Case Number: 1401910/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr Ato Anderson**

Respondent: **Qualasept Ltd t/a Bath ASU**

Heard at: **Bristol** **On:** **12, 13, 14, 15 and 16 December 2022**

Before: **Employment Judge Livesey**
Ms J Kaye
Mr H Launder

Representation
Claimant: Mr Gray-Jones, counsel
Respondent: Mr Probert, counsel

JUDGMENT having been sent to the parties on 3 January 2023 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claim

1.1 By a Claim Form dated 16 May 2021, the Claimant brought complaints of discrimination on the grounds of race and disability.

2. Evidence

2.1 The Claimant gave evidence and called Dr Akwei, a friend from his church, in support of his claim.

2.2 The Respondent called the following witnesses;
- 2.2.1 Mr Roderick, the former Managing Director;
- 2.2.2 Ms Summers, a Quality Assurance Team Leader;
- 2.2.3 Mr McLeary, a former Quality Assurance Team Leader;
- 2.2.4 Mrs Small, a former HR Engagement and Reward Manager;
- 2.2.5 Mr Osborn, the former Head of Quality.

2.3 The following documents were produced;
R1 - an agreed hearing bundle;

R2 - an agreed list of key documents;
R3 - an agreed Chronology and Cast List;
R4-7 - transcripts of meetings recorded by the Claimant;
R8 - the Respondent's counsel's skeleton argument;
C1 - the Claimant's counsel's skeleton argument.

3. Issues

3.1 The issues had been discussed, agreed and recorded by Employment Judge Roper on 25 November 2021 following the Case Management Preliminary Hearing which he undertook on that day. It was clear that a great deal of work had gone into the creation of his Case Summary. Those issues were confirmed as having been correct when they were revisited before Employment Judge Matthews on 3 November 2022.

3.2 At the start of the hearing, however, applications were made to alter the issues which had been settled for over a year in four respects;

3.2.1 An application to include dismissal as a detriment under the direct race discrimination claim, both strands of the section 15 disability claim and of the harassment complaints under section 26;

3.2.2 An application to broaden the complaints of disability discrimination such that the 11 complaints of discrimination arising from disability were to have been repeated as allegations of direct discrimination under section 13;

3.2.3 An application to broaden the protected acts relied upon under section 27, from the two acts listed in paragraph 8.1 of the Case Summary of 25 November 2021 to seven;

3.2.4 An application to replace the words "*religious leader*" with "*representative*" in paragraph 6.2.2 and elsewhere.

3.3 By way of introduction, the Claimant had been represented by counsel at the hearing before Employment Judge Roper and by solicitors for the last five months leading up to the final hearing. Although a solicitor had also represented him at the second hearing before Employment Judge Matthews, no attempt to change or alter the issues was made.

3.4 The issue at the heart of the case had always appeared to have been the Claimant's dismissal. Most of the separate allegations that we had to determine would, in most cases, simply have appeared as part of a factual matrix leading to the complaint of dismissal. To start a five-day hearing with four applications to change the list of issues, with a list which was already arguably overburdened, demonstrated poor preparation and was contrary to the overriding objective.

3.5 In relation to the first application (paragraph 3.2.1 above), Mr Probert very pragmatically agreed that adding those five new issues did not prejudice the Respondent. He acknowledged that he understood that the Claimant's complaint was really all about his dismissal and, whilst Mr Gray-Jones admitted that it was 'not satisfactory' for such a stark omission to have been made, the application was agreed.

3.6 In relation to the second application, the attempt to introduce 11 new complaints of direct discrimination on the grounds of disability was an attempt to bring new causes of action which had not been identified before Employment Judge Roper when many other s. 13 claims had been. No comparators were identified and no clear case under s. 13 was made out in the Claimant's witness statement, rather than under s. 15. The Claimant's case was that he was dismissed because of a poor work rate arising from his diabetes and/or because of poor communication arising from his stammer. Those were complaints most obviously brought under section 15 and alternative claims under section 13 appeared to add nothing but confusion. The alternative claims did not work, were not supported by the evidence, were opposed by the Respondent, had not been advanced before, were raised late and the application was refused (see *Woodhouse-v-Hampshire Hospitals NHS Trust* EAT 0132/13).

3.7 As to the five new protected acts, they were stated to have been as follows;
- 20 November 2020 to Mr Osborn;
- 9 December 2020 to Mrs Small;
- 11 December 2020 to Mr Osborn;
- 21 December 2020 to Mr Osborn and Mrs Small;
- 5 January 2021 to Mrs Small.

3.8 They were all denied by the Respondent as protected acts. Mr Probert pointed out that a protected act was only committed if a claimant made an allegation that the Act had been breached in some way (s. 27 (2)(d)). Further, they were largely unsupported by the Claimant's own evidence in paragraphs 30, 34, 36, 37, and 40 to 42. It was argued that they were unnecessary since the key act of victimisation, the Claimant's dismissal, occurred after the one protected act which *had* been conceded (that of 15 January 2021; paragraph 8.1.2 of the Case Summary). It was not appropriate for the Claimant's case to have been broadened in that manner at such a late stage for the same reasons as those set out above.

3.9 Finally, the Respondent did not object to the Claimant's application to insert the word 'representative' instead of 'religious leader'. Mrs Small was permitted to tailor her evidence accordingly.

4. Hearing

4.1 A timetable for the hearing had been discussed and agreed on 25 November 2021 before Employment Judge Roper. At that stage, the Respondent had intended to call seven witnesses. At the final hearing, only five witnesses were called and counsel agreed to a slightly amended timetable. It was clear that both, however, struggled to cover the ground and complete cross-examination within the time allocated but they did ultimately do so without the Tribunal having to resort to its powers under rule 45.

4.2 During Ms Summers' evidence, she referred to the existence of a document which had not been disclosed; a graph, specifically referred to in a meeting at page 226 of the bundle, R1. Mr Gray-Jones indicated that he wanted disclosure of the document. He was asked whether he wanted to make that application during his cross-examination or at some point subsequently. He said that he would take instructions and continue with his questioning of the witness and that he hoped that the matter might be resolved with Mr Probert. The issue was not raised before the Tribunal again.

5. Facts

5.1 We made the following findings of fact on the balance of probabilities. We attempted to limit our findings to matters which were relevant to a determination of the issues. Page references cited below are to pages within the agreed bundle, R1, unless otherwise stated and they appear in square brackets.

