THE EMPLOYMENT TRIBUNAL

Claimant: Mr K Ratnajothy

Respondent: Tesco Stores Limited

Sitting At: London South

Before: Employment Judge Truscott KC
Mrs N Beeston
Mr C Mardner

On: 21, 22, 23, 24 and 25 November 2022

Appearances:
For the Claimant: Mr K Perera legal assistant
For the Respondent: Ms J Ferrario barrister

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) that, where necessary, the time for lodging the claim be extended on a just and equitable basis,
(2) that the claimant's claim of disability discrimination contrary to section 13 of the Equality Act is not well founded and is dismissed,
(3) that the claimant's claim of disability discrimination contrary to section 15 of the Equality Act is not well founded and is dismissed,
(4) that the claimant's claim of failure to make reasonable adjustments contrary to section 20 of the Equality Act is not well founded and is dismissed,
(5) that the claimant's claims of harassment contrary to section 26 of the Equality Act is not well founded and is dismissed,
(6) that the claimant's claim of victimisation contrary to section 27 of the Equality Act is not well founded and is dismissed,
(7) that the claimant's claim of race discrimination contrary to section 13 of the Equality Act is not well founded and is dismissed, and
(8) that the claimant's claim of wrongful dismissal is well founded in that he did not commit gross misconduct and ought to have received 1 weeks' notice.
(9) that the claimant is awarded £400 for wrongful dismissal.

REASONS

PRELIMINARY

1. The claimant gave evidence on his own behalf and was represented by Mr K

Perera, legal assistant. The respondent was represented by Ms J Ferrario, barrister, who led the evidence of Pradeep Piratheban Balasunderam (Pradeep), his store manager, Pradeeskar Thangarajah ('Pradesh'), his shift manager and Muhammad Farhan Riaz (Farhan), a store manager. She proffered the witness statement of Mr Fayez Butt, a store manager for the value it had, as he was not available for the hearing and hence not available for cross examination.

2. There was a file of documentary productions to which reference will be made where necessary.

3. The claims in the ET1 were expanded upon in a Scott schedule. There was also an agreed list of issues which went beyond the ET1 claims but not to the extent of the Scott schedule. A number of the claims in the Scott schedule were not supported by the claimant in evidence. The parties agreed that the Tribunal should address the claims in the agreed list of issues [101-109].

THE ISSUES

4. The issues between the parties were agreed as follows:

1. **WRONGFUL DISMISSAL**

1.1 Did C breach his contract of employment? *R contends that C committed a repudiatory breach of contract entitling R to terminate C's contract of employment summarily.*
1.2 If so, was that breach serious enough to be a repudiatory breach?
1.3 Did R waive the breach?

2. **DISCRIMINATION – JURISDICTION**

2.1 Were all of C's discrimination complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010 ("EqA")?
2.2 In particular, and where specific matters complained of took place outside the primary three month time limits in the EqA (as extended by the early conciliation period), were those matters part of a series of similar matters amounting to conduct extending over a period?
2.3 If so, did that conduct form part of a chain of continuous conduct which ended within three months of the claim form being submitted?
2.4 If any individual matters or any course of conduct occurred or came to an end outside the primary limitation period, would it be just and equitable for the Tribunal to hear that part of the claim?

3. **COMPARATORS**

3.1 C relies on:-
  3.1.1 Pradeep Piratheban Balasunderam ("P") as his actual comparator in respect of his direct disability discrimination complaint; and
  3.1.2 P, Gobi [S] and Pradesh [T] as his actual comparator in respect of his direct race discrimination complaint.
3.2 Were any or all of the actual comparators' circumstances materially the same as C's?

3.3 If not, C relies on a hypothetical comparator whose circumstances are materially the same as C's.

4. DISCRIMINATION – DISABILITY

4.1 **Was C disabled?**

C relies upon the mental impairments of PTSD and depression. R accepts C meets the definition of a disabled person under section 6 of the EqA by reason of PTSD and depression.

4.1.1 Did R have actual or constructive knowledge of C's disability during the relevant period? *R contends that it did not have knowledge of C's disability until 27 May 2020 at the earliest.*

4.1.2 If so, when did R become aware or ought to have been aware of C's disability? *C says R knew and/or would have been reasonably expected to know that C had a disability prior to 27 May 2020.*

4.2 **Direct discrimination**

4.2.1 Was C treated less favourably than P (or, if applicable, a hypothetical comparator) was or would have been? C relies on the following less favourable treatment compared to P (or, if applicable, a hypothetical comparator):-

(a) On 21/04/20, C sent an email to Nina Buckell ("NB") complaining against P for the derogatory language he used but he was not investigated whereas when Desmond Rasanayagam ("DR") made a complaint against C, an investigation manager was appointed within a few hours and C was moved from his place of work to a different branch. C contends R did not investigate his complaint against P because R knew or suspected that C was not mentally stable.

4.2.2 If so, was the reason for the treatment either:

(a) C's disability: or

(b) the perception that C was a disabled person?

4.3 **Discrimination arising from disability**

4.3.1 Did the following arise from C's disability:-

(a) The way C conducted himself in the workplace, came across and answered the questions at the investigation meetings and the disciplinary hearing.

(b) C's alleged inability to answer questions promptly and put forward his defence in a proper manner.

(c) The way C answered the investigation officer and disciplinary panel thinking that C was trying to manipulate them.

(d) C broke down because of the alleged unfairness of the investigation and the undue pressure allegedly put on him by the investigating officer and the note taker.

(e) Distress and failure to cope with investigation and disciplinary process.

(f) A panic attack.

4.3.2 Was C subject to the following treatment:-

(a) On 26 May 2020, Farhan [Riaz] ("**F**"):- Forced C to turn off his mobile phone and C was unable to give exact dates for some

questions. *C says he was unable to give exact dates to F because of poor memory due to his disability.*

(i) During the investigation meeting C broke down and cried several times. C says he broke down because of the unfairness of the investigation and the undue pressure put by the investigating officer and the note taker and due to my disability. C says he was distressed and could not cope with the investigation meeting.

(ii) Continued the investigation in a very unfair manner even after C broke down and cried several times and this caused a panic attack and a recurrence of a mental breakdown.

(b) C was only given 2 days (excluding Saturday and Sunday) to prepare for the disciplinary hearing on 22 June 2020. *C says in his mental state he was not able to prepare well for the meeting and it caused a lot of stress and anxiety.*

(c) Being dismissed summarily (instead of being given a lesser sanction) even after C had requested the disciplinary panel take into consideration his mental state and give C an opportunity to work for R.

4.3.3 If so, what was the reason for that treatment?

4.3.4 In treating C in that way what aim was R seeking to achieve? *R's legitimate aim was to uphold acceptable standards of behaviour in the workplace by investigating and dealing with allegations of misconduct without unreasonable delay.*

4.3.5 Was that aim legitimate?

4.3.6 Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?

4.4 **Reasonable adjustments**

4.4.1 Did R apply any or any of the following provisions, condition or practices ("PCPs"):-

(a) Not allowing C a Union representative during the investigation meeting on 26 May 2020.

(b) Not informing C of the details of the allegation against him prior to the investigation meeting on 26 May 2020.

(c) Not allowing C to use his mobile phone to recall dates and events during the investigation meeting on 26 May 2020.

(d) Requiring all interviewees to respond to questions in a particular way like 'normal people' and not taking into consideration that the interviewee is or may be a disabled person.

(e) Continuing the investigation meeting on 26 May 2020 after C broke down and cried several times and showed clear signs that he could not cope and was distressed.

(f) Failure to call for a psychiatric report prior to the reconvened investigation hearing on 17 June 2020 to see whether:-

(i) C was fit to attend the reconvened investigation meeting; and / or

(ii) C's behaviour at the workplace, the behaviour at the investigation meeting on 26 May 2020; and the distress experienced on 26 May 2020 were related to his disability.

(g) Only giving C 2 days (excluding Saturday and Sunday) to prepare for the disciplinary hearing on 22 June 2020.

(h) Failure to call for a psychiatric report prior to the disciplinary hearing on 20 June 2020 to see whether:-

( ) C is fit to attend the disciplinary hearing; and / or

(ii)C's behaviour at the workplace and at the investigation meetings was related to his disability.

(i) Failure to call for a psychiatric report before making the decision to terminate employment to ascertain whether C's behaviour at the workplace, the investigation meetings and the disciplinary hearing were due to his disability.

(i) Failure to take into consideration C's disability prior to making a decision to terminate employment, even though C had brought his disability to the disciplinary panel's attention.

4.4.2 If so, did all of any of those PCPs place C at a substantial disadvantage in comparison with employees who were not disabled?

4.4.3 If so, did R know or could it reasonably have been expected to know C was likely to be placed at any such disadvantage?

