning. He wrote to the claimant on 27 January 2021 to this effect (pages 485 and 486). He said that the written warning had been issued *"under the disciplinary policy as the issues were related to your conduct, as opposed to your capability."* He said that "*as the issues are conduct related, I can accept and appreciate why an occupational health referral was not arranged prior to the investigation. However, if the issues related to capability, a referral to occupational health, prior to a formal process, may have been appropriate."*

77. Mr Rutherford said that no SMART objectives were set because the disciplinary *"was related to your conduct as opposed to your capability or quality of work."* That said, Mr Rutherford observed that the disciplinary outcome letter had outlined the need for an improvement in the claimant's conduct and commitment. Mr Rutherford acknowledged the claimant's health conditions and determined that Mr Wales had taken account of this mitigation in issuing a first written warning as opposed to a more serious sanction. The importance of communication was emphasised by Mr Rutherford.

78. The practice of sending the AM/PM emails continued. The claimant received instructions to this effect on 18 January 2021 and 24 February 2021 (page 632). Mr Wilkinson subsequently instructed the claimant that this practice may discontinue on 8 April 2021 (also at page 632).

79. The occupational health report is dated 3 February 2021. It was authored by Nicola King, occupational health advisor and is at pages 490 to 493. This is a thorough and helpful report.

80. The report was prepared following a telephone assessment of the claimant on 1 February 2021. Ms King gives a brief description of ulcerative colitis. She reported upon his current treatment which rendered him extremely clinical vulnerable hence the advice for him to shield.

81. She then says in the fourth paragraph on page 491 that, *"Mr Patel reported difficulties relating to his condition and flare up which he attributed to stress which started during the pandemic lockdown in March 2020 due to having to shield and concerns around his health. He reported going through increased flare ups with his medication not being as effective. He reported increased difficulties coping with his workload increasing his stress."* She goes on to say in the next paragraph that the claimant, *"reported the support over reducing his working hours from 40 hours per week to 20 had been helpful from September 2020. He also reported being able to work flexible hours during the day, as his symptoms tend to be more acute early morning and late afternoon/evening and more difficult to manage if working."* She then said that the claimant reported further stress *"in November 2020 following disciplinary procedures at work. [The claimant] tells me that he is currently at work but suffering increased fatigue and breakthrough symptoms, making it difficult to adhere to deadlines for his work."* He was due to see a gastroenterologist for further advice in the near future.

82. Ms King opined that the claimant's condition would meet the definition of disability for the purposes of the 2010 Act. She then said that he was fit for work with the current support and the ability to work from home. She recommended *"temporary adjustments".* These were:

    82.1. Ongoing shielding and working from home unless the government guidelines change.

    82.2. Flexible working hours during the day pending further specialist opinion.

    82.3. An extension to deadlines during the working day with a review of these once the claimant is back in remission. Such may help to reduce stress and encourage his recovery.

    82.4. Reducing the need for him to travel to sites until his flare ups settle.

    82.5. Providing support with carrying equipment to site.

83. Ms King then said that given the long term nature of the claimant's condition and the unpredictable flare ups, it is likely that his disability would impact on his ability to provide regular attendance in the future. She recommended taking this into account when considering the management of sickness absence. Finally, she said that no review had been planned *"as there is no further advice or onwards referral I could identify as needed at this stage."*

84. Upon receipt of the occupational health report, Mr Wilkinson and Miss Cahill arranged a meeting with the claimant. This took place by Teams on 6 April 2021.

Mr Wilkinson observed in paragraph 55 of his witness statement that happily the claimant's health was improving. He (the claimant) was happy with the current arrangements of starting at 12 noon. The claimant also broached the possibility of reverting to his contractual working time of 40 hours a week.

85. In paragraph 18 of his witness statement, the claimant says that he found it disheartening that a meeting such as that which took place on 6 April 2021 had not been arranged sooner.

86. There is a note of the meeting in Miss Cahill's handwriting at page 631. This is corroborative of the claimant and Mr Wilkinson's evidence that the meeting was positive, that the claimant wanted to increase his hours back to 40 per week and was content with his 12 noon starts in the interim. It was also confirmed that the AM/PM reporting requirements may cease. As we have seen, Mr Wilkinson emailed the claimant to this effect a couple of days later.

87. No further performance issues arose while the first written warning imposed by Mr Wales was live. As the claimant puts it in paragraph 20 of his witness statement, *"the six months embargo finished in June 2021".*

88. The claimant then underwent his 2021 performance review. This took place on 29 September 2021. Mr Wilkinson rated the claimant as underperforming. It is plain from the claimant's evidence in paragraph 21 of his witness statement that he was very disappointed to receive an underperformance rating.

89. In paragraph 59 of Mr Wilkinson's witness statement, he says that he had received verbal reports from Mr Freeburn, Mr Coates and Mr Duff that there were still communication issues and missed deadlines. Mr Wilkinson relied upon his own experiences of dealing with the claimant. He says in paragraph 60 of his witness statement that the claimant "*was still failing to contact me unless I emailed him first. He would notify me when he was unable to work due to sickness, but that was it. In addition, he still had not made any progress with his ICE training."*

90. The performance review is at pages 659 to 661. Matters were compounded by the fact that the claimant had failed to complete his appraisal document. We can see gaps under the *"goal review"* section of the performance review form at pages 659 -661 and where Mr Wilkinson observes there that it is difficult for him to make an assessment without comment from the claimant (which appears not to have been forthcoming).

91. On 11 October 2021 it was confirmed that the claimant may increase his working hours from 20 to 30 per week. Although the claimant had broached the issue of increasing his hours to 40 per week in April 2021, no action was in fact taken until October. He was to work six hours per day between Monday and Friday inclusive. The confirmation letter is at pages 663 and 664.

92. Miss Cahill was concerned that the claimant had been rated as underperforming for two consecutive years. She discussed the matter with Mr Wilkinson on 3 November 2021. It was resolved to put the claimant on a Performance Improvement Plan (known as a *"PIP"*).

93. After this decision was taken, Mr Wilkinson in fact received notice on 23 November 2021 (pages 695 and 696) from Mr Freeburn of further concerns with progress upon a project upon which the claimant was working. He was concerned about excessive time taken by the claimant in relation to a particular bridge

project and the failure to provide regular updates The claimant was also asked for a progress report upon another project which had been on his desk from 5 October 2021. On 12 November 2021 (page 684) Mr Freeburn informed Mr Wilkinson that the claimant appeared to have *"achieved very little".* Mr Freeburn then carried out a comprehensive analysis upon the claimant's project forwarding a summary (in tabular form) to Mr Wilkinson on 30 November 2021 (pages 714 to 716). In summary, this raised concerns about the number of hours being spent by the claimant upon projects, the accountability of the claimant for the hours apparently expended and, once again, communication issues.

94. Mr Wilkinson informed the claimant that he was going to be placed upon a PIP. The claimant was aggrieved by Mr Wilkinson's decision and emailed him to this effect on 15 November 2021 (pages 688 and 689).