Witnesses

5.2 We did not find the Claimant to have been a particularly reliable or credible witness. Much of his evidence was inconsistent with contemporaneous written documentation. On some occasions, he attempted to put a spin on documents which he himself had created (transcripts of his own covertly meetings). That said, we had no sense that he had deliberately tried to mislead the Tribunal. He appeared to genuinely believe what he told us about the motives for the alleged ill-treatment that he sustained.

5.3 Dr Akwei was not a helpful witness. She clearly struggled with the process of giving evidence and often failed to answer the question that she had been asked. Again, she appeared genuinely convinced that the Claimant had been ill treated.

5.4 Ms Summers was a measured witness. She made a number of concessions where appropriate and where her memory did not enable her to give a definite answer. She held her ground on the crucial issues and only committed herself if she was confident enough to do so.

5.5 Mrs Small made concessions too, especially with regard to how the Personal Improvement Plan ought to have been commenced.

5.6 By the time of the hearing, Mr McLeary had been out of the business for two years. He had not seen the hearing bundle until the morning of the first day. Not surprisingly, his recollection was vague in some respects, but he was very firm on other issues, including his level of involvement in the key decisions concerning the Claimant.

5.7 Mr Osborn was a much firmer and clearer witness. His involvement was, however, relatively limited.

Introduction

5.8 The Respondent manufactures chemotherapy and pharmaceutical products. It works within a strict regulatory regime and quality assurance is a key part of its undertaking. It employs about 200 people at premises in Corsham, Wiltshire.

5.9 The Claimant joined the business in March 2020. He was employed as a Quality Assurance Officer and had two primary tasks; to check worksheets, which involved him undertaking a second review of documents which were to have gone out with a product against a set list of criteria. Secondly, he was required to do 'release' work which required him to check the physical products against their worksheets to ensure that they were what they purported to be. The work was difficult and required a certain type of person to have been able to do it. Not surprisingly, the rate of loss of recruits in the first few months was quite high.

5.10 The Respondent operates three main shifts; 'earlies' (7:00 am to 3:30 pm), 'days' (8:30 am to 5:00 pm) and 'lates' (11:30 am to 8:00 pm).

5.11 The Claimant describes himself as black, of African origin. His line manager was Mr McLeary, who is also black, of Jamaican descent. Ms Summers, a white woman, became a Quality Assurance Operations Manager in March 2020 and she shared responsibility for the Claimant with Mr McLeary from that point on.

5.12 The Claimant's contract [47-50] contained a probationary period of six months (paragraph 2.1), although extensions to it were permissible (paragraph 2.4).

5.13 A number of policies were referred to during the evidence, which have been referred to below where necessary (Capability [51-4], Performance Review [55-8], Grievance [59-63] and Equality and Diversity [66-71]).

Disability

5.14 The Claimant is disabled. He has a speech impediment or stammer. He gave evidence for a number of hours before the Tribunal. We found the impediment to have been noticeable, but not particularly significant in terms of his speed of delivery of speech.

5.15 He also has type II diabetes. There was, however, not a great deal of evidence as to its symptoms and the alleged impact upon his day-to-day activities beyond his stated need for regular breaks, hydration, possible insomnia and blurry vision in the morning. The absence of detailed evidence in that respect was not satisfactory.

Initial months

5.16 The Claimant's induction and training did not appear to have been any different from that delivered to any other employees. In cross-examination, however, he referred to others (friends of Ms Summers) who, he said, had been fast tracked. That was an entirely new allegation and there was no

evidence as to who they were and/or in what manner they had allegedly benefited.

5.17 In April 2020, the Claimant complained that Ms Summers completed a timesheet for him which contained incorrect information about the times that he had worked. This related to an overtime claim when he had worked a bank holiday. Ms Summers had also worked the same bank holiday and she provided him with a form which contained his name, the date and the hours which she thought that he had worked, which she believed had been the same as hers. It appeared that the timings were not agreed by the Claimant; she had put him down for having worked slightly longer than he had. He nevertheless seemed grateful for what she had done [125].

5.18 The Claimant had a probationary review meeting on 7 July with Mr McLeary and Ms Summers [127-133]. It was positive. A further review was conducted on 17 August [138-140] and no concerns were identified. He maintained in evidence, however, that he was being micromanaged by Ms Summers from April 2020. If that had really been the case, we had difficulty in reconciling it with the notes of those meetings.

Events leading to the Personal Improvement Plan of 8 September 2020

5.19 The Respondent asserted that the Claimant's timekeeping began to become an issue in August 2020. Ms Summers became concerned on an occasion when she had been leaving work and he was seen returning to it when he was supposed to have been in work. She raised her concerns with him in an email [144-5]. He said in his witness statement (paragraph 12) that he had emailed her the day before and she had agreed to his absence to allow him to collect his car. That account sat uncomfortably with his email in response to hers [144]. Instead of claiming that he had been given permission, he tried to explain the reason for his absence. No such permission email was ever produced to us.

5.20 His absence prompted Ms Summers to check the Respondent's clocking in records and she then saw that he had been persistently late over the 3 month period over which the data was held [136-7]. Of the 64 days covered, he had been on time on only 7 occasions. On 2 of the remaining 57 days, he had reported his lateness. The time lost was nearly 12 hours. The Claimant accepted in evidence that the data was likely to have been accurate.

5.21 Ms Summers told us that another two white employees (identified only as 'Oliver' and 'Chantelle') were also seen to have been late in September. Their lateness was addressed through Personal Improvement Plans ('PIP's).

5.22 The matter was raised with the Claimant on 7 September by Mr McLeary [147]. He replied as follows;

"*Last few months has been very difficult and challenging for me. I lost a very close family member and still trying to come to terms with it as most of my family are not around so I have been on my own. I was also in a car*

accident last year on my way to work one morning when a truck crushed into me and my car was written off and lately I have been experiencing insomnia and excruciating pains in the mornings which is a struggle. I am not the best of person when it comes to speaking and opening up and I tried to deal with the situation rather than make excuses."

The PIP

5.23 Ms Summers and Mr McLeary met the Claimant to discuss his timekeeping on 8 September [148-150]. He referred to having difficulties with a short sleep cycle, low vitamin D levels, pain because of an injury sustained whilst moving house, blurry eyes in the morning and underestimating traffic levels. He too was placed on a PIP in relation to his timekeeping, with a final review due on 30 November. It was made clear that, if he failed his PIP, it could have meant that he had failed to pass his probation which may have resulted in dismissal [149]. Although he was not told separately in writing that his probationary period was being extended, it was implicit that that was the case [149], but he was also informed verbally [151].