4.4.4 If so, were there steps that were not taken that could reasonably have been taken by R to avoid any such disadvantage? C relies on the following steps that he alleges could have been taken:-

(a)Allowing C to have a Union representative during the investigation meeting on 26 May 2020.

(b)Informing C of the details of the allegation against him prior to the investigation meeting on 26 May 2020.

(c)Allowing C to use his mobile phone to recall dates and events during the investigation meeting on 26 May 2020 so that C could easily recall relevant dates.

(d)Acknowledging that C is unable to respond to questions in a particular way like 'normal people' and giving due allowance for the way C answered questions.

(e)Adjourning the investigation meeting on 26 May 2020 after C broke down and cried several times and showed clear signs that he could not cope and was distressed.

(f)Calling for a psychiatric report prior to the reconvened investigation hearing on 17 June 2020 to see whether:-

(i) C was fit to attend the reconvened investigation meeting; and / or

(ii) C's behaviour at the workplace, the behaviour at the investigation meeting on 26 May 2020; and the distress experienced on 26 May 2020 were related to his disability.

(g)Giving C sufficient time to prepare for the disciplinary hearing on 22 June 2020.

(h)Calling for a psychiatric report prior to the disciplinary hearing on 20 June 2020 to see whether:-

(i) C is fit to attend the disciplinary hearing; and / or

(ii) C's behaviour at the workplace and at the investigation meetings was related to his disability.

(i) Calling for a psychiatric report before making the decision to terminate employment to ascertain whether C's behaviour at the workplace, the investigation meetings and the disciplinary hearing were due to his disability.

(j) Taking into consideration C's disability prior to making a decision to terminate employment, because C had brought his disability to the disciplinary panel's attention.

5. **Harassment**

5.1.1 Did R engage in the following acts of alleged harassment related to disability:-

(a) On 11 November 2019 P said to C 'you sound like a mental person'.

(b) On 13 November 2019 P promised C he would warn Pradesh and Gopi and would not assign them to the same shift as C. P did not warn Pradesh or Gopi and did not carry out an investigation.

(c) On 17 March 2020 C fainted at work and DR and Pradesh did not support him.

(d) On 15 April 2020 P called/asked C 'are you an uneducated 'patti kattan or thotta kattan?' (which is calling someone a 'low standard village barbarian') C wishes to note that this word is used as a racist insult on a particular division of Tamils who live in the hill country of Sri Lanka who are descendants of Indian Tamil brought to Sri Lanka during colonial times as estate workers and that is where C comes from. C contends that Pradeep knows that. C says this was a direct insult on him and his community. C contends that Pradeep and all the Sri Lankans know the severity of this word].

(e) DR made a false allegation against C on the instigation of P and back dated this to 19 April 2020. C suspects that Desmond's complaint was written after C had forwarded his complaint against P to NB by email at 12.12 on 21 April 2020.

(f) On 21 April 2020, NB emailed C stating 'C am aware of your case as C have this morning received various feedback/complaints regarding to your alleged behaviour in the shop as the complaint came in early this morning C have already assigned an investigation manager to look into the complaints against you, within this process you will have the opportunity to give us your version of events like you have described in this email'. C was not informed what the complaints against him were.

(g) On 21 April 2020 F informed C that he was temporarily transferring him to South Wimbledon Tesco fuel site until the investigation was over. C was asked to go home and was told about his next shift at South Wimbledon.

(h) On 22 May 2020 C was asked to attend an investigation meeting on 26 May 2020 to investigate 'unacceptable behaviour at work and breach of code of conduct', the letter

did not mention anything about C's complaint regarding P's racist comment and his complaint was not investigated. C only had 16 hours to prepare for the meeting and contact the Union.

(i) On 22 May 2020 C was not informed of the details of his alleged unacceptable behaviour at work and breach of code of conduct which prevented him from preparing for the hearing. C was not given any evidence/documents that would be relied upon.

(j) On 26 May 2020, C was forced to turn off his mobile phone during the investigation meeting by F and Hakeem and was unable to give exact dates for some of the questions.

(k) On 26 May 2020, F and Hakeem carried on the investigation meeting when C had no Union representative.

(l) On 26 May 2020 during the investigation meeting F made comments like 'stop manipulating everyone Krish' and 'I am investigating you and you are not'.

(m) Investigating him - C broke down and cried several times and F asked him 'have you finished now'. F didn't let him finish his answers, kept interrupting him, didn't give him time to think and recall events and jumped to the next question before C finished explaining his side of the event in full. The note taker was asking questions in the middle of C's answers and was giving facial expressions as laughs, witty smiles and shake of his head like treating C as a joke. Hakeem did not write C's answers down in full and F said 'you can write everything we missed at the end of the investigation. He said he couldn't remember everything he said in the meeting and C was told it was his problem.

(n) On 26 May 2020, C said to F he couldn't continue if this was repeated however it continued for about 2 hours. C started to worry and panic about the aggressive and biased behaviour and had a panic attack while at the meeting and rushed out.

(o) On 29 May 2020 C received an email from NB informing him to attend an investigation meeting on the next day at 11pm.

(p) On 29 May 2020 R informed C it was no longer prepared to offer C any Occupational support**.**

(q) On 17 June 2020 at the reconvened investigation meeting, C was handed DR's statement dated 19 April 2020, the statement was not true and Gopi, Pradesh and Theeban, all Northern Sri Lankan Tamils like P came together to get rid of C and were instigated because he reported P regarding the derogatory statements he made to insult C. DR's statement is supported by others because P, Desmond, Gopi, Pradesh and Theeban are all Northern Sri Lankan Tamils who are supporting one another and consider Up-Country Tamils like C as 'low caste'.

(r) Although in his report dated 19 April 2020 DR says it was very hard to work with C it is not correct because C and DR were friends, they both support Man United and we went to

the pub for a drink etc. Further the last time C worked with DR was on 12.04.2020. C suspect this has been made because C verbally made the Protected Disclosure to P.

(s) P forwarding DR's complaint without discussing it with him first to get C's side of the story and to resolve the matter as he normally does. Further, as far C is aware, this is the first time that DR has made a complaint against him.

(t) On 15 April 2020 C had a discussion with P regarding his pay in relation to his two week leave following covid-19. P knew what he had said to C in this meeting was wrong and texted him saying 'Don't worry, as always, I shall look after you'.

(u) The reconvened investigation meeting was on 17 June 2020 and the disciplinary hearing was fixed for 22 June 2020. Hence C was only given 2 days (excluding Saturday and Sunday) to prepare for the disciplinary hearing.

(v) The disciplinary manager did not give any consideration to what C had said. C told the disciplinary panel to take into consideration his mental state and give him an opportunity to continue to work for Tesco. Despite that they dismissed him summarily.

(w) Failure to call for a psychiatric report prior to the reconvened investigation hearing on 17 June 2020 and the disciplinary hearing on 22 June 2020 to see whether:-

(i) C is fit to attend the disciplinary hearing; and / or

(ii) C's behaviour at the workplace and at the investigation meetings was related to his disability.

(x) Decision to terminate C's employment even after C had told the disciplinary panel about his disability.

(y) On 5 July 2020 C went to have an appeal hearing but it was postponed because C did not have a representative. C was told that he would be informed of a new date but was not contacted thereafter.

5.1.2 If so, was that conduct unwanted?

5.1.3 If so, did it relate to the protected characteristic of disability?

5.1.4 Did that conduct have the purpose or (taking into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) effect of:

(a) violating C's dignity; or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

6. DISCRIMINATION – RACE

6.1 Direct discrimination

6.1.1 Was C treated less favourably than P (or, if applicable, a hypothetical comparator) was or would have been? *C relies on the act detailed at paragraph 4.2.1(a). C contends that P is a Northern Sri Lankan Tamil whereas C is a Sri Lankan Up-country Tamil.*

6.1.2 Was C treated less favourably than Gobi S or Pradesh T (or, if applicable, a hypothetical comparator) was or would have been? *C*

relies on the following less favourable treatment compared to Gobi S and Pradesh T (or, if applicable, a hypothetical comparator):-

(a) On 13 November 2019, P promised C he would warn Pradesh T and Gopi S and would not assign them to the same shift as C. P did not warn Pradesh T or Gopi S and did not carry out an investigation.

(b) When a complaint is made against C by DR, P forwards it to NB, an investigation manager is appointed on the same day (see NB's email of 21 April 2020).

(c) On the same day C was moved to a different site and an investigation meeting is held on 26 May 2020.

(d) When C made complaints against Gobi S and Pradesh T, P said he will resolve it but when DR made a complaint against him, P promptly forwards it to NB and an investigation is held.

C contends that Gobi S and Pradesh T are Northern Sri Lankan Tamil whereas C is a Sri Lankan Up-country Tamil.

6.1.3 If so, was the reason for the treatment C's race, colour, nationality or ethnic origin or perceived race, colour, nationality or ethnic origin?