95. Mr Wilkinson then arranged to meet with the claimant to discuss the PIP. This meeting took place on 25 November 2021. Mr Duff and Mr Wilkinson met with the claimant. The PIP is at pages 712 to 713. It was dated 25 November 2021 and was scheduled to last for four weeks until 23 December 2021. The performance improvement objectives, required outcomes and strategies was set out in the plan.

96. One strategy was for the claimant to come into the office in Leeds. Mr Wilkinson's view was that the claimant ought to come into the office upon each working day following the easing of government restrictions and given that the claimant was no longer required to shield. This proved to be a contentious suggestion. Mr Wilkinson's evidence in paragraph 78 of his witness statement is that the claimant said at the meeting that attending the office five days a week would be difficult due to his health. The claimant suggested coming into the office for three days a week. This was because his condition was unpredictable. Mr Wilkinson made the astute observation that it was difficult to see how he could commit to coming in three days a week and not five if the condition was unpredictable. The parties compromised with the claimant agreeing to attend the office four days a week.

97. The claimant protested shortly afterwards that he was still anxious about coming to the office for the full four days a week. We refer to his email of 29 November 2021 at page 711.

98. In paragraph 26 of the claimant's witness statement he gave unchallenged evidence that, *"On 29 November 2021 I received an email with the attached PIP (please see bundle – pages 709 to 710). I sent a reply on the same day refusing to sign the PIP, I acknowledged the receipt of the PIP and wrote that I would follow the PIP except for coming into the office four days a week without flexibility. After the PIP meeting Covid-19 Omicron variant was prevalent which caused me more stress and anxiety. I was immunocompromised due to my medication. With fear of insubordination for not following the PIP I attended the office four days a week."*

99. The claimant also complains, in paragraph 25 of his witness statement, that he found it *"quite degrading to explain how my disability would prevent me from attending the office in detail to my manager and with Andy Duff present. My occupational health details were available to my manager which appeared to have been dismissed and ignored."* The claimant accepted in cross-examination that Mr Wilkinson and Mr Duff had asked him no more intrusive questions about

his condition than had Miss Rooney in the early part of her cross-examination of the claimant on the first day of the hearing.

100. We can accept the claimant may have felt some pressure to agree to go into the office four days a week. While the claimant did agree to this, it is plain from the contemporaneous email at page 711 that he did so reluctantly. Further, he in fact refused to sign the PIP (indicative of reticence) although he did say on 30 November 2021 that he would work towards *"the objectives on the PIP which I believe are reasonable and proportionate."* We refer to page 717.

101. On 30 November 2021, the claimant submitted a grievance to the respondent about Mr Wilkinson. This is in the bundle commencing at page 723. The headlines are that the claimant complained about disability discrimination, bullying, victimisation, harassment and the performance related pay process and evaluation.

102. Mr Wilkinson said that he was surprised, upset and stressed to be informed that a grievance had been issued against him. He says in paragraph 81 of his witness statement that, *"I felt that I'd given Zakir a lot of time, energy and help and felt that his allegations were completely unjustified."*

103. Mr Baron was appointed to hear the grievance. He met with the claimant (by Teams) on 6 December 2021. The notes of the meeting are in the bundle commencing at page 780. He informed Mr Baron of the ulcerative colitis and the effect upon him. He said that he had informed Mr Wilkinson of his condition in 2019. This appears not to be in dispute (Mr Wilkinson says so in paragraph 11 of his witness statement). The claimant said that his condition makes him feel fatigued and impacts upon him particularly in the mornings. He complained that there ought to have been an occupational health referral *"before I got punished".* By this, the claimant presumably was referring to the issue of the first written warning by Mr Wales. The claimant also complained that following the issue of the PIP he had lost the flexibility to work from home.

104. Mr Baron then met with Mr Wilkinson on 8 December 2021 (pages 752 to 756). During the meeting Mr Wilkinson suggested that it may be better if he no longer acted as the claimant's line manager. As we know, Mr Wales reverted to that role with effect from 25 January 2022.

105. Mr Baron decided that the claimant's grievance about disability discrimination, bullying, victimisation and harassment should be rejected. He concluded that there was no *"written or oral evidence of any incident or example which supported these allegations."*

106. However, Mr Baron considered there to be shortcomings on both sides around the reviews of the claimant's performance between June 2021 and November 2021. He therefore recommended that the 2021 performance review should be re-opened and there be a review of the PIP. Mr Baron noted that the claimant had been rated as strong in 2019 and this was followed by two underperforming ratings which caused him concern. There was also good evidence of underperformance until June 2021 but then a gap in the evidence until October 2021. This accords with the material in the Tribunal's bundle. There is little (if any) evidence of underperformance following the meeting of 6 April 2021 until performance issues appear to be resurrected by senior management around the end of October 2021 (see for example the contemporaneous emails around page 665 *etc* of the bundle).

107. The grievance outcome was sent to the claimant on 14 December 2021 (pages 831 to 838).

108. The remitted performance review meeting was held on 13 January 2022. Again, this was by Teams and was attended by the claimant, Mr Wilkinson and Mr Duff. Mr Wilkinson maintained the underperforming rating. Mr Wilkinson explained his reasoning for this at a further meeting held on 24 January 2022 (pages 861 to 862).

109. The PIP had been extended beyond 23 December 2021. Mr Wales further extended it when he took over the claimant's line management. The PIP ended on 19 May 2022. Mr Wales still entertained concerns about the claimant's lack of communication, poor time management and self-checking. Mr Wales emailed the claimant to this effect on 19 May 2022 (pages 881 to 883). Mr Wales rated the claimant as underperforming for the performance year ending 30 September 2022. He issued another PIP on 23 September 2022 (pages 923A to 923C). Again, the issue of engagement and communication with the team needed to be improved. This concludes our findings of fact.

The issues in the case

110. These were identified by Employment Judge Rostant at the case management hearing which was held on 17 May 2022. The following are the issues in the case: (here, we recite from Employment Judge Rostant's case management order).

"The claimant is making a number of complaints as detailed 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 3 November 2021 may not have been brought in time.

1.2 Were the discrimination and harassment claims made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will 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. *Disability*

2.1 The respondent confirms that it accepts that the claimant has the impairment of ulcerative colitis and that as a result he meets the definition of a person with a disability for the purposes of the Equality Act.

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

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Giving the claimant a written warning.
3.1.2 Rating the claimant as underperforming in September 2021 with a consequent effect on his pay (no end of year pay rise).

3.2 Did the following things arise in consequence of the claimant's disability:

3.2.1 The performance shortcomings relied on by the respondent's manager in giving the warning.
3.2.2 The performance shortcomings relied upon in rating the claimant as underperforming

3.3 The warning and the adverse rating were for poor performance.

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

3.5 The Tribunal will decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims.

3.5.2 could something less discriminatory have been done instead.

3.5.3 how should the needs of the claimant and the respondent be balanced?

3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

4.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

4.2.1 At the informal meeting of September 2020 requiring the claimant to communicate with his manger early in the morning as to what work he would be doing and when he would be starting that day.

At the formal meeting on 24 November and then by outcome of a formal warning-

4.2.2 Requiring the staff to comply with work deadlines.

4.2.3 Requiring the claimant to work his agreed reduced hours evenly spaced throughout the week (four hours per day) and at set hours.