5.24 It was important to note that the PIP was a joint decision between Mr McLeary and Ms Summers. We had no sense, particularly after Mr McLeary's evidence, that Ms Summers had led the decision.

5.25 The Claimant was keen to point out that there had been no meeting with him before the imposition of the PIP. Mrs Small considered that it would have been good practice for such a meeting to have taken place.

5.26 A PIP review took place on 22 September [154-5]. The issue that was discussed then concerned the Claimant and a colleague having undertaken overtime without reference to Ms Summers. The colleague was also on a PIP.

5.27 A further review took place on 28 September [156-9]. At that point, the Claimant was seen to have become more negative about his work and his team and was reported as having been somewhat blunt and rude;

"*Ato's attitude has changed of late and he seems very defensive and negative about his team. Ato needs to be aware of how to address and speak to his managers and other members of management of Bath ASU. Arguing as well as not taking feedback on board is not what we would expect of a QAO team member.*"

He had also exceeded the tolerances which had been set regarding lateness;

"*Since the 1st review, Ato has been late on three separate occasions. This is not acceptable behaviour and Ato needs to be aware of the consequences of his actions. There is no consistent pattern forming with Ato's lateness it occurs on both Day and Late shifts.*"

5.28 The Claimant's case was that the rebuke which he received in relation to his communication style arose from his speech impediment. Having heard all of the evidence in relation to that meeting, we concluded that that was not the

case. He was clearly perceived to have been rude and/or blunt both then and subsequently (see, further, [179]).

5.29 On 18 October, the Claimant notified the Respondent that medical test results indicated a likelihood that he had type II diabetes [167-8], although it was dependent upon further tests [166]. He had previously alerted his employers to the fact that his GP had said that he may have been a 'borderline diabetic' [158].

5.30 On 26 October, Ms Summers expressed concern about the pace of the Claimant's work [171-2]. The expectation was for him to have completed five or six worksheets per hour, but he was only doing about three. That was the first time that the pace of his work generally was raised with him. It was important to note that, although the Claimant did not challenge the accuracy of the figures that were put to him on that occasion, none of the data relating to his work rate was produced in evidence for any period prior to 2021. It was also noteworthy that the Claimant did not reply to that email until 2 November, a week later [169-170].

5.31 Around this time, the Claimant attended another medical appointment and asserted that the documents showed that Ms Summers was 'against' him 'taking time off work' (paragraph 25 of his witness statement). That was not what the emails showed [173-7]. They demonstrated that he had had an appointment at 10.00 am, that HR had asked Ms Summers if he was being given unpaid leave for it, but that she had responded by saying that his working day was not going to have been affected since he was working a late shift. We noted Ms Summers' sympathetic approach to appointments on other occasions (for example [223]).

5.32 The Claimant attended another review on 2 November ([160-4] and [179-180]). He was informed that he had breached the tolerances of the PIP in relation to further instances of lateness and that HR were to have been informed. His communication style in emails was also addressed [179], as was his defensiveness and negativity [163]. He appeared to have been accepting and apologetic in respect of the former ([164] and [180]).

5.33 On 4 November, the Claimant provided a copy of a nurse's letter to Ms Summers which indicated that he was then being treated for type II diabetes [181]. This appears to have been the first firm indication of the existence of the condition, but neither the letter nor the Claimant himself explained what that meant in terms of his work needs and/or performance. That picture was an emerging one which, as Mrs Small said, often had to be 'dragged out' of him (paragraph 8 of her witness statement).

5.34 On 20 November, the Claimant complained to Mr Osborn about the PIP. He said that he had been the victim of 'micro-aggression' and expressed dissatisfaction at the manner in which he had been managed [202]. He was upset and Mr Osborn specifically asked him if he was alleging that he had been discriminated against. He answered 'no' to that question on three separate occasions, as clearly noted. The Claimant said in evidence that

the notes were wrong. Mr Osborn, however, was very clear on the matter and we preferred his account because of his contemporaneous note and the quality of the comparative oral evidence.

5.35 At around this time, the Claimant alleged that Ms Summers told him to inform his colleagues if and when he was to leave the work area to use the toilet. He also asserted that she 'announced' his diabetes by 'instructing' him to buy a 3 litre bottle of water (see paragraph 5.1 of the Case Summary).

5.36 The Respondent's case was that there was never a discussion about toilet breaks per se and certainly no limit on such things. He was asked to tell the team *if* he was leaving the work area for a moment, because he had a habit of not doing so. He was not directed to inform them *why*. Further, as a result of the requirements which arose from his diabetes, he was permitted to have a bottle of water in the work area, which was an exception. He was not 'instructed' to buy one. It was Mr McCleary who suggested it, but its size was not specified. He was also allowed to keep a sugary drink in the Ms Summers' office, should he have needed it (a bottle of Lucozade).

5.37 Our findings were that, in relation to the bottle, it was agreed that he would obtain a bottle and keep it at his workstation, as a suggestion led by Mr McCleary, which he appeared willing to accept. The size was not specified. In relation to toilet breaks, we accepted the Respondent's evidence; the issue that the Respondent sought to address was his habit of disappearing when others had appeared good at telling their team when/if they were popping out for any reason.

5.38 At around this time, the Claimant was offered the chance to avoid early shifts if he had wanted to. His managers were conscious that some of his timekeeping problems might then have been linked to issues arising from his diabetes (blurry eyes) and they were keen to avoid or limit any issues which he appeared to suffer in the mornings (see paragraphs 25 and 8 of Mr Roderick's and Ms Summers' witness statements respectively). The Claimant declined the offer. The evidence also showed that he was offered staggered shifts and altered breaks, which were also declined.

<u>The Development Plan</u>

5.39 In light of the medical picture which had emerged, it was decided to move from the PIP model to a more holistic package which might have been better suited at supporting the Claimant's condition (the rationale was more fully explained by Mrs Small in paragraph 7 of her witness statement). In essence, the Development Plan was a PIP with targets, but it incorporated a discussion and understanding of the needs which arose from his disability. Ms Summers stated that, since some of the Claimant's lateness could have been linked to his disability, it was not then appropriate to have used the PIP as a blunt target for performance management.

5.40 It was surprising to us that the Respondent did not obtain Occupational Health advice at that point. It did have some medical evidence from the

Claimant and he was, of course, able to tell them himself what he needed, but both sides would have benefited and/or been better protected had such advice been obtained.

5.41 A meeting took place on 8 December between Ms Summers, Mr McCleary, Mrs Small, the Claimant and a friend of his from his church, Dr Akwei, who had been permitted to attend even though it was outside the Respondent's policy (which only permitted trade union representatives and/or workplace colleagues). The Claimant chose to covertly record the meeting and he subsequently produced a transcript of it in evidence [R4].