7. **Harassment**

7.1.1 Did R engage in the following acts of alleged harassment related to race:-

(a) On 9 November 2019, at 7am C was forced into the office by Gopi and Pradesh saying they needed to do a 'Let's Talk', Pradesh then shouted at C saying 'take
off your jacket and sit, or get out, you will not work for Tesco for too long, C know what to do, C know how to send you home'.

(b) C relies on the acts detailed at paragraphs 5.1.1(a) - 5.1.1(y).

7.1.2 If so, was that conduct unwanted?

7.1.3 If so, did it relate to the protected characteristic of race?

7.1.4 Did that conduct have the purpose or (taking into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) effect of:-

(a) violating C's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

8. **VICTIMISATION**

8.1 C relies on the following alleged protected acts:-

8.1.1 On 21 April 2020 C informed P that the reason for his sickness was stress in the workplace, namely the derogatory words he said on 15 April 2020. P allegedly asked C "*are you an uneducated 'patti kattan or thotta kattan?"* (which is calling someone a 'low standard village barbarian')] which in Sri Lanka is a racist insult in C's community and, C says P, who is also a Sri Lankan from a different Tamil community, is well aware of.

8.1.2 The email C sent to NB on 21 April 2020.

8.2 Are any of the above protected acts, as defined by section 27(2) of the EqA?

8.3 If there was a protected act, was C subjected to a detriment because of any protected act? C relies on the followed alleged detriments:-

(a) DR made a false allegation against C on the instigation of P and back dated this to 19 April 2020. C suspects that Desmond's complaint was written after he (C) had forwarded his complaint against P to NB by email at 12.12 on 21 April 2020.

(b) Other workers Gobi, Pradesh and Theeban ganged up with DR and P to make false allegations against C at the investigation meeting.

(c) P did not carry out an investigation regarding the allegations C made against Gopi and Pradesh on 9 November 2019.

(d) R did not conduct an investigation into C's allegation that P made racially discriminatory comments towards C.

(e) C was removed from his place of work on 21 April 2020 and transferred to a different site.

(f) R did not conduct a fair and impartial investigation meeting on 26 May 2020 or at the reconvened investigation meeting on 17 June 2020.

(g) R did not give details of the evidence/documents they were going to use against C so he could prepare for the investigation hearing 26 May 2020.

(h) The investigation interview on 26 May 2020 was carried in such a way that C broke down and cried several and showed clear signs that he could not cope and was distressed.

(i) Even though C was clearly distressed the meeting continued after a short break in the same unfair manner that R caused C had a panic attack.

(j) R caused C's mental health issues to recur.

(k) Failure to call for a psychiatric report prior to the reconvened investigation hearing on 17 June 2020 and the disciplinary hearing on 22 June 2020 to see whether:-

(i) C is fit to attend the disciplinary hearing; and / or

(ii) C's behaviour at the workplace and at the investigation meetings was related to his disability.

(l) R did not conduct a fair and impartial disciplinary hearing.

(m) R dismissed C on 22 June 2020.

(n) R did not take C's mental health into consideration when conducting the investigation meetings on 26 May 2020, reconvened investigation meeting on 17 June 2020 or the disciplinary hearing on 22 June 2020.

(o) R did not carry out an appeal hearing.

9. **REMEDY**

9.1 If C's claims for discrimination are successful:-

9.1.1 Should C be awarded any damages for personal injury?

9.1.2 What amount of financial compensation is just and equitable in the circumstances?

9.1.3 What award for injury to feelings (if any) is just and equitable?

FINDINGS OF FACT

1. On 16 December 2018, the claimant commenced employment with the respondent as a full-time Customer Assistant working the night shift usually 11pm – 7am at the Tolworth Express store. Prior to commencing, the claimant did not declare on the medical questionnaire that he had PTSD/depression in an interview with Pradeep.

2. This diagnosis is evident from a medical report dated 7 February 2017 [136]. A further medical report dated 27 May 2020 records in its history section "He has a diagnosis of PTSD with previous psychotic symptoms and was recently discharged from the TSS, following a successful recovery". It is not clear when "recent" was.

3. The store manager at the time was Pradeep who interviewed the claimant. He has worked for the respondent for approximately 20 years. Two shift leaders in the store at that time were Pradesh and Gopi Shanmugavadivel ('Gopi') who have also worked for the respondent for several years.

4. From 2019, the claimant worked in a second job two days a week, during the day. The claimant said that one day a week he would work a day shift at his second job and then a night shift at Tesco.

5. On 5 November 2019, the claimant was told by Joseph, his Shift Team Leader, that he had failed to charge a customer for fuel. On 9 November 2019, Gopi and Pradesh held a 'Lets Talk' discussion with the claimant about the fuel incident. The claimant sent a message to Pradeep [296] complaining about the 'Lets Talk' discussion. On 11 November 2019, the claimant alleges Pradesh spoke to him and said 'you sound like a mental person. On 13 November 2019, Pradeep spoke with the claimant about the 'Lets Talk' discussion. This conversation was covertly recorded by the claimant [224].

6. On 23 January 2020, the claimant and Pradeep met to discuss his request for a transfer. Again, the meeting was covertly recorded by the claimant [237]. The claimant decided not to transfer to another store.

7. On 17 March 2020, the claimant was taken ill with Covid 19 symptoms at work and collapsed and claims no assistance was offered him. On 5 April 2020, the claimant returned to work.

8. On 14 April 2020, the claimant claims that he was spoken to in an intimidating harsh tone by the shift team leader, Gopi.

9. On 15 April 2020, Pradeep spoke with the claimant about pay. The claimant alleges a derogatory and racist comment was made to him. Again, the meeting was surreptitiously recorded by the claimant [393]. There is no record of the alleged remark. The claimant says that his phone had ceased to function at that point.

10. On 19 April 2020, one of the shift leaders, Desmond Rasanayagam ('Desmond') submitted a letter of complaint about the claimant [411].

11. On 20 April 2020, the claimant returned to work after 3 days sickness absence. The next day, on 21 April 2020, Pradeep spoke with the claimant to get him to complete a return to work form. The claimant says he told Pradeep that he had been feeling stressed due to his derogatory and racist comment. The claimant sent an email to Nina Buckell, in HR, raising various complaints about colleagues, the alleged comment by Pradeep and saying he can no longer work with Pradeep [413]. The respondent informed the claimant that he was being transferred to another store. The claimant says that it was Farhan who told him. Farhan disputes this. On 24 April 2020, the claimant began working at the South Wimbledon Express store.

12. On 4 May 2020, the claimant was unwell at work and was absent from work for 2 weeks having received a fit note from his GP for a stress related problem [128]. The claimant returned to work on 22 May 2020. He was provided with a letter inviting him to an investigation meeting on 26 May 2020 regarding his conduct at work [473]. The claimant became unwell during the meeting with Farhan and it was postponed [474].

13. On 28 May 2020 in the morning, a letter was sent to the claimant for a resumed investigation meeting on 29 May [495 – 497 & page 67 item 17]. Later that day at 10.21pm, the claimant replied saying that he has been signed off work by his GP for 2 weeks and a pre-existing mental health issue has been triggered following the investigation meeting [499]. On or about this date, the claimant sent a GP letter to Nina Buckell which contained information about PTSD and depression [124].

14. The resumed investigation meeting took place on 12 June 2020 [532] during which the claimant provided a written statement [524] and raised a number of issues. The meeting was postponed. The respondent sent the claimant a letter inviting him to the resumed meeting for 17 June 2020 [538].

15. On 17 June 2020, the resumed investigation meeting concluded [540]. The respondent invited the claimant to a disciplinary hearing [550]. The disciplinary hearing took place on 22 June 2020 [554] during which the claimant provided a written statement [551]. On 23 June 2020, the respondent sent the outcome letter to the claimant [574]. Mr Butt's decision was to dismiss the claimant for gross misconduct. The respondent accepted that the conduct at work did not constitute gross misconduct and the other two reasons given did not change the position.

16. On 5 July 2020, the claimant provided written grounds of appeal [577]. On 7 July 2020, he was invited to attend an appeal meeting on 24 July 2020. On 19 July 2020, the respondent concluded the case report [597]. On 24 July 2020, the appeal meeting took place [604].

17. On 17 August 2020, the claimant applied for Early Conciliation and an ACAS Certificate was issued [8]. On 17 September 2020, the claimant presented his claim to the Employment Tribunal [9].