4.2.4 Requiring staff enrolled on the ICE scheme to make progress towards completion.

4.2.5 Requiring proper communication between staff and colleagues and management.

As part of the PIP imposed in September 2021

4.2.6 Requiring the claimant to attend the office on 5 days a week

4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

4.3.1 For 4.2.1 the claimant's illness was always worse in the morning and this requirement meant that he needed to rise earlier then he felt able to?

4.3.2 For 4.2.2 the unpredictable nature of the claimant's illness made it difficult for him to meet deadlines.

4.3.3 For 4.2.3 the claimant's fluctuating condition made it hard for him to work with the regularity required.

4.3.4 For 4.2.4 the claimant's illness had prevented him from undertaking any training.

4.3.5 For 4.2.5 although the claimant was criticised for poor communication he does not say that his illness prevented or hindered his communication other than his ability to send the early email set out above.

4.3.6 For 4.2.6 the claimant's condition means that he is immunosuppressed and the risk to him of attending the office was greater than for those without a disability

4.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

4.5.1 For 4.2.1 not imposing that condition and instead permitting the claimant to communicate his work as and when he felt fit to.

4.5.2 For 4.2.2, extending deadlines to take into account the claimant's illness

4.5.3 For 4.2.3 permitting the claimant to work 20 hours per week in any pattern that suited his condition in a particular week.

4.5.4 For 4.2.4 relaxing the requirement on the claimant to make progress on ICE until his condition improved.
4.5.5 See 4.5.1
4.5.6 For 4.2.6 permitting the claimant to remain working from home

4.6 Was it reasonable for the respondent to have to take those steps?

4.7 Did the respondent fail to take those steps?

5. *Harassment related to disability (Equality Act 2010 section 26)*

5.1 Did the respondent do the following things:

5.1.1 Require the claimant at a meeting with his manager and a colleague on 25 November 2021 to explain the nature of his condition in detail when both were in possession of an Occupational Health Report containing all the details.

5.2 If so, was that unwanted conduct?

5.3 The conduct clearly related to the claimant's disability

5.4 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?

5.5 If not, did it have that effect? The Tribunal will 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.

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

6.1 The respondent accepts that on 30 November 2021 the claimant submitted a grievance alleging that he had suffered discrimination because of his disability. The respondent concedes that that was a protected act.

6.2 The respondent accepts that it did the following things:

6.2.1 On 24 January 2022, rating the claimant as underperforming.
6.2.2 On 1 February 2022 extending the claimant's PIP.

6.3 By doing so, did it subject the claimant to detriment?

6.4 If so, was it because the claimant did a protected act?

7. *Remedy for discrimination or victimisation*

7.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the claimant?

7.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? [We observe that this is inapplicable in this case as the claimant remains employed by the respondent].

7.4 If not, for what period of loss should the claimant be compensated?

7.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the respondent or the claimant unreasonably fail to comply with it?

7.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

8. ***Unauthorised deductions***

8.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

8.2 The claimant will say that he was contractually entitled to a pay increase at the end of year which he did not receive.

9. ***Remedy***

9.1 How much should the claimant be awarded?

The relevant law

111. We now turn to a consideration of the relevant law. We shall start with the consideration of the limitation period.

112. By section 123 of the 2010 Act, a claim concerning work related discrimination, victimisation or harassment must be presented to the Tribunal within the period of three months beginning with the date of the act complained of. There is however no bar on claims being presented outside the three months limitation period

because the Tribunal has a discretion to allow a claim to be brought within such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of that period. Where there is a series of distinct acts, the time limit begins to run when each act is completed whereas if there is continuing discrimination, time only begins to run when the last act is completed.

113. Where an employer operates a discriminatory regime, rule, practice or principle, then such will amount to an act extending over a period. Where however there is no such regime, rule, practice or principle in operation, an act will not be treated as continuing, even though the act has ramifications which extend over a period of time. The Tribunal needs to look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer. In doing so, one relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

114. If any acts are not established on the facts or found not to be discriminatory then they cannot form part of the continuing act. Authority of this proposition may be found in **South Western Ambulance Services NHS Foundation Trust v King** [EAT 0056/19].

115. It is open to a Tribunal to extend time should it be just and equitable so to do. Time limits are exercised strictly in employment cases. It is for the complainant to convince the Tribunal that it is just and equitable to extend time. In considering whether to exercise discretion under section 123 to extend time, all factors must be considered including in particular the length of and the reasons for the delay.

116. There is no presumption that Tribunals should extend time unless they can justify failure to exercise the discretion. The reverse is the case. The Tribunal cannot hear a claim unless the claimant convinces the Tribunal that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. However, that does not mean that exceptional circumstances need to be shown before the discretion will be exercised.

117. The Tribunal's discretion to extend time upon an out of time complaint is a wide one. The factors which are almost always relevant are the length of and reasons for the delay and whether the respondent suffered prejudice. There need not be a good reason for the delay. It is not the case that time cannot be extended in the absence of an explanation for the delay from the complainant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any reason are relevant matters to which the Tribunal ought to have regard. However, there needs to be something to convince the Tribunal that it is just and equitable to extend time. Authority for these propositions may be found in the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2019] EWCA Civ 640.

118. The Tribunal may take into account any factor which it considers to be relevant. The strength of the claim may be a relevant factor when deciding whether to extend time. In disability cases, the Tribunal may recognise that disabled claimants may find it difficult to comply with the three months' time limit.

119. It is necessary for the Tribunal to weigh the balance of prejudice between the parties. A refusal to extend time will inevitably prejudice the claimant. However, the claimant needs to show more than the loss of the claim will prejudice them. If that were to be sufficient, it would emasculate the limitation period. Plainly,

Parliament has legislated for relatively short limitation periods in employment cases. The limitation period must be applied unless the claimant can convince the Tribunal that time ought to be extended.

120. The other side of the coin is that some prejudice will of course be caused to the respondent if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that. Otherwise, such would emasculate the discretion vested in tribunals by Parliament to consider just and equitable extensions of time.

121. Save for the unlawful deduction form wages complaint, the claimant's complaints arise under the Equality Act 2010. By section 136 of the 2010 Act, it is for the claimant to prove facts from which the Tribunal could decide that an unlawful act of discrimination or harassment has taken place. Should he do so, then the burden of proof shifts to the respondent to prove a non-discriminatory explanation.

122. It is therefore for the claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, then the claim will fail. Where the claimant has proved facts from which inferences could be drawn that the respondent has discriminated or harassed upon a protected ground, then the burden of proof moves to the respondent. There is then a burden upon them to prove that they did not commit or should not be treated as having committed the acts in question. This entails the respondent showing on the balance of probabilities that in no sense was the treatment of the claimant on the protected ground.

123. The claimant's complaints are brought against the respondent in their capacity as his employer. The complaint of unfavourable treatment for something arising in consequence of disability is brought pursuant to section 15 when read in conjunction with section 39(2) of the 2010 Act. The latter provides that an employer must not discriminate against an employee in the way in which the employer affords the employee opportunities for promotion, transfer, training or to receive any other benefit or by subjecting the employee to detriment.