5.42 It was clear that an attempt was made to draw a line in the sand at the meeting and find a positive way forward to get the Claimant beyond his probationary period (see pages 1 and 3 of R4, attributed to Mrs Small). The meeting, however, became more difficult and our impression was that the Claimant took the initiative and sought to criticise Ms Summers and her conduct. He consistently referred to her as 'she', 'her' or his 'line manager', rather than by name, which caused her upset. She was tearful after the meeting and stated that she "*felt like dirt*" (paragraph 43 of her evidence).

5.43 The Claimant asserted that he performed a protected act during the meeting in that he informed Mrs Small that he intended to bring a grievance against Ms Summers concerning race and/or disability discrimination (paragraph 33 of his witness statement). The Respondent denied that such allegations were made and the transcript, in our view, did not contain any. The Claimant pointed to statements that he had made on pages 9 and 11 of R4, but they did not concern alleged breaches of the Equality Act.

5.44 On 9 December, the Claimant met with Mrs Small again [201]. He asked for another line manager at that point and was clearly very unhappy. He also asked her if she thought that he was being singled out because of the colour of his skin or his religion. She replied "*not at all*". It was noteworthy that his subsequent email did not contain any allegation that he had been threatened with disciplinary action at that meeting, as was alleged as part of his case. It was also not something that he had alleged within paragraph 36 of his witness statement.

5.45 On 11 December, the Claimant complained that Mrs Small screamed and shouted at him in the open plan office (paragraph 3.1.12 of the Case Summary). That allegation appeared to have been broadened somewhat in paragraph 35 of his witness statement in which he also said that he had been accused of having been unprofessional and called names. The Claimant's subsequent emails showed no sign of him having been upset by the nature of any treatment on 11 December [207-8]. Quite the contrary; he thanked Mrs Small for her "*continuous support*".

5.46 Mrs Small's account was that the Claimant had been late for a meeting which she had invited him to. He had actually declined the invitation for the meeting after it had been due to start [209]. She then had to go and collect

him and said something like ‘come on, are you ready to go?’ as she did so. She did not shout.

5.47 We found that the emails were telling. The Claimant had clearly declined the meeting invitation after it had been due to start. There was no indication of upset or accusation of shouting. The Respondent’s account was to have been preferred, although we could understand why the Claimant had felt awkward, having been collected by Mrs Small from the public work area.

5.48 A further meeting took place on 21 December at which the Claimant was again supported by Dr Akwei ([210] and [R5]). There was further discussion about the Claimant’s access to liquid in the office and his work targets. At that point, Dr Akwei made the assertion that the Claimant had been the victim of discrimination, although no protected characteristic was identified (p.17 of [R5]).

5.49 The data used to assess the Claimant’s performance was an important issue in the case. He asserted that ‘fictitious’ figures were used at the meetings of 8 and 21 December and subsequently. Dr Akwei referred to ‘deliberate attempts’ which had been made to manipulate data. What was never explained, however, was how and in what respect the data was said to have been wrong. The numbers with which he took issue were not identified.

5.50 Ms Summers was cross-examined on this point and her evidence was clear to the Tribunal. There were three different types of metrics against which the Claimant’s performance was assessed [417]; worksheets, ‘3’s’ (the period around 3 o’clock when work was busiest) and release work. She compared his performance in January and February against the team’s average (the figures shown in blue [417]). She did not, however, use the Claimant’s own performance within the average, nor that of another under performing employee who was also on a PIP. She also excluded the best performing employee who was very experienced. The Claimant was assessed against the targets set in his Development Plan [272]. His performance figure was shown in green if he achieved the Development Plan target, or yellow if he failed it [417]. His failure rate was approximately 50%.

5.51 It was important to note that he was judged against a target range within his Development Plan [272] the bottom of which was lower than the targets for the rest of the team. The team average changed from time to time if there was a lot of work available or if the work became easier or more complex but the Claimant was not failed if he failed to meet the average. He was always assessed against the lower target. Also, when he claimed that he had worked less time in a particular area because he had taken breaks, his figures were adjusted (see the two sets of data for 4 January which, when adjusted, did not affect his attainment [417]).

5.52 Ms Summers had been asked to produce another illustration of the data for the purposes of the hearing [415-6]. She was provided with raw data from

the IT department in August 2022 for the purpose and accepted that not all of the figures had been transcribed accurately. Nevertheless, on checking them against the Claimant's original figures [417], it seemed largely accurate, although there was little doubt that the original document was the more reliable.

5.53 The Development Plan was put together by Ms Summers after the meeting on 21 December and emailed to the Claimant [213]. It covered timekeeping, communication and work rate. It was to have run for six weeks, with a review every two weeks, finishing on 15 February.

5.54 On 24 December, the Claimant was asked to have a look at the plan and return it with any comments by the 28th [212]. Having heard nothing by the 29th, Ms Summers arranged the next meeting for 5 January [211], effectively extending his deadline to that date. On 5 January, the Claimant eventually responded with a number of issues [214-6], which she addressed in turn [220-2]. It was explained that he was no longer on the PIP which had been stopped when diabetes had been diagnosed [220];

"*We discussed this previously and stated that since your confirmation of your diabetes letter was received by HR, we would allow the PIP to finish being managed. This was so that we could further understand what support and mentoring you would need from us to ensure your health and well-being was catered for. The primary cause of your original PIP was your lateness. The development plan is a new way for us to support you in achieving your goal to pass your probation. It is not linked to the PIP nor will there be any comments made in reference to the PIP. This plan has been put in place so that you know what is expected of you going forward. We will not be using any historical data to measure you on. Just your performance across the next six weeks.*"

5.55 One of the particular concerns at that point was the Claimant's continuing poor communication style, highlighted by Ms Summers in her comments back to him [222];

"*I have had comments raised to me from other QAO's who are unhappy with the way you talk to them. For example; making comments about people's relationships. Or taking jokes too far and unsettling people.*"

5.56 The meeting was held on 5 January, as anticipated, between the Claimant, Ms Summers, Mr McCleary and Mrs Small when the Development Plan was discussed [233-9]. Dr Akwei's attendance was not approved on that occasion as it was felt that her attendance at all meetings was not 'workable' ([230-2] and paragraph 7 of Mrs Small's statement). We had no sense that the Claimant complained about that beyond his email at [232] and/or that he was unable (or only able with difficulty) to explain himself without her. The transcripts demonstrated his full and active participation.