SUBMISSIONS

18. The Tribunal heard submissions from both parties with a skeleton argument for the respondent.

LAW

Time limits

Just and equitable extension

19. Section 123(1)(b) of the 2010 Equality Act permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

20. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the Employment Appeal Tribunal in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

21. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

22. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

23. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;

the extent to which the party sued had co-operated with any requests for information;
the promptness with which the claimant acted once he knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

24. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

25. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

26. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

Dismissal for gross misconduct

27. At common law gross misconduct is conduct by an employee which fundamentally repudiates his contract of employment and justifies summary dismissal. There are several authorities *inter alia* **Laws v. London Chronicle Ltd** [159] 1 WLR 698 and **Wilson v. Racher** [1974] IRLR 114 which confirm that gross misconduct is misconduct of such a nature that it fundamentally breaches the contract of employment. In the case involving the organist of Westminster Abbey, **Neary v. The Dean of Westminster** [1999] IRLR 288, who was summarily dismissed for gross misconduct, the Queen's Special Commissioner, Lord Jauncey, at paragraph 22 stated that:

"…conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

28. This test for gross misconduct or repudiation was endorsed by the Court of Appeal in **Briscoe v. Lubrizol Ltd** [2002] IRLR 607 CA.

Discrimination

29. Section 13 of the Equality Act 2010 ("EqA") deals with direct discrimination. It states as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

30. Section 23 EqA deals with comparators. It states as follows:

> "(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

31. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the claimant to what would have been received by the actual or hypothetical comparator, that the test of whether an alleged act was direct discrimination arises and this requires a consideration of the reason for the treatment.

32. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

> The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

33. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

> Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the Claimant to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

34. In **Amnesty International v. Ahmed** [2009] IRLR 884 Mr Justice Underhill (as he then was) (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v. Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372, the Tribunal should ask what is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained about. In **Nagarajan v. London Regional Transport** [1999] IRLR 572, HL, it was stated that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out.

35. The crucial question is why the claimant received the particular treatment of which he complains.

36. Paragraph 3.11 of the Code of Practice confirms:
The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

37. Paragraph 3.13 of the Code of Practice confirms:
In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

38. The burden of proof provisions in relation to discrimination claims are found in section 136.

39. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.

40. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e. looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63. That interpretation was approved by the Court of Appeal in **Madarassy v Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

41. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).

42. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] ICR 748 CA.

Protected characteristics

Race

43. 'Race' as a protected characteristic includes colour, nationality and ethnic or national origin (Section 9 EQA). Tamils present with the seven essential characteristic that form an 'ethnic group' namely, a long-shared history, own cultural tradition, a common language, literature, religion, common geographical origin and being a minority group: **Mandla v. Dowell Lee** [1983] 2 AC 548 HL.

44. The question as to whether class or caste discrimination can arise in a racial group has been considered by the Government. Section 9(5) EqA was amended in 2013 to enable caste discrimination regulations to be issued. In July 2018, the Government decided against regulation as only a few cases had arisen and left it to case-law to bring caste cases within the definition of 'ethnic origin' (*Caste in Great Britain and equality law: consultation response).* In **Chandhok and another v. Tirkey** [2015] IRLR 195 EAT, the Employment Appeal Tribunal said there may be cases where an ethnic group is determined in part by descent.

Disability

45. The respondent accepted that the claimant was disabled.

Direct disability discrimination

46. Section 13 of EqA is not repeated here.

Discrimination arising from a disability

47. Section 15 EqA 2010 provides, relevantly, as follows:

> '(1) A person (A) discriminates against a disabled person (B) if—
> A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim."
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.'

48. There are two questions of causation, as the Employment Appeal Tribunal held in **Basildon & Thurrock NHS Foundation Trust v. Weerasinghe** [2016] ICR 305 EAT explained:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

49. **Sheikholeslami v. University of Edinburgh** [2018] IRLR 1090 EAT confirmed that there are two distinct causative issues:

50. **Pnaiser v. NHS England** [2016] IRLR 170 EAT set out the following guidance as to the correct approach to a claim under section 15 EqA 2010 (at [31]), including, relevantly, the following:

> 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
> The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there

> may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…
>
> The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
>
> … However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
>
> This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
>
> …
>
> Moreover, the statutory language of s.15(2) makes clear… that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so…

51. Whilst the test is objective and could arise from a series of links, there still has to be some causal connection between the "something" and the claimant's disability: per HHJ Eady QC (as she then was) in **iForce v. Wood** UKEAT/0167/18 (2 January 2019, unreported).

52. It is also sufficient if the disability is an "effective cause" of the "something" that causes the unfavourable treatment: it does not have to be the sole (or even main) cause. In **Risby v. London Borough of Waltham Forest** (UKEAT/0318/15, 18 March 2016, unreported) the Employment Appeal Tribunal held that:

> "17. … In the passage cited from the Employment Tribunal's decision, it is plain that it believed that it was necessary for it to be shown that there was a "direct linkage" between the Claimant's disability and his conduct on 19 June 2013. There was no such requirement. All that had to be established was that the Claimant's conduct arose in consequence of his disability or, to put it in Laing J's words, that was an effective cause or more than one of his conduct. …

> 18. If he had not been disabled by paraplegia, he would not have been angered by the Respondent's decision to hold the first workshop in a venue to which he could not gain access. His misconduct was the product of indignation caused by that decision. His disability was an effective cause of that indignation and so of his conduct, as was, of course, his personality trait or characteristic of shortness of temper, which did not arise out of his disability. On the Employment Tribunal's own analysis of the facts, this was a case in which there were two causes of conduct that gave rise to his dismissal, one of which arose out of his disability."

Requirement of knowledge in section 15(2)

53. In **Pnaiser** at para. 31 (g) the Employment Appeal Tribunal said:

> Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of **Weerasinghe** as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

54. The foregoing approach was confirmed in **City of York Council v. Grosset** [2018] ICR 1492 CA.

55. The test of justification is an objective one to be applied by the Tribunal, against the backdrop of evidence before it. The Tribunal may, therefore, reach a different conclusion to that advanced by the employer: **York City Council v Grosset** [2018] ICR 1492 CA. held that:

> "54. … the test in relation to unfair dismissal proceeds by reference to whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) of the EqA is an objective one, according to which the employment tribunal must make its own assessment …"

56. The EHRC Code further states that:

> "5.20. Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments …
> 5.21. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

57. Para 4.31 states that:

> "EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the

> legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

58. In other words, the justification defence will not be made out where the same aim could be achieved by less discriminatory means.

59. Albeit in the context of indirect discrimination, Lady Hale addressed the justification defence (which is the same in section 15) in **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] ICR 640 SC and stated at [29]:

> "A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

60. In **Homer v Chief Constable of West Yorkshire** [2012] ICR 704 SC the Supreme Court considered the justification defence (again in the context of indirect discrimination) and Lady Hale stated:

> "19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim…
>
> …
>
> 20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:
>
> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."
>
> He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:
>
> "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"
>
> As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.
>
> …
>
> 22. The ET (perhaps in reliance on the IDS handbook on age discrimination) regarded the terms "appropriate", "necessary" and "proportionate" as "equally

> interchangeable" [29, 31]. It is clear from the European and domestic jurisprudence cited above that this is not correct. Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.
> …
> 23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. The EAT suggested that "what has to be justified is the discriminatory effect of the unacceptable criterion" [44]. Mr Lewis points out that this is incorrect: both the Directive and the Regulations require that the criterion itself be justified rather than that its discriminatory effect be justified (there may well be a difference here between justification under the anti-discrimination law derived from the European Union and the justification of discrimination in the enjoyment of convention rights under the European Convention of Human Rights)."

61. Proportionality was considered by the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 where Lord Reed JSC stated at page 791:

> "74 The judgment of Dickson CJ in Oakes provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in Oakes can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in de Freitas, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption JSC, but there is no divergence of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

Reasonable adjustments (sections 20 and 21 of the Equality Act 2010)

62. The duty to make reasonable adjustments is found in section 20 of the Equality Act 2010:

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

63. The PCP being complained of must be one which the alleged discriminator 'applies or would apply equally' to persons who do not have the protected characteristic in question. As Baroness Hale stated in **Rutherford v. Secretary of**

State for Trade and Industry [2006] ICR 785 SC, 'It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups.'

64. In **Royal Bank of Scotland v. Ashton** [2011] ICR 632 EAT, the Employment Appeal Tribunal held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment. This case was considered by the Court of Appeal in **Griffiths v. Secretary of State for Work and Pensions** [2016] IRLR 216 on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

65. In **British Airways plc v. Starmer** [2005] IRLR 862 EAT, the term 'PCP' was held to be broad enough to encompass a discretionary management decision which applied only to the claimant. Conversely, in the disability discrimination case of **Nottingham City Transport Ltd v. Harvey** [2013] EqLR 4 EAT, Langstaff P held that the manner in which a disciplinary procedure was applied to an employee did not amount to a PCP, because a 'practice connotes something which occurs more than on a one-off occasion and … has an element of repetition about it.' Any apparent conflict between these two cases was resolved by the Court of Appeal in **Ishola v. Transport for London** [2020] ICR 1204 CA which said:

> 'The words 'provision, criterion or practice are not defined in the Equality Act.'
>
> 'The Equality Act 2010 Statutory Code of Practice issued by the Equality and Human Rights Commission provides: '6.10 The phrase PCP is not defined by the Act but should be construed widely so as to include for example any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions..''
>
> 'As a matter of ordinary language I find it difficult to see what the word 'practice' adds to the words if all one -off decisions and acts necessarily qualify as PCP's ..if something is simply done once without more, it is difficult to see on what basis it can be said to be 'done in practice.' It is just done and the words 'in practice' add nothing.'
>
> 'The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee.'
>
> ' .. in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to 'practice' as having something of the element of repetition about it. In Nottingham City Transport Ltd v Harvey UKEAT/0032/12, the PCP relied upon was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might

> have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way.'