124. The complaint of victimisation is brought pursuant to sections 27 when read in conjunction with section 39(4). The latter provides that an employer must not victimise an employee in the provision of benefits or by subjecting the employee to detriment.

125. The complaint of a failure to make reasonable adjustments is brought pursuant to sections 20 and 21 when read in conjunction with section 39(5). The latter provides a duty to make reasonable adjustments applies to an employer.

126. The complaint of harassment is brought pursuant to section 26 when read in conjunction with section 40 of the 2010 Act. The latter provides that an employer must not in relation to employment harass an employee.

127. Pursuant to section 15 of the 2010 Act (when read in conjunction with section 39(2)) an employer must not discriminate against an employee by treating the employee unfavourably for something arising in consequence of disability. This provision will not apply if the employer shows that the employer did not know, and could not reasonably have been expected to know, that the employee had a disability. Further, the employer will have a defence to a complaint of such unfavourable treatment if they are able to show that it was a proportionate means of achieving a legitimate aim.

128. A claimant needs to establish that they have been unfavourably treated. The unfavourable treatment must then be shown to be because of a relevant *"something"* and that the relevant *"something"* arises in consequence of the disability.

129. The Tribunal must therefore 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 the decision makers. The thing that causes the unfavourable treatment need not be the main or sole reason for it. However, it must have at least a significant (or more than a trivial) influence on the unfavourable treatment and so amount to an effective reason for it.

130. The Tribunal must then determine whether the reason is something which arises in consequence of the claimant's disability. A loose causal link may be established by the complainant.

131. The second stage of the causation test involves an objective question and does not depend on the thought process of the alleged discriminator. The required state of mind is simply that the unfavourable treatment should be because of the relevant something. There is no requirement that the alleged discriminator should have known that the relevant something arose from the disability.

132. Should the claimant establish that they have been unfavourably treated for something arising in consequence of disability, then it is open to the respondent to justify that unfavourable treatment. The burden is upon the respondent when seeking to run a justification defence to show that the treatment of the complainant is a proportionate means of achieving a legitimate aim.

133. The aim in question must be legitimate and unrelated to any discrimination based on any prohibited ground. The means or measure adopted to achieve the aim must be capable of so doing and must be proportionate. The objective of the measure must be sufficiently important to justify the limitation of a protected right. This involves a consideration of whether a less intrusive measure could have been used and balancing the severity of the measure's effect upon the complainant against the extent that the measure will contribute to the achievement of the aim from perspective of the employer. The test to be applied by the Tribunal is objective. The Tribunal has to make its own judgment as to whether the measure applied by the respondent is reasonably necessary as a proportionate means of achieving the aim in question.

134. The Tribunal must evaluate the employer's legitimate aim and not some other aim that the Tribunal may consider would have been preferable. Where there is no other way of achieving the identified aim, then the means will inevitably be proportionate. The employer must convince the Tribunal that there was a legitimate aim and that it was appropriate and reasonably necessary to adopt the means in question in order to achieve the aim. It must be shown that the means adopted actually contributed to the pursuit of the aim.

135. The Equality and Human Rights Commission's *Employment Code* sets out guidance on objective justification. The code says that the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. As to proportionality, the code notes that the measure adopted by the employer do not have to be the only possible way of achieving the legitimate aim but that the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

136. In **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, CA Elias LJ said, *"An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part time – will necessarily have infringed the duty to make reasonable adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be a reason related to disability and if a potential reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified".*

137. In this case, of course, the claimant has not been dismissed. However, this principle holds good. In a consideration of the justification defence advanced in answer to the complaint brought under section 15, the Tribunal will consider whether reasonable adjustments may have been made by the respondent which came with the prospect of avoiding the unfavourable treatment. There are difficulties with conceiving of a case where it would be open to a Tribunal to find that an employer's unfavourable treatment of the claimant because of something arising in consequence of their disability is justifiable as a proportionate means of achieving a legitimate aim if, at the same time, it is established that the employer could and should have made a reasonable adjustment to deal with the substantial disadvantage caused by the claimant's disability. This view is supported by the EHRC in the code which states (at paragraph 5.21) that, *"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it would be very difficult for them to show that the treatment was objectively justified".*

138. This neatly leads us on to a consideration of the law as it relates to reasonable adjustments. Employers are required to take reasonable steps to avoid a substantial disadvantage where a provision criterion or practice applied to a disabled person puts that disabled person at a substantial disadvantage compared to those who are not disabled. The word *"substantial"* in this context means *"more than minor or trivial".*

139. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that the particular provision, criterion or practice disadvantages the disabled person. A comparison may be made with non-disabled people generally.

140. The phrase *"provision, criterion or practice"* is not defined by the 2010 Act. It broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices or arrangements.

141. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled and that they are placed at a substantial disadvantage by the application to them of the relevant provision, criterion or practice. The words *"could not reasonably be expected to know*" encompasses the concept of constructive knowledge. The question of whether the employer had or ought to have knowledge of the disability in question is one of fact for the Tribunal.

142. The duty to make reasonable adjustments requires employers to take such steps as are reasonable to have to take in order to make adjustments. There is no onus upon the disabled person to suggest what adjustments should be made. However, by the time that the matter comes before the Employment Tribunal, the disabled

person ought to be able to identify the adjustments which they say would be of benefit.

143. There is no requirement for the disabled person to show that on balance the adjustment would ameliorate the disadvantage. There merely has to be a prospect that the adjustment may benefit the disabled person. As was said by Elias P (as he then was) in **Project Management v Latif** [2007] IRLR 580 (at paragraph 54): *"… the claimant must not only establish that a duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made."*

144. The following are some of the factors which, according to the EHRC code, might be taken into account when deciding what is a reasonable step for an employer to have to take. These are:

- Whether taking any particular step would be effective in preventing the substantial disadvantage.
- The practicality of the step.
- The financial costs of making the adjustments and the extent of any disruption caused.
- The extent of the employer's financial or other resources.
- The availability to the employer of financial or other assistance to make an adjustment.
- The size and type of the employer.

145. Ultimately, the test of reasonableness is an objective one and will depend upon the circumstances of the case. In **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664, the Employment Appeal Tribunal held that employers do not have to consult with employees before making the adjustments. There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments they should make (although it will be good practice to do so).

146. We shall now consider the ingredients of a harassment claim. There are three essential elements. Firstly, it must be shown that there was unwanted conduct. Secondly, the conduct needs to have a proscribed purpose or effect. Thirdly, the conduct must relate to a relevant protected characteristic.

147. The word *"unwanted"* is not defined in the act but is essentially the same as *"unwelcome"* or *"uninvited"*. This is confirmed by the EHRC's code (at paragraph 7.8). Whether the conduct is *"unwanted"* will largely be assessed subjectively from the employee's point of view.

148. The second limb of the statutory definition of harassment requires that the unwanted conduct in question has the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. Conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect.

149. Where a complaint is brought upon the basis that the relevant conduct had the effect of violating a person's dignity or creating an intimidating *etc* environment then such must be assessed both subjectively and objectively. The subjective part involves the Tribunal looking at the effect that the conduct of the alleged harasser has upon the complainant. The objective part requires the Tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had the effect.