5.57 At the meeting, he appeared to have been generally accepting of his slow pace [224]. Overall, it seemed to have been a fairly positive discussion, with him concluding that he was happy to communicate more with his line managers and "*draw a line in the sand and move on*" [229].

5.58 On 15 January, the Claimant informed Mrs Small that he intended to bring a grievance in relation to race and disability discrimination. This was a conceded protected act within the meaning of s. 27 and it was reflected by the emails which followed [239-240]. Mrs Small's notes clearly indicated that his views about discrimination had changed [238] and it was also evident that she had positively encouraged him to raise the issue through the grievance process (pages 2 and 3 of [R6]).

5.59 A review of the Claimant's performance against the Development Plan took place on 19 January. He was not seen to have hit his targets in relation to his pace of work. A further review took place on 25 January and that difficulty was identified again. At the review on 1 February [267-270], his communication and attendance were seen to have improved, but his pace of work was still not consistently on track.

5.60 In February, the Claimant sought to challenge the Respondent's data again (see his email of 12 February [253-264]). His detailed analysis of the statistics was addressed by Ms Summers (in red on the document). There were clearly some obvious inaccuracies in the Claimant's analysis (his use of only 34 worksheets, for example).

5.61 The final review was due to take place on 15 February. Ms Summers, Mrs Small, Mr Grant and Mr Osborn discussed his performance and, because of continuing inconsistency over the course of the Plan, they decided to dismiss him. Mr McCleary was not involved at that stage, having just left the business.

5.62 The Claimant was told at the meeting on that day that he had not hit his release target in the weeks commencing on 1 or 8 February [368-9]. There had been further communication problems too [369] ([267-270] and [R7]). He was dismissed with pay in lieu of notice.

5.63 After the meeting, the Claimant collected his belongings from his locker and it was the Respondent's case that Mrs Small then received his access card and computer from him at the turnstiles as he left the building. His case was that he was 'escorted off the premises' (paragraph 46 of his witness statement). His own transcript (page 3 of [R6]) reflected the Respondent's evidence as to what actually happened and we considered that it represented the most likely course of events.

5.64 The Claimant had submitted a grievance that morning to Mrs Keeley, the Head of HR [274]. Although it was not relied upon as a protected act, Ms Summers and Mrs Small were aware of it because the Claimant had mentioned it at their meeting later in the day. They were not aware of its contents and had already decided to dismiss him, but they were both aware of the conversation which he had had with Mrs Small on 15 January. The full text of the grievance did not follow until 23 February [280-290]. It was a broad ranging complaint that largely reflected the claim before the Tribunal.

5.65 A letter confirming the Claimant's dismissal was then provided to him [273] and he attempted to appeal against the decision, even though he had not been given the right to do so [177-9].

5.66 A grievance meeting was arranged for 9 March, but then rearranged for the 19th. Mr Roderick chaired the meeting and informed the Claimant that he would consider his grievance *and* his appeal against dismissal. The Claimant was then represented by a trade union representative [298-305].

5.67 Mr Roderick then set about investigating the issues. He interviewed seven people [326], including Mr McCleary who was then working elsewhere. One of those interviewed was Mr Salako, a black employee who had not been managed by Ms Summers, but who had also had his probationary period extended and had an eye impairment [307-8]. He informed Mr Roderick that he had not considered that he had experienced discrimination.

5.68 On 22 April, Mr Roderick held a grievance and appeal outcome meeting [326-7]. Both were rejected. His subsequent outcome letter was detailed and lengthy [328-335]. In evidence, he said that he thought that the business had probably been too lenient by extending the Claimant's probationary period when it was clear that his performance and attendance had not been up to scratch. He thought that it was probably clear fairly early on that he was not 'the right fit' for the Respondent (paragraph 27 of his witness statement).

6. Relevant legal principles

Direct discrimination

6.1 Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

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

The protected characteristic relied upon was race.

6.2 The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

"*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

6.3 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to have been shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his race, because of his race.

6.4 Any unexplained, unreasonable conduct was capable of shifting the burden (*Law Society-v-Bahl* [2004] EWCA Civ 1070) and we also considered the case of *Olalekan-v-Serco* [2019] IRLR in which it was said that inferences could have been drawn from decisions taken by managers other than those in the direct spotlight. A lack of transparency and poor record keeping was also capable of shifting the burden (see paragraph 16.44 of the statutory Code of Practice on the Equality Act 2010 which gave effect to section 15 (4) of the Equality Act 2006 by emphasising that employers should keep records to justify each decision).

6.5 In situations where the burden did shift, we needed to find cogent evidence in support of the Respondent's non-discriminatory explanation for the treatment focussing, as suggested in *Bennett-v-MiTAC Europe Ltd* [2022] IRLR 25, on the mind of the putative discriminator.

6.6 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

6.7 If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

6.8 When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see *Fraser-v-Leicester University* UKEAT/0155/13/DM). In *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

6.9 As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Bahl,* above).

6.10 We reminded ourselves of Sedley LJ's well known judgment in the case of *Anya-v-University of Oxford* [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

Harassment

6.11 Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (EHRC Code paragraph 7.9 and *Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

6.12 As to causation, we reminded ourselves of the test set out most recently in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) had either of the prescribed effects under sub-paragraph (1) (b), a tribunal had to consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to have been regarded as having had that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)).

6.13 It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Discrimination arising from disability

6.14 When considering complaints under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability, which was an objective question and, secondly, unfavourable treatment which was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-Weerasinghe* UKEAT/0397/14). That second question was subjective, in the sense that it required us to examine the employer's mind in order to establish whether the treatment had been by reason of its attitude or reaction to the '*something*' (*Dunn-v-Secretary of State for Justice* [2019] IRLR 298, CA). Although an employer must have had knowledge (actual or imputed) of the disability, there was no requirement for it to have been aware that the relevant '*something*' had arisen from the disability (*City of York-v-Grosset* 2018] IRLR 746, CA). No comparator was needed.

6.15 Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might have been several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (*Pnaiser-v-NHS England* [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (*Sheikholeslami-v-University of Edinburgh* UKEATS/0014/17 and *Scott-v-Kenton Schools Academy Trust* UKEAT/0031/19/DA).

6.16 In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

6.17 '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

Failure to make reasonable adjustments

6.18 In addressing the claims under ss. 20 and 21, we bore in mind the guidance in the case of *Environment Agency-v-Rowan* [2008] IRLR 20 in relation to the correct manner that we should have approached the sections.