66. The Court said that although a one-off decision or act could amount to a practice, it was not necessarily one; all three words (provision, criterion and practice) carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again and the PCP in **Starmer** was readily understandable as a decision that would have been applied in future to similarly situated employees.

67. With reasonable adjustments, there must be a prospect that the adjustment(s) will work (**Leeds Teaching Hospital NHS Trust v Foster** EAT/0552/10). In **South Staffordshire and Shropshire Healthcare NHS Trust v Billingsley** EAT/0341/15 Mitting J said:

> [17] Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under s 15(1) of the *2010 Act*. [We understood this to be a reference to section 20].
>
> [18] It is in the end a question of judgment and evaluation for the Tribunal, taking in to account a range of factors, including but not limited to the chance. A simple example may suffice to illustrate the point. If a measure proposed by an employee as a reasonable adjustment stands a very small chance of avoiding the unfavourable treatment arising out of her disability to which she would otherwise be subjected, but it was beyond the financial capacity of her employers to provide it so a Tribunal would be entitled to conclude that it was not a reasonable adjustment. Indeed, on those facts it would be difficult to justify a conclusion that it was a reasonable adjustment. In the case of a large organisation by contrast, where a proposed adjustment would readily be implemented without imposing an unreasonable administrative or financial burden on the employer then the obligation to take it may arise notwithstanding that the chance of avoiding unfavourable treatment was very far from a certainty.

68. Schedule 8 Part 3 paragraph 20 of the EQA: 'A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know (b) that an interested disabled person has a disability and is likely to be placed at the substantial disadvantage referred to in the first, second or third requirement.' In **Wilcox v. Birmingham CAB Services Limited** [2011] UKEAT/0293/10/DM, the EAT confirmed (see para. 37, *per* Underhill P) that an employer is only under a duty to make reasonable adjustments if:

> the employee is disabled;
>
> the employee is placed at a substantial disadvantage (in comparison with non-disabled employees) as a result of the application of the PCP under consideration; and

the employer knows, or ought reasonably to have known, both of the above matters.

69. The burden is on the claimant to establish both the fact of the alleged PCP(s) and the substantial disadvantage said to arise in consequence thereof: see for example **Bethnal Green & Shoreditch Educational Trust v. Dippenaar** [2015] UKEAT/0064/15, at paras. 40 – 42.

70. The recommended 'structured approach' to resolving claims of this nature was set out by the EAT in **Secretary of State for Work and Pensions (Job Centre Plus) v. Higgins** [2014] ICR 341 EAT, as follows:

> "29 In a case where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the tribunal should identify (1) the employer's provision, criterion or practice ("PCP") at issue, (2) the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the tribunal is in no position to find what (if any) step it is reasonable for the employer to have to take to avoid the disadvantage.
>
> 30 These requirements flow from the statutory wording. This wording has changed slightly from the wording in the preceding Disability Discrimination Act 1995, in respect of which the Employment Appeal Tribunal emphasised the importance of such an approach: see *Environment Agency v Rowan* [2008] ICR 218, paras 26–27 (Judge Serota QC). The guidance in *Rowan* remains apposite: tribunals should give careful consideration to, and make findings concerning, each element of the statutory provision which is engaged in the case before it. Eliding different elements within the statutory definition, or failing to make clear findings concerning each element, leads to difficulty. Elements may differ in their importance from case to case, but it is good discipline to state conclusions on them even if the conclusions appear obvious.
>
> **31** We would add one further point. The duty to make an adjustment is a duty to take a "step" or "steps" to avoid the disadvantage. Just as the tribunal should expect to identify the PCP, the comparators and the nature and extent of the substantial disadvantage, so it should expect to identify the step or steps which it was reasonable for the employer to have to take to avoid the disadvantage."

71. Finally, in **Royal Bank of Scotland v. Ashton** [2011] ICR 632 EAT, the EAT (*per* Langstaff J) held at paras. 14 – 15:

> "14. A close focus upon the wording of 3A(2), 4A and 18B shows that an Employment Tribunal - in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination - must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.
>
> The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect - that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to

help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it."

72. The Court of Appeal in **Newham Sixth Form College v. Sanders** [2014] EWCA Civ 734 CA at para 9 endorsed what was said in **Royal Bank of Scotland v. Ashton** that when considering the question of reasonable adjustment, it is critical to identify the relevant PCP concerned and the precise nature of the disadvantage which it creates by comparison with its effect on the non-disabled. The importance of this is that until the disadvantage is properly identified, it is not possible to determine what steps might eliminate it.

Harassment

73. Under section 26(1), harassment occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

violating the worker's dignity; or

creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

74. Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

75. In **Betsi Cadwaladr University Health Board v. Hughes** EAT/0179/13 (Langstaff P) the EAT considered the recent cases in relation to harassment under section 26 Equality Act and said as follows:

> [10] Next, it was pointed out by Elias LJ in the case of *Grant v HM Land Registry* [2011] IRLR 748, that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said "tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."
>
> [11] Exactly the same point was made by Underhill P in *Richmond Pharmacology* at para 22:
>
> ". . . not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."
>
> [12] We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

76. In relation to the word "environment" in section 26 the EAT in **Weeks v Newham College of Further Education** EAT/0630/11 (Langstaff P) said "…it must be remembered that the word is "environment". An environment is a state of affairs". Words spoken must be seen in context and that context includes other words spoken and the general run of affairs within the particular workplace.

Victimisation

77. Section 27 provides that:

"A person (A) victimises another person (B) if A subjects B to a detriment because—

B does a protected act, or A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

bringing proceedings under this Act;

giving evidence or information in connection with proceedings under this Act;

doing any other thing for the purposes of or in connection with this Act;

making an allegation (whether or not express) that A or another person has contravened this Act."

78. In **Chalmers v. Airpoint & Ors.** UKEATS/0031/19/SS dated 16 December 2020, it was held that comments in a grievance that actions "may be discriminatory" may not amount to a protected act.

DISCUSSION AND DECISION

Evidence

79. The claimant's case speculated that there had been collusion between his fellow store employees with Pradeep who had gone on to influence the subsequent managers and Nina Buckell to bring about his dismissal. This was said to be because of his race and/or his disability but this was not so. The Tribunal found the evidenced of Pradeep credible and reliable. Far from colluding in the removal of the claimant, he appeared to the Tribunal to have been exceptionally patient with the claimant. His evidence was consistent with the transcripts of the covert recordings. The Tribunal also considered the evidence Pradesh credible and reliable. The evidence given to the Tribunal by Farhan was unreliable but the Tribunal relied upon the written records he made at the time. The Tribunal found the claimant's, evidence not credible and unreliable except where supported by other evidence or as specifically found by the Tribunal. The evidence of Mr Butt was of a procedural nature and was taken into account although there was no cross examination possible. The activities of Nina Buchell, who was not a witness, were attacked by the claimant but the Tribunal considered what she did in the circumstances as reasonable.

Race

80. The claimant's evidence which was accepted was that Tamils present with the seven essential characteristic that form an 'ethnic group' namely, a long-shared history, own cultural tradition, a common language, literature, religion, common geographical origin and being a minority group. The respondent agreed that Tamils

are an ethnic group and a racial group. The claimant, Pradeep, Pradesh and Gopi identify as Sri Lankan Tamil. Tamil is a Sri Lankan race and according to Pradeep, Tamils are based all over Sri Lanka and do not differentiate between each other. During cross examination, the claimant described the Tamil caste system and it appeared that he was describing a class system in the Tamil race.

Disability

81. The respondent accepted that the claimant has the disability of PTSD and depression. The issue for the Tribunal was of knowledge.

82. The claimant's evidence to the Tribunal was that he told Pradeep about his PTSD during his interview in 2018 and did not mention it again until 27 May 2020. The Tribunal took this to refer to the meeting on 29 May 2020. Pradeep told the Tribunal that he was not aware of any mental health issues until 2020 and he was very clear that, as a recruitment manager, he has a responsibility to his employer and prospective employees and recruits to ensure they are provided with support where they need it. He is currently the recruitment manager for South West London which covers 32 stores. If the matter had been raised with him by the claimant, he would have insisted the PTSD was disclosed. The Tribunal accepted the evidence of Pradeep and the undisputed evidence about PTSD not being mentioned by the claimant until 29 May 2020.