150. The complainant must therefore actually have felt or perceived their dignity to have been violated or an adverse environment to have been created. The Tribunal will then go on to consider whether it was reasonable for them to have those perceptions. Plainly, if the complainant does not perceive their dignity to have been violated or an adverse environment created then the conduct cannot be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an intimidating *etc* environment for them then it should not be found to have done so.

151. The Tribunal will also take into account the other relevant circumstances. The EHRC code notes that the relevant circumstances may include those of the complainant, such as their health, including mental health and previous experiences of harassment. It can also include the environment in which the conduct takes place.

152. In order to constitute unlawful conduct under section 26(1) of the 2010 Act, the unwanted and offensive conduct must be *"related to a relevant protected characteristic."* Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the Tribunal, making a finding of fact and drawing upon the evidence before it.

153. We shall now have a look at victimisation. To succeed in a claim of victimisation, the claimant must show that they were subjected to a detriment because they had done a protected act or because the employer believed that they had done or might do a protected act. The test is not precisely one of causation. The Tribunal must identify the real reason or the core reason for the treatment complained of. A *"but for"* test does not mean that the treatment was because of the protected acts: in other words, it is not enough for a complainant to argue that but for having raised a grievance, the detriment would not have occurred.

154. This is because the protected act must have a significant influence upon the acts in question. The protected act need not be the only reason for the detrimental reason for victimisation to be established. It is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor.

155. The reason why a complainant was subjected to detriment will need to be inferred from the findings of fact. It is unlikely that a Tribunal will regard the mere fact of a protected act and a detriment as sufficient to shift the burden of proof to the employer. There is a need for some evidence from which the Tribunal infers a causal link between the protected act and the detriment.

156. The word *"detriment"* is not defined by the 2010 Act. The EHRC's code says that a detriment can take many forms and is anything which the complainant concerned might reasonably consider to be to their disadvantage.

Discussion and conclusions

157. We now turn to our discussions and conclusions. We shall start with the limitation issue. In her closing written submissions, Miss Rooney sought to break down into three periods of time the events with which the Tribunal is concerned. This is what she said in paragraph 66.2 of her written submissions:

> *"The events giving rise to this claim can be broadly grouped into three categories: the matters arising in September 2020 to January 2021 ("the original period"); the subsequent concerns that the claimant was underperforming, and the resulting PIP, which arose in the period September 2021 and November 2021 ("the PIP period"), and the matters arising out of the claimant's grievance meeting and the response to the grievance between 6 December 2021 and 24 January 2022 ("the grievance period")."*

158. It appears to the Tribunal that this is a reasonable and accurate analysis. What Miss Rooney calls the original period ended in January 2021 with Mr Rutherford's rejection of the disciplinary appeal. Between January 2021 and September 2021, there was little activity although there was of course the important discussion about the occupational health report which took place in early April 2021. There was also the effluxion by the running of time of the written warning imposed by Mr Wales in December 2020. Essentially, however, matters were uneventful between the end of January 2021 and September 2021.

159. The characterisation of the next two periods as "*the PIP period"* and "*the grievance period"* is a reasonable characterisation of events. They could as easily have been conflated or run together as one period as in reality the matters falling within the grievance period arose out of the events in the PIP period.

160. This is a moot point anyway because Miss Rooney, rightly, accepts that the claims brought in relation to the PIP period and the grievance period were presented by the claimant to the Employment Tribunal within the limitation period in section 123 of the 2010 Act. This is a proper concession given that the claimant presented his complaint to the Employment Tribunal on 9 March 2022 after first going through mandatory early conciliation between 30 December 2021 and 5 January 2022.

161. That therefore only leaves for reconsideration the original period relating to events between September 2020 and January 2021. On behalf of the respondent, Miss Rooney submits that the complaints in the original period cannot be linked to those in the PIP period and the grievance period. She refers to **Hendricks v Metropolitan Police Commissioner** [2003] 1 All ER 654, Court of Appeal, in which it was held that for a series of allegedly discriminatory incidents to constitute a continuing act it is necessary to show that the incidents are linked to each other and that they are evidence of an ongoing situation or continuing state of affairs. As she observed, this will be a fact sensitive finding. A crucial distinction is to be drawn between conduct that extends over a period which may amount to a continuing act and a one off decision that has continuing consequences which is a different matter. Authority of this proposition may be found in **Barclays Bank Plc v Kapur** [1991] 2 AC 355.

162. It is right, in our judgment, to say that there is no ongoing situation or continuing state of affairs linking the original period with the PIP period and the grievance period. It is of course right that the claimant was on the respondent's radar because of the informal and then formal performance processes, culminating in the first written warning. The trigger for the PIP was the claimant being scored as

underperforming for the performance year ended 30 September 2021. This was his second underperformance score in a row, the first occurring during the original period and the second occurring during the PIP period. To that extent, therefore, there is a link. However, the underperformance score for the year ended 30 September 2020 and then the imposition of a first written warning are properly characterised as one off decisions which had continuing consequences (in the sense that the claimant's performance was being monitored).

163. It follows therefore that the claims in so far as they relate to matters arising between September 2020 and January 2021 have been presented outside the limitation period. The original period was then followed by a gap until the PIP period. The claimant would not of course know in January 2021 that he would be scored as underperforming for the performance year ended 30 September 2021 and then subjected to a PIP that November. As there was no continuing course of conduct complained of after the dismissal by Mr Rutherford of the claimant's appeal, it would have been open to the claimant to commence early conciliation through Acas and then commence proceedings before the end of April 2021 (plus whatever further time he gained by going through early conciliation). He did not commence early conciliation until 30 December 2021 which on any view is outside the time within which a claim ought to have been brought upon the events arising from the original period.

164. The question that arises therefore is whether time ought to be extended. In our judgment, it is just and equitable so to do.

165. During his submissions, the claimant sought to argue that his view was that the running of time only commenced upon expiry of the first written warning. In our judgment, this is legally incorrect because that is a continuing consequence of the one off decision of Mr Wales to impose that sanction. That said, the claimant's misunderstanding upon this is reasonable and excusable. The distinction between a continuing state of affairs on the one hand and the continuing consequences of a one off act may be nuanced and subtle. Within three months of the expiration of the first written warning the claimant found himself back under the microscope with the underperforming annual performance review followed by the escalation of matters by the respondent to the PIP. From the claimant's perspective therefore he understandably considered there to be a continuing state of affairs.

166. We also take into account the impact of the claimant's disability upon him and on his abilities to commence proceedings. He says that his disability caused him fatigue. This is corroborated by the occupational health report. The claimant was plainly having difficulty functioning at work. His abilities to manage an Employment Tribunal claim must, it follows, have been greatly impaired.

167. There is no forensic prejudice to the respondent. There was no submission from Miss Rooney to this effect. All of the matters pertaining to the claimant's performance and meetings with him have been documented and have been produced for the benefit of the Tribunal in a bundle running to in excess of 900 pages. The respondent was able to call five witnesses all of whom were able to give a detailed recollection of events. There can be no suggestion that the delay arising from the claimant in commencing proceedings rendered the trial in anyway unfair or meant that witnesses were not able to provide evidence or that the evidence had become unavailable and the cogency of it was affected.