6.19 First, we had to identify whether and to what extent the Respondent had applied a provisions, criteria and/or practices (the 'PCPs'). Those words were to have been given their ordinary English meaning. They did not equate to 'act' or 'decision'. In the context of defining a PCP, a 'practice' generally required a sense of continuum. Although it did not need to have

been applied before or applied to everyone, a claimant had to demonstrate that it would have been applied or that it was capable of broad application. It was akin to an expectation which applied to other employees or was repeated (*Ahmed-v-DWP* [2022] EAT 107. A PCP connoted a state of affairs and one off, isolated acts relating to the Claimant alone were unlikely to satisfy that test unless they were capable of having had broad application (*Nottingham City Transport-v-Harvey* [2013] Eq LR 4, *Gan Menachem Hendon Ltd-v-De Groen* [2019] ICR 1023 and *Ishola-v-Transport for London* [2020] EWCA Civ 112).

6.20 In relation to the second limb of the test, it had to be remembered that a claimant needed to demonstrate that he was caused a substantial disadvantage when compared with those not disabled. It was not sufficient that the disadvantage was merely some disadvantage when viewed generally. That test was an objective one (*Copal Castings-v-Hinton* [2005] UKEAT 0903/04 and *Sheikholeslami-v-University of Edinburgh* [2018] 1090, EAT).

6.21 Further, in terms of the adjustments themselves, it was necessary for them to have been both reasonable and to have operated so as to have avoided the disadvantage. There did not have to have been a certainty that the disadvantage would have been removed or alleviated by the adjustment. A real prospect that it would have had that effect would have been sufficient (*Romec-v-Rudham* UKEAT/0067/07 and *Leeds Teaching Hospital NHS Trust-v-Foster* [2011] EqLR 1075). It was not generally considered reasonable to have required an employer to have made an adjustment which might have caused there to have been a drop in standards of competence (*Hart-v-Chief Constable of Derbyshire* UKEAT/0403/07/ZT).

6.22 It was often difficult to see how policies, which caused all employees a disadvantage, might legitimately have provoked claims under s. 20 since adjustments to a policy to remove the substantial disadvantage would not have been particular to a claimant (*Salford NHS Primary Care Trust-v-Smith [2011] Eq LR 1119*). In *General Dynamics Ltd-v-Caranzza* [2015] IRLR 43, EAT, it was said that, in order to correctly identify a PCP, the focus ought to have been upon what it was about the employer's operation which caused disadvantage to the employee (paragraph 39).

6.23 We referred to the statutory Code of Practice and, specifically, paragraph 6 relating to the duty under ss. 20 and 21.

Victimisation

6.24 There were also claims to consider under s. 27. Although the Respondent did not dispute the fact that the Claimant had one performed protected acts within the meaning of s. 27 (1), it disputed the other and the suggestion allegation that he had been subjected to detrimental treatment because of the act(s).

6.25 The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant has been victimised '*because*' he had done a protected act, but we were not to have applied the 'but for' test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it did not have to have been the principal cause. The most recent formulation of the test, in *Warburton-v-Chief Constable of Northamptonshire Police* [2022] EAT 42, stressed the need to focus upon the 'reason why' question and consider whether the protected act had been, at the very least, a significant influence on the detriment. It had to have been the act itself that caused the treatment complained of, not issues surrounding it.

6.26 In order to succeed under s. 27, a claimant needed to show two things; that he was subjected to a detriment and, secondly, that it was because of the protected act(s). We have applied the 'shifting' burden of proof s. 136 to that test as well.

Jurisdiction (time)

6.27 Under section 123 of the Equality Act 2010 a complaint of discrimination may not have been brought after the end of the period of three months starting with the date of the act to which the complaint related (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period was to be treated as done at the end of the period (s. 123 (3)(a)) and the provision covered the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

6.28 Should a claim have been brought outside the three month period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s. 123 (1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time and, if he advanced no case in support of an extension, he would not be entitled to one (*Rathakrishnan-v-Pizza Express* [2016] ICR 23 and *Moray Hamilton-v-Fife Council* UKEATS/0006/20/SS). Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated albeit that the absence of one would not necessarily be determinative (*ABMU-v-Morgan* [2018] IRLR 1050 (CA)).

6.29 Tribunals had been encouraged to consider the factors listed within s. 33 of the Limitation Act 1980 (the *Keeble* factors), although it was not necessary to use the section as a framework for the approach (*Adedeji-v-University Hospital Birmingham NHS Foundation Trust* [2021] EWCA Civ 23). I/We have considered the length of and reasons for the delay, the extent to which the Claimant had sought professional help and the extent to which information, which he/she said that they needed, was not known by him/her until much later and the degree to which the Respondent should have been blamed for any late disclosure in that respect. We also had to consider whether the Claimant had dragged his/her feet once he/she knew all of the

relevant information. It was thought that the touchstone, however, was the issue of prejudice; whether and to what extent the delay has caused prejudice to either side. Although certainly relevant, it was by means a determining factor (see Laing J in *Miller-v-Ministry of Justice* UKEAT/0003/15 at paragraph 13).

7. Conclusions

Direct race discrimination

7.1 The Tribunal dealt with each allegation in accordance with the numbering within paragraph 2 of the Case Summary of 25 November 2021 [39-40], as amended where applicable.

2.2.1 There was no evidence of differential and/or adverse treatment in terms of the Claimant's initial training and support. The point was not really put to any of the Respondent's witnesses in those terms. Reviews undertaken in July and August had been positive and the Claimant had raised no complaints. Whilst he did allege in evidence that other employees were fast tracked in training, he gave no evidence as to who they were and in what circumstances that was said to have occurred. There was no evidence as to their ethnicity;

2.2.2 This allegation was proved as a matter of fact in the sense that the precise times that the Claimant had worked were not correctly shown on the form, but it did not cause him any detriment; he appears to have been put down as having started at 7.04 am when, in fact, he had started at 7.07 am. He had been grateful for what Ms Summers had done [125]. There was no evidence that the error was made on the grounds of the Claimant's race;

2.2.3 We were not convinced that the Claimant was micromanaged by Ms Summers before the start of the PIP. He appeared to have been entirely happy in July and August. Things only changed when his timekeeping came into focus. After that, the real question here was whether the PIP, which did involve greater scrutiny and accountability, was justified.

In our judgment, it had been justified on entirely non-discriminatory grounds on the basis of the data at [136-7]. It was interesting to note that the Claimant did not actually allege that the PIP itself was discriminatory (paragraph 15 of his witness statement). To the extent that he did allude to it having been potentially discriminatory elsewhere, it appeared to have been on the grounds of disability, not race (see paragraph 18 of his witness statement and [165]).