Complaints

83. The claimant claims that Pradesh and Gopi spoke with him on 9 November 2019 [page 57, item 1] and shouted at him *'Take off your jacket and sit or get out you will not work for* Tesco *for too long I know what to do I know how to send you home.'* Pradesh does not remember this meeting and said in evidence that he would never speak or shout in this way to the claimant. He does however accept that he and Gopi had issues with the claimant's conduct. The Tribunal accepted the evidence of Pradesh that the incident did not take place.

84. The claimant claims that on 11 November 2019, Pradesh spoke to him about being paid for extra time worked (page 58, item 2) and when the claimant questioned him, Pradesh said *'You sound like a mental person.'* Pradesh does not remember this discussion and said in evidence that he would never speak or shout in this way to the claimant. The Tribunal accepted the evidence of Pradesh that he did not make this statement.

85. The claimant told Pradeep about the alleged incident on 9 November 2019 but did not raise a formal grievance about it, nor did he raise a grievance about the 11 November complaint. He told the Tribunal that he hoped it would be resolved informally. He had several conversations with Pradeep about Gopi and Pradesh during which Pradeep advised him of the option to put a complaint in writing but the claimant chose not to.

86. On 13 November 2019, when Pradeep returned from annual leave, he and the claimant had a conversation. The claimant recorded the conversation covertly [224]. He told the Tribunal that he recorded conversations *'when things were getting a bit weird towards me.'* The conversation appears to contain references to Gopi and how

he spoke to the claimant whilst Pradeep was on annual leave. The claimant alleges victimisation but does not provide any details. The claimant claims that Pradeep promised to warn Gopi and Pradesh about their behaviour during this conversation and ensure they were not on the same shift as the claimant however during cross examination the claimant accepted that there is no mention of this in the transcript. The Tribunal finds that Pradeep did not promise the claimant that he would warn Gopi and Pradesh. The claimant refers to another conversation involving members of staff on that date, where he says the racist slur subsequently used against him was used and thus Pradeep would know what it meant [654]. The Tribunal did not consider any conclusion could be drawn from the document and the evidence of the claimant and adhered to its finding that Pradeep was a credible witness.

87. On 23 January 2020, the claimant recorded another conversation with Pradeep covertly [236]. During the conversation, the claimant appears to be suggesting that a female member of staff has treated him inappropriately but does not provide any details. Pradeep refers to allowing the claimant to *'run the shift'* [241]. The claimant asked for a transfer. Pradeep said that he will request the transfer if that's what the claimant wants [242] to which the claimant says *'No I do not like to leave this place.'*

88. There was no mention of race or disability by the claimant during the covertly recorded conversations in November 2019 and January 2020.

89. In March 2020, the claimant alleges that he collapsed at work. He says that neither team leader assisted him but Pradesh said that he assisted in taking the claimant to a room where he gave him water to drink. There is a dispute about the date, the claimant refers to 22 March 2020 (page 59/60, item 4) and Pradesh recalls it as 17 March 2020. The Tribunal accepted Pradesh's account. The claimant's symptoms were due to Covid 19 and he was off work until 5 April 2020. There was no mention by the claimant of a disability during this time.

90. On 14 April 2020, the claimant claims that Gopi spoke to him in an *'intimidating and harsh tone'* (page 60, item 5) and he sent messages to Pradeep to tell him [335 – 339]. The messages refer to Gopi giving instructions to the claimant but say nothing about how they were given.

91. Pradeep had a conversation which was covertly recorded by the claimant on 15 April 2020 during which the claimant claims Pradeep said to him *'are you an uneducated patti kattan or thotta kattan?'* [page 62 item 6]. The claimant told the Tribunal that his mobile telephone battery died whilst he was recording the conversation and prior to Pradeep's comment. During the conversation, the claimant appears to be suggesting that Gopi and Pradesh should not be giving him direct instructions. Pradeep says that as far as he was concerned the claimant's issues with Gopi and Pradesh had been resolved [396] and he said *'I do not want to come back to this every three months ...'* The conversation continues and there is a discussion about the claimant potentially leaving and deciding to stay, the claimant refers to March 2020 when he collapsed in the store. He mentions having sharp chest pains. The claimant also talks about other colleagues being prioritised before him (possibly for shift leader) and says *'I know what is going on and you know what is going on and I know that ... I have a sense that you put some other people, prioritise them because they are more trained and they can ... I do not know because for the service they have provided that amount of time they have been with you and things, I am just a colleague*

right I do not know even know to [unclear] anything. You might end up not losing anything if I walk out of the store' [397]. There follows a discussion about Gopi where Pradeep and the claimant appear to agree that Gopi can sometimes be argumentative [397]. Pradeep says that he has *'punished'* Gopi and the claimant mentions that he may be racist [399] but does not provide any details. They also discuss potential promotion for the claimant to shift leader and store manager [403]. The conversation then appears to focus on Pradeep and his difficulties as a store manager.

92. Later the day of 15 April 2020, in a text message conversation, Pradeep tells the claimant that he will look after him [335 – 339].

93. During all the recorded conversations Pradeep and the claimant sometimes speak in Tamil and these words have not been transcribed.

94. The claimant was off work for 3 days with illness and returned to work on 20 April 2020. The first contact that the claimant had with his GP in 2020 was 4 May 2020 [120].

95. On 19 April 2020, one of the shift leaders, Desmond Rasanayagam ('Desmond') submitted a letter of complaint about the claimant [411]. Pradeep told the Tribunal that when he received the letter from Desmond he was not surprised because Desmond had previously made verbal complaints to him about the claimant's conduct at work. Pradeep also told the Tribunal that other shift leaders had complained about claimant verbally from time to time. The claimant told the Tribunal that this complaint was a lie and Desmond had been forced to fabricate the complaint by Pradeep. He claims this was because Pradeep wanted him out of the business because of his disability and race. The Tribunal does not accept that Pradeep was behind the complaint by Desmond or that the contents of the complaint were a lie.

96. The claimant claims that during a return to work meeting with Pradeep on 21 April 2020, he made a protected disclosure (the Tribunal took this to refer to there being a protected act) and told Pradeep that he felt very uncomfortable talking to him because of the comment he had made. The transcript suggests that they discussed pay, the reason for the claimant's absence [420] and an occupational health referral [421]. The claimant says that Pradeep *'pushed me to the verge'* [425-426] but he does not mention the alleged comment but says *'you repeatedly said that is unfortunately that is the situation ...'* and from the content of the transcript this appears to relate to pay whilst off sick and the claimant's issues with colleagues]426 – 430] particularly who should be giving him instructions. According to the transcript, the claimant does not mention any alleged racist or derogatory comment by Pradeep. Pradeep explains during the conversation how he has supported the claimant [426]. The claimant does not appear to dispute this. There is no comment from the claimant during this conversation that he requires an immediate transfer because he cannot work with Pradeep anymore [63]. The Tribunal accepted Pradeep's accounts and consider that he interacted with the claimant with extraordinary patience.

97. The claimant claims that he made a second protected disclosure (that there was a second protected act) when he sent an email to Nina Buckell in HR on 21 April 2020 setting out his difficulties during recent days [64 and 413 – 415]. The respondent accepted that this email was a protected act. When Nina Buckell received the email from the claimant, she was already in receipt of the complaint letter from Desmond

[411]. The email alleged bullying behaviour in November 2019 and derogatory comments from Pradeep [413]. Nina Buckell's response focused on the complaint received from Desmond (item 7 pages 64 and page 411). The claimant told the Tribunal that he believes that Nina Buckell was influenced by Pradeep in her response because they have a close working relationship. During cross examination, the claimant told the Tribunal that Nina Buckell's conduct towards him was not related to his race. The Tribunal found that there had been no influence by Pradeep on the actions of Nina Buckell.

98. The claimant claims that on 21 April, Farhan (store manager at Wimbledon Morden Road) visited him at Tolworth and said that the claimant was being temporarily transferred to the South Wimbledon store (page 64 item 8). Farhan says that he has never visited the Tolworth store and whilst he was aware of the transfer, he cannot recall having a role in the decision or the delivery of it. The claimant may have been correct in his recall.

99. On the 4 May 2020 [120], the claimant became unwell at work with chest pains and was signed as unfit for work by his GP later that day until 22 May due to *'stress related problems'* [126]. There is no mention of PTSD or depression. Nina Buckell organised an occupational health telephone consultation for the claimant [457] but it appears that he did not receive the call. The Tribunal accepted that the claimant did not receive the call.

100. On 22 May 2020, when the claimant returned to work, he was provided with a letter inviting him to an investigation meeting on 26 May regarding the complaint raised by Desmond [473]. The respondent stated in the letter and during the meeting that the claimant was entitled to be accompanied to the meeting [items 9 – 12 pages 65-66].