168. As a further factor, the claimant's principal course of dealings was with Mr Wilkinson. Mr Wilkinson was the claimant's line manager from 1 July 2019 until

25 January 2022. As far as the claimant was concerned, therefore, it was reasonable (even if legally erroneous) to consider the events occurring in the original period and the PIP period and the grievance period as being linked by reason of the continued thread of Mr Wilkinson's heavy involvement in matters.

169. In our judgment, if the claimant were to be prevented from presenting the discrimination claims arising out of the original period, that would amount to a serious injustice. There is public interest in discrimination claims being heard and resolved. Therefore, it would not be just and equitable for the claims that arise from the original period to be simply dismissed on limitation grounds in circumstances where a fair trial has been possible, where the claimant's disability has impacted his ability to present and manage the Employment Tribunal claim any sooner and where by and large the same people have been involved with the claimant across all three periods.

170. We shall therefore now turn to the substantive complaints. We shall start with the reasonable adjustments claim. It makes sense to look at this first before the complaint of unfavourable treatment for something arising in consequence of disability. This is because of the *ratio* in **Griffiths** to which we referred above in paragraph 136. In other words, if the Tribunal were to find that there were available to the respondent reasonable adjustments which were not made which may have prevented the unfavourable treatment in question then this is bound to impact upon the Tribunal's assessment on the justification defence run by the respondent upon the section 15 claim.

171. The first issue upon the reasonable adjustments complaint is whether the respondent required the claimant to communicate with his manager early in the morning as to what work he would be doing when he would be starting the day. On any view, this is a provision, criterion or practice. It was a requirement or arrangement imposed upon the claimant by Mr Wilkinson when he imposed the AM/PM email regime.

172. The next question then is whether the claimant was put at a substantial disadvantage compared to someone without his disability in that his illness was always worse in the morning, making it more difficult for him to comply with the arrangement. In our judgment, the claimant has made out his case that he was substantially disadvantaged by this requirement. Somebody without ulcerative colitis and without a disability should easily have been able to comply with the requirement to send a short email to their line manager by 9.30 in the morning of a working day. We accept that the ulcerative colitis suffered by the claimant is worse in the morning rendering him at times incapable of communicating prior to the 9.30am deadline. On any view, this is more than minor or trivial and substantial disadvantage has therefore been established.

173. The next issue is whether the respondent knew or ought to have known that the claimant was substantially disadvantaged in this way. Miss Rooney submitted this to be the case from the date of the appeal hearing before Mr Rutherford. In our judgment, the respondent acquired knowledge sooner. In paragraph 31 of his witness statement Mr Wilkinson said that the timings of the AM/PM emails were flexible depending upon how the claimant was feeling. Mr Wilkinson said that, *"it was understood that this might be later in the morning if Zakir was unwell or had to start later in the day."* This is sufficient in our judgment to fix Mr Wilkinson (and thus the respondent) with knowledge that there was more than minor or trivial

disadvantage to the claimant in having to comply with the AM/PM email arrangement caused by his disability.

174. The question then is what steps could the respondent have taken to avoid the disadvantage. The claimant suggested that a reasonable adjustment would be to allow the claimant to communicate his work as and when he felt able to. In our judgment, in reality, this is what the respondent did. Mr Wilkinson gave a number of examples in paragraph 32 of his witness statement of the claimant communicating the AM/PM emails outside the timeframe which had been arranged. No formal or informal disciplinary action of any kind was taken against the claimant and he was permitted to proceed in this way. In our judgment therefore the respondent complied with the duty to make reasonable adjustments to alleviate the disadvantage caused by the application of the AM/PM email arrangement. There may have been no formal (or even informal) consultation with the claimant about this but there need not be - see **Tarbuck** above. The question is whether objectively the respondent made an adjustment with a prospect of alleviating the disadvantage. The respondent did so.

175. The second provision, criterion or practice with which we are concerned is that of requiring staff to comply with work deadlines. It is convenient, we think, to consider this requirement alongside the fifth in the list of issues which is requiring proper communication between staff and colleagues and management.

176. The substantial disadvantage claimed by the claimant is that the unpredictable nature of his illness made it difficult for him to meet deadlines and hindered communication and his ability to send emails and other documents to his fellow workers.

177. In our judgment, the provision, criterion or practice at paragraph 4.2.2 does not in fact fit the case presented by the claimant. We have determined that there were no deadlines imposed upon the claimant other than a general exhortation that work must be done in a reasonable time. It is however open for the Tribunal to cast the provision criterion or practice as is appropriate to meet the case. In our judgment, therefore, the relevant requirement was for the claimant to comply with the requirement to undertake his work with reasonable expedition.

178. The Tribunal is satisfied that these requirements did disadvantage the claimant. A non-disabled comparator would have been more readily fit and able to progress work in a timely manner and communicate with colleagues. There is ample evidence within the bundle of the claimant's condition making him feel fatigued and affecting his performance and communication skills. Again, this is corroborated by the occupational health report. He has therefore established a more than minor or trivial disadvantage attributable to and caused by his disability.

179. We are satisfied that the respondent knew of the disadvantage. Indeed, the respondent, to their credit, recognised the issue fairly early on in the claimant's career such that he was relieved of the need to go on site visits and was primarily office based. His fatigue then caused him to request reduced working hours which was agreed to by the respondent. The senior management who complained to Mr Wilkinson about the claimant's performance all were mindful of the claimant's disability as an explanation. The claimant proffered his disability as an explanation for poor performance and communication in the meetings which he attended with Mr Wales, Mr Wilkinson and Mr Rutherford.

180. The reasonable adjustment suggested by the claimant was an extension of deadlines. As we have said several times already, the word *"deadline"* does not meet the facts of the case. In reality what the claimant is saying is that he should have been given more time to progress matters than may have been expected of a non-disabled comparator with like duties to progress work with reasonable expedition. We agree with Miss Rooney that in reality this is what the respondent did. The respondent agreed to the claimant's request for reduced and flexible working hours. Inevitably, working 20 hours a week was going to be less productive than working 40 hours a week. Considerable flexibility was allowed to the claimant. We agree with Miss Rooney that it goes too far for the claimant to suggest that it would have been reasonable for the respondent to leave him to his own devices and not be accountable at all. There was still a need for the claimant to progress the work as quickly as he was reasonably able and to let the respondent know what he was doing (or to let them know that he was unable to work on any given day). In our judgment, reasonable adjustments were made which had a prospect of alleviating the substantial disadvantage caused to the claimant by the application of these requirements.

181. There came a point of course where the respondent felt it incumbent upon them to take action against the claimant in the light of his underperformance. His health was taken into account by the imposition of a sanction only of a first written warning for a period of six months. This had been proceeded by an informal process which regrettably did not result in a significant improvement. The claimant was therefore given opportunities to improve before the respondent moved to a formal process. After the claimant was scored as underperforming for the second time in September 2021, the respondent did not move matters on under the formal policy but rather used the PIP process the intention of which was to encourage improved performance. Although the claimant may not perceive it as such, the respondent was not heavy handed with the claimant, was patient with him but ultimately (in balancing their interest with his) felt the need to take action in November 2020 and then again in November 2021. The respondent made reasonable adjustments by accommodating the claimant, taking into account the factors in paragraph 144.