As to the particular sub-paragraphs of this allegation, our conclusions were as follows;

(i) It was true that the Claimant's whereabouts became the focus of his manager's attention once the PIP was commenced;

(ii) This allegation was true inasmuch as instances of lateness were raised with him [165];

(iii) The Claimant complained of emails during breaks or outside work hours but did not refer to either email of 21 October or 24 December in his witness statement. The October email was not even produced in evidence;

(iv) On occasion, Ms Summers did try to find out where the Claimant was on CCTV if he could not otherwise have been seen, as with other employees;

(v) His pace of work was raised, but not repeatedly. The 26 October was the first time that it was raised;

(vi) This allegation was true;

(vii) The Claimant was not required to complete his response to the Development Plan by 28 December, abridged *from* 5 January. In fact, it happened the other way round ([211-2]).

To the extent that the matters in (i) to (vi) were proved as facts, there was insufficient evidence upon which we were able to infer or conclude that they had had anything to do with the Claimant's race;

2.2.4 The extension of the probationary period occurred in conjunction with the imposition of the PIP (see below);

2.2.5 The PIP was imposed because of the Claimant's accepted lateness record [136-7]. Also, it was not imposed by Ms Summers alone, but in conjunction with Mr McCleary. The Claimant's probation was extended as a consequence of it ([149] and [151]). Two white employees, Oliver and Chantelle, also had PIPs imposed as a result of their lateness history.

Although the Respondent ultimately demonstrated a non-discriminatory motive for the treatment, this was an allegation in respect of which the burden of proof shifted. An inference which required rebuttal was raised by the Respondent's failure to follow good practice by raising its concerns about the Claimant's timekeeping before the imposition of the PIP, as Mrs Small had suggested. Further, there was the fact that Mr Salako, another black employee of African ethnicity, had also had his probationary period extended in circumstances where there was no evidence of any other white employee suffering such extension (as opposed to the imposition of a PIP). Yet further, there was the fact that the Claimant did not receive written notification of such in accordance with his contract (paragraph 2.4 [47]). As stated above, however, the inference was rebutted for the reasons given;

2.2.6 The Claimant did not specifically allege that the imposition of the Development Plan was discriminatory within paragraph 40 of his witness statement. In our judgment, it was imposed for wholly non-discriminatory reasons; timekeeping, performance and communication. In other words, the perceived shortcomings which had been identified at various points before the Development Plan was commenced.

Again, the burden of proof shifted here. The Tribunal considered it unsatisfactory that the Respondent had failed to retain records and/or produce data of the Claimant's performance prior to 2021. Paragraph 16.44 of the statutory Code of Practice was particularly important but it was also noteworthy that the Claimant had seemed accepting of his slow rate of work on 5 January and the inference was rebutted for the reasons stated above.

It was important to remember that, whilst Mr Salako was performance managed, so too was Mr Herbert, a white employee and, according to other documents [433], so were a number of other employees whose ethnicities were not known;

2.2.7 This allegation was not proved on the facts. The source data [417] appeared to have been reasonably reliable and accurate and the Claimant did not demonstrate otherwise through his own evidence or through the cross-examination of others.

Even if it had been unreliable, the same data was used for all other employees. The Claimant accepted that he did not know what data had been applied to his colleagues and was not in a position to challenge paragraph 47 of Ms Summers' evidence in that respect;

2.2.8 This allegation was not proved on the facts;

2.2.9 As a probationary employee, he was not entitled to the benefit of all of the policies (paragraph 2.6 [48]) but Mr Roderick dealt with his appeal in any event in conjunction with the grievance;

2.2.10 The issue of the appeal and the dismissal were addressed together (see below);

2.2.11 The Claimant's grievance of 19 February 2021 was investigated by Mr Roderick. We had no sense that any shortcomings which there may have been (for example, the alleged failure to address the detail of the data more rigorously with Ms Summers) had been on the grounds of the Claimant's race such as a hypothetical white employee would have been treated differently;

2.2.12 As stated above, the Claimant also complained of his dismissal as an act of direct discrimination and, in conjunction, the failure to uphold his appeal against it.

For reasons which will now be clear, there was no evidence to suggest or infer that the Claimant's dismissal or the failed appeal had been on the grounds of his race. There was good evidence of underperformance [417], poor communication ([159], [179] and [222]) and historic poor attendance which, although improved during the Development Plan, had led to its inception.

7.2 Accordingly, there were no grounds to consider that the Claimant suffered the treatment alleged on the grounds of his race and his complaints of direct discrimination were dismissed.

Harassment related to race

7.3 Although set out after the allegations of direct discrimination, we considered whether the test under s. 26 had been made out before addressing the different test under s. 13 because of the wording of s. 212 of the Act.

7.4 The allegations here mirrored those under s. 13. The only additional complaint was that set out within paragraph 3.1.12 [42], which failed as a matter of fact.

7.5 Those factual allegations which were proved to have occurred, did not demonstrate conduct which had been related to the Claimant's race within the meaning of s. 26 for the reasons stated above.

Discrimination arising from disability (speech impediment)

7.6 The 7 allegations (including that of dismissal) within paragraph 4 of the Case Summary [42] were determined as follows;

4.1.1 The Claimant's requirement to improve his communication skills was raised on 28 September, but not because of his speech impediment or stammer, but because of his perceived rudeness and/or bluntness with managers and others. The issue was raised again on 2 November in similar terms and in January. It was not raised for reasons arising from his disability;

4.1.2 Employees were not ordinarily permitted to have representation from outside the Respondent's workforce, unless a trade union representative. Dr Akwei attended twice, but the refusal to allow her to continue to do so did not arise from the Claimant's disability nor did it cause him any detriment that we perceived;

4.1.3 There was very little evidence to substantiate this complaint within the Claimant's witness statement. During his oral evidence, he did say that she lost patience with his stammer and tended to tap her foot and/or appeared frustrated. Those allegations were wholly and strongly denied by Ms Summers and we preferred her account for the reasons already explained. The allegation was rejected on the facts;

4.1.4 There was no indication as to how the Development Plan was said to have been 'disproportionate' and/or how the targets arose from his disability. The only way in which they were shown to have been different from those of his colleagues was because they were lower, but for reasons potentially associated with his diabetes, not his stammer.

4.1.5-7 The seventh allegation was that of dismissal. Taking those allegations together, however, there was no evidence to suggest that any of them occurred for reasons arising in consequence of the Claimant's speech impediment.