101. During the investigation meeting on the 26 May 2020, (i) the claimant told Farhan that Pradeep had made a *'remark about his community'* [479], (ii) the claimant said that he had been bullied and harassed by Gopi and Pradesh [482] (iii) the claimant was asked about his job role. When he was asked about his role, Farhan suggested that he was changing his answers, at which time the claimant said that he was unwell and the meeting was adjourned [484]. Farhan denies all matters raised by the claimant during this meeting [items 13 – 16 pages 66-67]. During cross examination, the claimant told the Tribunal that Farhan's treatment towards him was not related to race. The Tribunal does not accept that Farhan treated the claimant in the manner described by the claimant.

102. The claimant was signed off work by the GP due to stress at work [125]. The note is dated 28 May 2020 and it is not clear when it was received by the respondent.

103. On 28 May 2020, the respondent sent the claimant an invitation for the resumed investigation meeting, for 29 May 2020 [495]. The claimant requested a 2 week postponement [499]. On 28 May 2020, the respondent sent the claimant an invitation for the resumed investigation meeting, for 29 May 2020 [495]. The claimant requested a 2 week postponement [499]. Nina Buckell wrote to the claimant on 29 May agreeing to change the investigations manager (as requested by the claimant) and to postpone the resumed investigation meeting to 12 June 2020 [504 and 507]. On or about this date, the respondent had knowledge of the claimant's disability.

104. On 1 June, Nina Buckell advised colleagues that there will be no referral to occupational health as the claimant had failed to attend to 2 telephone consultation [510 & 68, item 18]. At least one was not his fault.

105. The investigation meeting was resumed on 12 June 2020 [532]. The claimant produced a written statement [524] and Mr Patel adjourned the meeting to make further enquiries. The investigation meeting was resumed on 17 June 2020. The claimant's claims regarding this meeting and Desmond's statement are not accepted by the Tribunal [items 19 – 23 pages 69 – 70]. There is no evidence of collusion. It is accepted that Desmond and the claimant were friends. The claimant's claim that the matter was referred to a disciplinary hearing because of his disability and the letter received from his GP is not accepted by the Tribunal.

106. Following the investigation meeting, the claimant was invited to a disciplinary hearing on 22 June 2020 [538]. During the disciplinary hearing, the claimant provided a statement in writing [551]. The claimant alleges that he was given insufficient time to prepare for the meeting (page 70 item 24) however at the beginning of the disciplinary meeting when he is asked if he is happy to continue, he says that he is [page 555]. During the meeting he is asked again if he is happy to continue and says that he is [558]. During cross examination, the claimant said that if he had not had the mental health issues referred to in the GP letter, he would have been treated more favourably. The Tribunal does not accept that he is correct. Mr Butt opened the meeting by inviting the claimant to state his version of events. The claimant tells Mr Butt all that he was concerned about. He mentions one allegation of 'racist behaviour' namely the alleged remark by Pradeep about the claimant's community on 15 April 2020. He does not allege any other behaviour towards him arising from his race. He does not mention any behaviour towards him because of his disability [555 – 557]. During the meeting, Mr Butt refers to a statement taken from a colleague during the investigation in which it is commented that the claimant appears disinterested, always tires, slow in his work and *'spends quite a lot of time in the loo.'* The claimant replies that his PTSD and depression symptoms have been triggered for which he is taking medication and he spends time in the toilet to have a cry. During cross examination when the claimant was asked why he had not provided his version of events in relation to unfavourable treatment and Desmond having lied about his complaint, the claimant told the Tribunal that he had *'given up'* because during a comfort break, his union representative had told him that he was probably going to be dismissed. The claimant was dismissed at the conclusion of the meeting and received the outcome letter the following day [574].

107. The claimant submitted grounds of appeal of the decision [577]. He accepted during cross examination that numbers (1) to (7) of his appeal grounds made no mention of race or disability. Number 8 of the appeal grounds refers to the alleged derogatory comment by Pradeep on 15 April 2020. The claimant does not claim that he was dismissed because of his race or that it was a material factor. He claims that the alleged comment was not investigated. The claimant told the Tribunal that his legal representative assisted him in preparing his grounds of appeal. Numbers 9 and 10 of the appeal grounds allege disability discrimination by the disciplinary officer. The claimant did not adduce any evidence during the disciplinary hearing to suggest that either (i) He had been subjected to treatment by colleagues because of his disability or (ii) Desmond had raised a complaint about his's conduct because of his disability. The only medical evidence that the respondent had at this time was the letter from the

GP, that does not mean that the individuals other than Nina Buckell were aware of the contents. The claimant did not rely upon his disability to either explain his conduct or allege unfavourable treatment.

108. On 8 July 2020, an invitation to an appeal meeting was sent to the claimant for the 24 July [588 – 589] and on 13 July, the claimant said that he would attend [590]. The claimant attended the meeting on 24 July [604] and it was adjourned to enable the claimant to be represented by his union. The claimant said that he was content to proceed but the Chair of the meeting, Nina Buckell, advised that a union representative should be present and it would be preferable to adjourn in the hope that the meeting could be resumed the following week. The claimant agreed with this. The respondent heard nothing further from the claimant in relation to pursuing his appeal.

The issues

109. The narrative of the issues is not repeated here.

Time limits

110. The claimant began early conciliation on 17 August 2020 and on 17 September 2020, the certificate was issued and the claim was presented to the employment tribunal. In line with section 123 EqA, the last discriminatory act to be in time would have taken place on or about 17 May 2020. The questions for the Tribunal were: Was there conduct extending over a period and if so, was the claim made to the Tribunal within 3 months of the end of that period (plus early conciliation period extension)?

111. Items (1) – (6) of the Scott Schedule [57] are not within the prescribed time limit. The claimant told Pradeep about the conduct on 9 and 11 November 2019, within a matter of days. In evidence, he told the Tribunal that he continued to believe that Pradeep would resolve his issues with Gopi and Pradesh but he did not. He said that he only realised this when he was facing a disciplinary hearing in June 2020. The most recent incident involving Gopi or Pradesh was on 14 April 2020.

112. From 15 April 2020, the claimant's attention turned towards Pradeep and the racist derogatory comments that he says Pradeep made to him. The conduct of Gopi and Pradesh no longer featured in his complaints and the claimant's evidence was that he was the victim of race discrimination because of Pradesh and his influence over colleagues. The conduct alleged in 2019 did not therefore extend beyond 14 April 2020. Although the incident on 15 April 2020 is outside of the time limit, it was part of conduct extending over a period because the claimant complains about Pradeep's conduct up to his dismissal and thereafter.

113. In order to address all of the contentions which were relevant to the complaints, the Tribunal decided that it was just and equitable to extend time where necessary in relation to items 1-6.

Comparators

114. The Tribunal is asked by the claimant to decide whether the claimant was treated detrimentally to how Pradeep was treated in relation to disability and Gopi and Pradesh in relation to race. There should be no material difference between the

comparators' circumstances and the claimant's. During his evidence, the claimant said that he is from the Up-Country, a different area in Sri Lanka to the North and he considers himself to be different from Pradesh (and indeed a different race). Gobi & Pradesh are also Northern Sri Lankan. As the comparators are from Northern Sri Lanka, there may be a material difference between their backgrounds (according to the social class or caste system) and they hold higher positions in the managerial hierarchy to the claimant, they are unsuitable comparators. The Tribunal decided that where comparison was necessary, it should be against a hypothetical comparator.

Issue 4.1

115. The respondent accepted that the claimant has a disability (PTSD and depression) but maintains that the respondent became aware of this on or about 28 May 2020 after he became unwell at work and spent some time in hospital. The only medical evidence that was provided to Nina Buckell prior to the claimant's dismissal was a letter from the GP dated 2 June 2020 [124]. Pradeep categorically denies that the claimant told him during his interview stage that he suffered from mental health issues. The claimant told the Tribunal that he did not mention it again to Pradeep or any other colleague until he became unwell on or about 26 May 2020. It was suggested to Pradeep during cross examination that he should have seen the signs of mental illness having regard to the claimant's conduct. Pradeep denied this and said that as far as he was concerned, they had normal conversations. No cogent evidence was provided to the Tribunal of knowledge prior to the 26/27/28 May 2020 and there is no evidence to support the claimant's claim that prior to this date either the respondent was aware or ought to have been aware. A number of shift leaders had issues with and spoke to the claimant prior to May 2020 and none of them saw any signs of a mental illness. The Tribunal does not accept that Pradesh made the comment alleged by the claimant on 11 November 2019. This element of the claim fails.

Issue 4.2

116. The claimant's complaint regarding Pradeep which was sent to Nina on 21 April 2020 was not investigated. There is no evidence to connect this with the claimant's disability. During his evidence, the claimant told the Tribunal that he only told Pradeep about his disability. Pradeep denied knowledge until 26 May 2020 but, even if he had been aware, it is mere speculation on the part of the claimant that Pradeep must have told Nina Buckell and it was due to the disability that she did not initiate an investigation. The claimant is inviting the tribunal to find that Pradeep informed Nina of the disability and together they colluded and decided not to initiate an investigation into his complaint. Pradeep was asked about the complaint and he said that at the time, he had no idea that the claimant had raised a complaint against him. The Tribunal considered that Pradeep demonstrated himself to be a person of integrity and honesty and participated in a process in which he did not discriminate against the claimant on any basis. This element of the claim fails.