182. The next provision, criterion or practice with which we are concerned is at paragraph 4.2.3 which is "*requiring the claimant to work his agreed reduced hours evenly spaced throughout the week (four hours per day) and at set hours."*

183. In the Tribunal's judgment, this PCP in fact conflates the requirement with the adjustment. We would have thought that the relevant PCP was requiring the claimant to work his contractual hours of 40 per week between Monday and Friday inclusive. The agreement for him to work fewer hours is the adjustment.

184. As a matter of fact, when the respondent agreed for the claimant to work 20 hours per week from 14 September 2020, the requirement was for him to work four hours per day between Monday and Friday inclusive but without dictating the specific hours. The requirement for him to work specific hours (in the event, from noon to 4pm each day) only came in later in the chronology.

185. The Tribunal finds that the requirement for the claimant to work his full contractual hours plainly put him at a substantial disadvantage. A worker without a disability would have been able to work 40 hours per week. The claimant could not because of the effect of his disability. The respondent plainly had knowledge of this because they agreed to his flexible working request which was based upon his health.

186. We find the respondent did make an adjustment by permitting the claimant to work 20 hours per week in any pattern that suited his condition. As we say, only later did the arrangement become more fixed but then this was with the agreement of the claimant in any case and still imported some flexibility. It follows therefore that a reasonable adjustment was made by the respondent to ameliorate the disadvantage caused by the application of the relevant requirement.

187. The next provision criterion or practice is requiring staff enrolled on the ICE scheme to make progress towards completion. We agree that this was a provision required of the claimant by the respondent. It applied to all graduate engineers. We also agree that this placed the claimant at a substantial disadvantage compared to someone without the claimant's disability. Someone without the disability would have been able to manage the demands of the ICE training alongside their work duties. The claimant could not do that. His condition caused him to make a flexible working request as he could only manage to work 20 hours per week from September 2020. On any view therefore coping with the demands of ICE training as well was beyond the claimant's capability and capacity because of his disability. A substantial disadvantage has therefore been established.

188. It follows that the respondent knew that the claimant was disadvantaged in this way. They knew of his limited capacity hence their agreement for him to work 20 hours per week. They were aware that he was making little if not no progress towards attaining the ICE qualification. In our judgment, the respondent ought (at the very least) to have connected the two and thus had constructive knowledge (at least) that the requirement to complete the ICE training was a disadvantage suffered by the claimant because of his incapacity and limited capacity for work.

189. We find that the respondent did make adjustments. There was very much a *"hands off"* approach towards the ICE qualification. Effectively, the facility was withdrawn from the claimant as we have seen (see paragraph 24 above). However, it was always open to the claimant to re-apply when he felt fit enough to progress the matter. The respondent refrained from action to compel the claimant to complete the ICE training which in our judgment ameliorated the disadvantage to him as he was not required to be concerned by it until he was fit enough to resume work towards it.

190. The final requirement is requiring the claimant to attend the office five days a week. This of course arose on 25 November 2021.

191. The claimant says that he was disadvantaged by this because his condition means that he is immunosuppressed and the risk to him of attending the office was greater than for those without a disability. He suggests as an adjustment that he ought to have been permitted to remain working from home.

192. The government guidelines lifted the restriction upon those shielding with effect from around November 2021. The claimant produced no medical evidence that he was unfit to go into the office at all and should remain shielding. On the contrary, he suggested to Mr Wilkinson that he was able to attend the office three days a week. It is difficult see why his condition permitted him to go in three times a week and not five if it was unpredictable.

193. In the event of course an arrangement was made for him to go into the office four times a week. As a matter of fact, therefore, this is the relevant provision criterion or practice (as opposed to that set out in Employment Rostant's case management order that the claimant was required to go into the office five times a week). The

Tribunal finds that the claimant was not substantially disadvantaged by this requirement because of his disability. As we say, he has provided no medical evidence that he needed to continue to shield. He was able to go in three times a week even on his own account. It is difficult to see why a requirement to go into the office four times a week created a substantial disadvantage in circumstances when going in three times a week did not. As the claimant has not shown any substantial disadvantage then this claim must fail.

194. Upon this basis, therefore, the Tribunal finds that all of the claimant's complaints that the respondent failed to comply with the duty to make reasonable adjustments fail and stand dismissed. We now turn to the complaint that the claimant was unfavourably treated for something arising in consequence of disability.

195. The unfavourable treatment in question is firstly giving the claimant a written warning on 18 December 2020 and secondly rating the claimant as underperforming in September 2021 with the consequent effect on his pay (that is to say, he would enjoy no end of year pay rise).

196. The respondent concedes that the claimant was unfavourably treated upon both of these grounds. On any view, this is an appropriate concession. Had it not been made, the Tribunal would unhesitatingly have found that the service of a warning and an underperformance rating are unfavourable treatment, being matters which the claimant may reasonably consider to be to his disadvantage.

197. The next issue is whether the performance shortcomings which lay behind these acts arose in consequence of disability (in whole or in part). Mr Wilkinson had in mind that the claimant was not performing well (not least in terms of communicating with colleagues). It is that which influenced his decision-making to take the steps that he did. It is not, of course, necessary for Mr Wilkinson to know that the deficient performance leading to these acts was something arising in consequence of disability.

198. Upon the evidence in the occupational health report, we find that the claimant's performance shortcomings did arise to a material degree out of his disability. Nicola King said that the flare up of the colitis was caused by stress which increased his difficulties in coping with his workload. The Tribunal is not concerned with the causation of the flare up. The fact of the matter is that the claimant suffered flare ups of colitis. He was suffering from fatigue. This affected performance.

199. On any view, therefore, the claimant has established the necessary causal links. The fatigue and stress caused by the colitis flare ups impacted upon performance. He was not performing well. It was that poor performance (in particular, poor communication) which led to the steps taken by Mr Wilkinson. The poor performance was therefore a thing which materially arose in consequence of disability.

200. It is open to the respondent to defend the claim upon the basis of a lack of actual or constructive knowledge of disability. Miss Rooney made no submission to this effect. In our judgment, she was right not to do so. The claimant declared the fact of his disability at recruitment stage. Mr Wilkinson was well aware of it. He had made adjustments for the claimant because of it. These adjustments have been made before the issue of the first written warning and the performance assessment in September 2021.

201. The crucial issue upon this claim therefore is one of justification. It is for the respondent firstly to establish a legitimate aim. The aim behind the steps taken by Mr Wilkinson is pleaded as being "*to encourage the claimant to improve and meet the respondent's required standards, the demands upon the CAFA team and the respondent's business."* On any view, these are legitimate aims.

202. The real issue is one of proportionality. This requires the Tribunal to look objectively at the balance to be struck between the interests of the claimant on the one hand and the interests of the respondent on the other.

203. The respondent was faced with an underperforming employee. As we have determined, reasonable adjustments were made but performance concerns continued. The provision of first written warning and an underperforming rating performance review arose in consequence of disability. They amount to unfavourable treatment because of something arising in consequence of the claimant's disability. They are therefore limitations of a protected right not to suffer such unfavourable treatment.