Discrimination arising from disability (diabetes)

7.7 Paragraph 5 of the Case Summary [42-3];

5.1.1 This allegation was not proved on the facts;

5.1.2 This allegation was also not proved on the facts;

5.1.3 As above, there was no evidence that the targets were detrimentally 'disproportionate' in the Claimant's case. They took into account difficulties which were said to have been associated with his diabetes. The extent to which the lowered targets were asserted as 'disproportionate' was not explained;

5.1.4 Various reasons were given for the Claimant's lateness on 8 September, none of which were obviously then said to have arisen from his diabetes (traffic, low vitamin D, pain because of an injury, poor sleep and blurry eyes). Ms Summers was good enough to acknowledge that his diabetes may, once identified, have contributed to some of his lateness which was why a different tack was taken and the PIP was ended. The PIP itself did not arise from a known disability;

5.1.5 In order to demonstrate that the initiation of the Development Plan arose from the Claimant's diabetes, he would have needed to have shown that it had detrimentally affected his work rate, his communications and/or his timekeeping.
In relation to his performance, there was a paucity of evidence as to the manner in which his diabetes was said to have adversely impacted the pace of his work beyond the need for him to have been more hydrated with the consequence that he might have needed to have visited the toilet more. Critically, as demonstrated by the data [417], it was not that he could not keep pace. He could for 50% of the time. It was his lack of consistency which was the problem and that was never explained in terms of his diabetes.
In terms of his communication style, there was no evidence that it was adversely affected by his diabetes and, in terms of his timekeeping, once the Respondent knew of his diabetes, they did accept that lateness may have been impacted. It was noteworthy that he made a significant improvement whilst on the plan, with no lateness recorded in February and only one in January ([233] and [267]). It therefore appeared that the one factor which may have had the closest link with the Claimant's disability, was resolved during the Development Plan.

Reasonable adjustments

7.8 These claims were set out in paragraph 6 of the Case Summary [43-4].

7.9 Before looking at the provisions, criteria and/or practices ('PCP's) relied upon, it was worth summarising what the Respondent had done to adjust its management of the Claimant around his stated disabilities. It adjusted its policy regarding employees keeping water at their workstations and other drinks at work, with Ms Summers agreeing to keep Lucozade for him in her office. It offered the Claimant staggered shifts to assist with his brakes, specific breaks to assist with diet [182] and/or no early shifts to mitigate the effects of his disability upon early mornings. All of those offers were declined. It adjusted its work rate targets in his case. The bottom of the target range for him in his Development Plan was lower than the targets of his team. It also adjusted its policy regarding workplace colleagues attending meetings on two occasions in respect of Dr Akwei.

7.10 As to the PCPs relied upon in paragraph 6.2;

6.2.1 There was no evidence that such a practice existed, either generally or as applied to the Claimant specifically;

6.2.2 Even though we changed 'religious leader' to 'representative', the PCP still did not work. It really ought to have been 'non-workplace representative'. Even then, there was no evidence of any substantial disadvantage. The Claimant demonstrated a good ability to represent and express himself in the meetings and during his evidence (see, in particular, his transcripts [R4-7]);

6.2.3 There was a PCP that employees would work across all shifts. Assuming, for a moment, that the Claimant was caused a substantial disadvantage by morning shifts, an adjustment was offered to him, but declined;

6.2.4 Although the application of the Capability Policy could have been a PCP, it was not clear how its application to the Claimant caused a substantial disadvantage when compared to other, non-disabled employees;

6.2.5 We repeat the comments made in 6.2.4 above but the Development Plan was specifically tailored to the Claimant and adjusted below the expectations that applied to others. But the PCP alleged was even more generic than that; it was the application of Development Plans in general. It was not clear how *any* plan would have caused a substantial disadvantage;

6.2.6 See 6.2.3 above.

7.11 Accordingly, those complaints failed also.

Harassment related to disability

7.12 These allegations were set out in paragraph 7 of the Case Summary [44-5] but were effectively been dealt with elsewhere under different sections of the Act. In short, our findings were;

7.10.1 Proved factually;
7.10.2 Proved factually;
7.10.3 Not proved;
7.10.4 Not proved;
7.10.5 Proved factually;
7.10.6 Proved factually;
7.10.7 Not proved;
7.10.8 Not proved.

7.13 Of those which we had found to have been proved factually, we did not consider that any act or omission complained of had been related to the Claimant's disabilities (speech and/or diabetes) for the reasons already provided.

Victimisation

7.14 The second protected act within paragraph 8.1.2 was conceded. The first protected act was not made out (8.1.1). The Claimant had relied upon what he had said as recorded in the bottom sections of pages 9 and 11 of the transcript [R4]. The Tribunal did not consider that any allegations of discrimination have been made within those sections.

7.15 The detriments set out within paragraph 8.2;

8.2.1 No complaints of discrimination were raised and therefore there was nothing to investigate. When discrimination *was* raised, on 15 January, Mrs Small was very clear about how it ought to have been pursued [R6];

8.2.2 There was no evidence that a threat was made on 9 December (see [201], [203] and paragraph 36 of the Claimant's witness statement) or 11 December (see [207-8] and paragraph 36) in relation to any grievance;

8.2.3 The Claimant was not dismissed on the ground that he had committed the alleged or any protected act. He was dismissed for non-discriminatory reasons related to performance and communication.

Jurisdiction (time)

7.16 In light of the findings set out above, we did not need to consider this issue. That said, we expressed the view that, had the allegations been proved, we would have found that they had formed a series of discriminatory acts as

considered in *Hendricks*. We would have preferred the Claimant's submissions on that point to those of the Respondent.

Concluding comments

7.17 This was a workplace in which there was a reasonably high turnover of staff in the first few months of employment as it became clear to the employee or the employer whether individuals were well suited to the work. Although not spotted for a while, it was clear to the Tribunal that the Claimant's attendance was clearly an issue, which he had accepted and which effectively served to launch the performance management process. During the PIP, his communication style was also perceived to have been an issue, both in terms of his written abruptness [179] and his ability to argue [179] and/or upset people [222]. Then, the pace of his work became the main focus of concern and, whilst there was a lack of cogent evidence in that respect prior to 2021, there was good evidence that he was not able to achieve even the lowered standards expected on a consistent basis during the period of the Development Plan. As an employee who had been in work for less than a year and was still under his probationary period, it was of no great surprise to us that he was not seen as a 'good fit' for the job on non-discriminatory grounds.

Employment Judge Livesey
Date: 5 January 2023

Reasons sent to the parties: 11 January 2023

FOR THE TRIBUNAL OFFICE