Issue (4.3)

117. There is no medical evidence before the Tribunal to support the 'matters arising' as stated at 4.3.1. The matters at 4.3.1 parts (b) – (d) and (f) are only relevant if the respondent is found to have had prior knowledge of the disability which the Tribunal has held that it did not. Parts (a) and (e) relate to the disciplinary hearing which post-

dates the respondent's knowledge. The Tribunal considered whether the respondent treated the claimant unfavourably as alleged at matters 4.3.2 parts (a) – (c). The Tribunal decided that it did not. Even if it did, the treatment was not because of matters arising from the claimant's disability. For the avoidance of doubt, the Tribunal did not accept that the matters relied upon at 4.3.1 (a) – (f) occurred.

118. In relation to the alleged unfavourable treatment at 4.3.2 (a)(i) – (iii), The Tribunal heard Farhan say that he did not force the claimant to turn off his phone, he does not recall the claimant crying during the meeting but accepts he cried after he had walked out of the meeting and he denied being aggressive or unfair. The claimant was not subjected to the treatment he alleges by Farhan. The Tribunal came to no firm conclusion as to whether Farhan asked the claimant to turn off his phone or to put it on silent but either course of action was appropriate. Even if the Tribunal had found that the claimant was subjected to this treatment, there is no evidence to suggest that it occurred because of matters arising from his disability.

119. The Tribunal considered whether either during or following the investigation meeting on 26 June 2020, that the respondent should have explored the claimant's symptoms before continuing but as it concluded that any procedural failings did not arise from matters arising from the disability, it followed that it did not need to,

120. If this claim had reached this stage, the Tribunal found that the respondent had established a legitimate aim of having a duty to investigate and address allegations of misconduct as expeditiously as possible but did not establish proportionality. Indeed, its own actions in agreeing changes and postponements to the arrangements showed that time was not of the essence.

Issue 4.4

121. The matters listed at 4.4.1(a) are not PCP's but one-offs personal to the claimant. There is no evidence to suggest that the respondent made a practice of conducting itself in the manner alleged. Even if the Tribunal had found that one or more matters at 4.4.1 amount to a PCP, for a duty to arise to make reasonable adjustments, the respondent must have known of the disability. Parts (a) - (d), occurred prior to the respondent's knowledge of the claimant's disability. As the Tribunal found that the respondent was first made aware on 26/27 May 2020, these matters fall away.

122. Parts 4.4.2 & 4.4.3: If the Tribunal had found all or any parts (e) – (i) as amounting to a PCP, the respondent was unaware of the substantial disadvantage on the basis of the following:

The medical evidence consisted of the GP letter [124].

During his resumed investigation meetings on 12 and June 2020, the claimant confirmed several times that he was able to continue [532 and 545] and there were no issues arising for claimant and no signs of PTSD symptoms.

The meeting was resumed on 22 June 2020, the claimant said that he was happy to continue and he talked about his *'mental health problems being triggered again'* in April 2020 [556].

123. The claimant said in evidence that he *'had given up'* during the hearing as when he took a break his union representative advised him that he was potentially facing

dismissal when previously she had been confident that he would keep his job. When the claimant was asked why he did not explain his issues to the respondent [554], he said that he knew that he was going to lose his job so he did not try and fight for it. The claimant did not tell the respondent during the meeting that he had struggled because of his disability or that he had or was experiencing PTSD symptoms. The Tribunal did not accept the claimant's reason for not advancing his disability.

Issue 5

124. On the basis of the finding that the respondent was unaware of the claimant's disability prior to 26/27 May 2020, parts (a) – (n) of 5.1.1 fail. Parts (o) & (p), whilst the respondent does not dispute these acts, there is no evidence to connect this with the claimant's disability. Parts (q) – (s): are not established and it is fanciful for the claimant to suggest that Pradeep has attempted to *'get rid of C.'* Part (t): The Tribunal has found that Pradeep did not make the racial slur as alleged on 15 April 2020. Part (u): whilst these acts occurred, there is no evidence to connect this with the claimant's disability. Parts (v) – (y): These matters are not established. The record of the disciplinary hearing [554] does not include a comment from the claimant as alleged in (v). There is no evidence that the claimant was told he would be provided with a new appeal hearing date (y). The Tribunal considered that none of the conduct which it found took place at 5.1 was related to the claimant's disability.

Issue 6

125. Part 6.1.1: the claimant relies upon the conduct at part 4.2.1(a) and the failure by Nina Buckell to investigate the claimant's complaint against Pradeep. The respondent accepted that it did not investigate his complaint. The Tribunal does not find that this was related to the claimant's race or to the alleged comment made by Pradeep to the claimant on 15 April 2020 involving 'up-country Tamils.' The claimant said that when Pradeep (allegedly) made the 'up-country' comment to him, he took this to be a slur against the caste or class of his family. When describing the difference between Northern & Up-Country Tamils, the claimant was describing a social class system. This is very different to describing the Tamil race and as 'class' is not a protected characteristic, any claim of discrimination relating to race (6.1) fails. The respondent's evidence has consistently maintained that all Tamils are the same, both in relation to race and ethnic origin, wherever they originate from or settle and this was accepted by the Tribunal.

126. Part 6.1.2: the Tribunal applied the same reasoning in relation to the alleged treatment at parts (a) – (d) and the claim fails for the same reason.

127. Part 6.1.3: The claimant has not identified that he was of a different race or ethnic origin, colour or nationality than his colleagues and neither has he illustrated evidence to show a perceived difference. Pradeep's evidence to the Tribunal was that the majority of the staff at the Tolworth store were Tamils and Pradeep was unaware from which area of Sri Lanka the staff originated because he said that all Tamils are equal. The claimant's evidence of the caste system does not create a separate ethnic group for 'Up-Country' Tamils because they share the same essential characteristics with Tamils originating and living in other areas. They are therefore part of the same ethnic group and racial group. The claimant considered the comment from Pradeep to

be derogatory because it related to his class or caste within his racial group. Pradeep did not make the comment. There is no prima facie case of race discrimination.

Issue 7

128. 7.1.1(a) – (b): The Tribunal heard evidence from the respondent denying that the act at part (a) occurred. Pradesh did not say those words and would not speak in that way. The Tribunal found that his evidence was genuine, credible and consistent. In any event, this part of the claim fails because the claimant has not established that he is a different race or ethnic group to the respondent's witnesses and therefore he is unable to rely upon this protected characteristic.

Issue 8

129. 8.1.1: the Tribunal found that the claimant told Pradeep on 21 April 2020 that he had been absent due to derogatory words said to him by Pradeep on 15 April 2020. The transcript of the covert recording [417] confirms this.

130. 8.1.2: the respondent accepted that the email sent to Nina Buckell on 21 April 2020 amounted to a protected act. In relation to the detrimental acts alleged, 8.3: Parts (a) – (b) did not happen. Part (c) is accepted because Pradeep's evidence was that he dealt with the matter informally in line with the claimant's wishes. Parts (d) – (e) are accepted. Part (f) is not accepted. Part (g), it is accepted that the claimant was not provided with details of the evidence. Parts (h) – (j) are not accepted. Part (k), it is accepted that a psychiatric report was not obtained. Part (l) is not accepted. Parts (m) & (o) are accepted. Part (n) is not accepted.

131. The Tribunal considered whether any of the acts which it accepted did occur either independently or collectively together with the admitted acts, amount to a detriment. The Tribunal concluded that there were no detrimental acts. Even if the Tribunal had found that the claimant was subjected to one or more of the alleged detrimental acts, the Tribunal was not satisfied that detriment was 'because' of the protected act. In relation to the protected act at 8.1.2, there was no causal link between the claimant's complaint about Pradeep and any of the detrimental acts. Pradeep said that he had not been aware of the complaint about him until these proceedings. His evidence was accepted by the Tribunal.

132. The respondent accepted that the stated reasons for dismissal did not amount to gross misconduct. Accordingly, the claimant was entitled to one week's notice. As he did not receive notice, he is awarded £400 being one week's pay. If the claimant had been dismissed for making covert recordings of conversations of his work colleague, this might well have been a gross breach of trust and hence gross misconduct.

133. For the foregoing reasons, the Tribunal decided to dismiss all of the claimant's claims except his claim for notice, in respect of which the Tribunal awarded £400 which was the agreed pay for one week, the notice he did not receive.

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Employment Judge Tuscott KC
Date: 8 December 2022

Sent to the parties on
Date: 9 December 2022