204. However, on any view, the imposition of unfavourable treatment upon the claimant by the respondent for something arising in consequence of his disability arose for a sufficiently important reason, namely the encouragement of the claimant to meet the respondent's required standards.

205. Upon an objective analysis, there was no less intrusive measure that could have been taken. After all, the respondent had already tried to deal with matters on an informal basis in September 2020. While this resulted in initial improvement, matters regrettably deteriorated such as to leave the respondent with little choice but to escalate matters. The claimant accepted that the underperformance rating was warranted (or at any rate did not challenge his need to improve communication).

206. The Tribunal is satisfied therefore that there was a legitimate aim and that it was appropriate and reasonably necessary to adopt the means in question in order to achieve the aim. The Tribunal is satisfied that the means adopted contributed to the pursuit of the aim. The claimant escaped further censure and the first written warning simply expired by a effluxion of time. As we observed, there was something of a hiatus between April 2021 and September 2021. Performance concerns remained but not such as to warrant moving matters on during the currency of the first written warning. There was therefore some improvement which went towards achieving the aim.

207. Not rewarding an underperforming employee with a salary increase similarly goes towards the achievement of the aim. Such an employee will then be incentivised to improve with the assistance of a performance improvement plan. They did not invoke further formal action against the claimant. A less intrusive way forward was taken by the respondent, who had little option but to do something about the claimant's performance. The respondent's actions, in our judgment, struck the correct objective balance between the parties' interests.

208. We now turn to look at the claimant's harassment complaint. The unwanted conduct complained of is the requirement placed upon the claimant at the meeting with Mr Wilkinson and Mr Duff held on 25 November 2021 to explain the nature of his condition in detail where both were in possession of the occupational health report.

209. The context of this meeting was of course the respondent's decision to require the claimant to follow a PIP. It was at this meeting that the controversial issue of requiring the claimant to attend work five days a week was raised. As we have seen, the claimant said that he could come in for three days a week and the parties settled at four.

210. Mr Wilkinson acknowledges in paragraph 78 of his witness statement that the basis for the claimant's reluctance to come in five days a week was the unpredictability of his condition. As the claimant was seeking an adjustment and flexibility against Mr Wilkinson's wish for him to come in five days a week, it is inevitable that there would be discussion about the claimant's condition. Significantly, the claimant accepted in cross-examination that the questioning of him about his condition was no more intrusive than that of him from Miss Rooney in the course of her cross-examination. The Tribunal's records show that she asked him around a dozen questions or so none of which can be characterised as unwarranted prying into the claimant's condition and his privacy. Upon that basis alone, therefore, the harassment complaint must fail as a discussion of his condition was not unwanted. On the contrary, it was wanted by the claimant who was hoping to prevail upon Mr Wilkinson to reduce the number of times that he (the claimant) was required to go into the office.

211. Even if we are wrong about that, we hold that the questioning of him by Mr Wilkinson (in the presence of Mr Duff) was not such that it could be considered to be a violation of his dignity or the creation of an intimidating *etc* environment. Non-intrusive questions of the kind asked of the claimant by Miss Rooney cannot reasonably have that effect.

212. We do accept, of course, that the impugned conduct was related to the claimant's disability. About that there can be no question. That was the whole point of the discussion. However, we find that the conduct was not unwanted, and in any case did not reasonably have the effect of violating the claimant's dignity or creating an intimidating *etc* environment for him. No claim was brought by the claimant that Mr Wilkinson asked the questions which he did for the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. Had such a complaint been raised then it would have been rejected by the Tribunal upon the basis that Mr Wilkinson was simply seeking to engage with the claimant's request for there to be adjustments to the five days' a week requirement.

213. Next, we shall look at the victimisation complaint. The protected act is the grievance raised by the claimant on 30 November 2021. As we have seen, this alleged disability discrimination. Miss Rooney, rightly, conceded that the grievance was a protected act.

214. The claimant says that he was subjected to a detriment for having done the protected act. He relies upon two matters. The first of these is that on 24 January 2022 the claimant was rated as underperforming. The second is that on 1 February 2022 the respondent decided to extend the claimant's PIP.

215. The grievance was of course about Mr Wilkinson. The decision to extend the PIP was that of Mr Wales. Mr Wales was aware of the grievance brought against Mr Wilkinson by the claimant. However, there is no evidence that he was aware of the detail and in any case, Mr Wales was not the subject of the grievance nor was he interviewed about it by Mr Baron.

216. It is the case that but for the grievance (being the protected act) Mr Wales would not have resumed his line management of the claimant. It was decided to move the line management away from Mr Wilkinson because, amongst other things, the claimant had raised a grievance about him. However, that is not enough for the claimant to be able to demonstrate that Mr Wales' decision to extend the PIP was causally linked with the grievance. Mr Wales explains in paragraph 39 of his witness statement that he made the decision to extend the PIP so that he *"could have a vision of [the claimant's] performance myself and measure his progress."* In paragraph 40 he says that he "*thought this was the best step as it would give Zakir an opportunity to start afresh and resolve the issues, which remained outstanding."* The claimant did not suggest to Mr Wales that he was in any way influenced to extend the PIP because of the grievance. Therefore, while we can accept that the issue of a PIP and the extension of it could reasonably be considered by the claimant to be to his disadvantage and thus constitute a detriment, we find there to be no causal link with the grievance of 30 November 2021.

217. Mr Wilkinson rated the claimant as underperforming on 24 January 2022. It will be recalled that Mr Baron remitted the issue of the 2021 performance review to Mr Wilkinson as part of his grievance recommendation. Mr Wilkinson maintained his view that the claimant should be rated as underperforming. He did this upon the basis of the evidence before him which had led to him scoring the claimant as underperforming in September 2021 coupled with the further discussion with the claimant, Mr Duff and Mr Freeburn.

218. Mr Wilkinson emailed Sinead Cahill on 24 January following his discussion with the claimant that day. His record is at pages 861 and 862. There was no suggestion that the claimant said at the meeting that Mr Wilkinson was influenced by the fact that the claimant had raised a grievance against him. Mr Wilkinson forwarded to the claimant his comments on the claimant's goals at pages 871 to 874. This was done on 7 February 2022. There was nothing from the claimant by way of reply at around this time to suggest that Mr Wilkinson had been improperly influenced by the grievance. That point was not put to him by the claimant during the course of the hearing before us.

219. The victimisation claims therefore fail and stand dismissed.

220. Employment Judge Rostant's list of issues includes a complaint that the claimant an unauthorised deduction from wages. This appears to relate to a claim that the claimant should not have been rated as underperforming and therefore should have enjoyed a salary increase. Nobody (with a few exceptions) received a salary increase in September 2020 because of the impact of the pandemic. The claimant was scored as underperforming for the performance years ended 30 September 2021 and 2022. This therefore disentitles him to a salary increase. No salary increase is lawfully due and upon that basis any complaint that he suffered an unauthorised deduction from his wages must stand dismissed.

221. In conclusion therefore, all of the claimant's complaints fail and stand dismissed.

Employment Judge Brain

Date: 9 December 2022