EMPLOYMENT TRIBUNALS

Claimant: Mr B Lokkason

Respondent: Superbowl UK Newport Ltd

HELD AT/BY: Newport – both as an in-person and then as a remote hearing **on:** 6th – 10th March 2023

BEFORE: Employment Judge T. Vincent Ryan
Ms L. Thomas
Mr. P. Pendle

REPRESENTATION:

Claimant: Mr Lokkason represented himself
Respondent: Ms J. Williams, Counsel

RESERVED JUDGMENT

Structure of this judgment:

A) The judgment starts with a formal declaration of the outcome without details. The details are set out below the formal judgment.

B) I then include some introductory comments to set the a context for the hearing and the judgment.

C) The next section sets out the Tribunal's findings of fact.

D) Then, I make reference then to the applicable law. The law is set out in an Appendix to this judgment.

E) Finally I explain how the Tribunal applied the law to the facts; that is how we reached the judgment.

A)

The unanimous judgment of the Tribunal is:

1. The following claims made by Mr Lokkason succeed:

1.1. The respondent discriminated against Mr Lokkason because of something arising in consequence of his disability, Autistic Spectrum Condition (ASC) (s.15 Equality Act 2010 (EqA)).

1.2. The respondent failed in its duty to make reasonable adjustments (ss20-21 EqA).

1.3. The respondent harassed the claimant in relation to the protected characteristic of disability (s26 EqA):

1.3.1. At a meeting convened without notice, or an encounter, with Managers, on 19th August 2019 and

1.3.2. Upon the issuing of a final written disciplinary warning dated 5th November 2019.

2. The following claims made by Mr Lokkason fail and are dismissed:

2.1. Automatic constructive Unfair Dismissal – Public Interest Disclosure (s.103A Employment Rights Act 1996 (ERA)).

2.2. That he was subjected to detriment(s) done on the ground that he had made a protected disclosure(s) (s.47B ERA).

2.3. Wrongful Dismissal.

2.4. Direct Disability Discrimination (s.13 EqA).

2.5. Indirect Disability Discrimination (s.19 EqA).

2.6. Harassment in relation to the protected characteristic of disability save as above at paragraph 1.3 (s26 EqA)

3. Mr Lokkason withdrew a claim that the respondent made unauthorised deductions from his wages. That claim is dismissed because it was withdrawn.

4. The Tribunal also finds that the claimant made protected disclosures on multiple occasions to several of the respondent's managers during the period 26th January 2019 until his written Response document presented at a disciplinary hearing on 23rd September 2019, (ss 43A-43C ERA). The claimant disclosed to the respondent information which, in his reasonable belief, was made in the public interest and tended to show that:

4.1. a criminal offence had been committed and was being committed,

4.2. that the respondent had failed, and was failing, to comply with legal obligations to which it was subject, and

4.3. that the health and safety of any individual had been and was being endangered.

5. Other claimed disabling conditions:

5.1. It was agreed at the outset that the claimant's claims of disability discrimination related to ASC and ADHD, the claimant being autistic.

5.2. It was noted, without objection, that his claims did not relate to his conditions of asthma and dermatitis (albeit they caused him anxiety), or anxiety (albeit the claimant displayed anxiety during the course of his employment because of the treatment received by him or which he perceived he was being subjected to).

5.3. In those circumstances the respondent did not concede any disability other than autism (ASC) and ADHD. Neither party led evidence or raised specific questions in cross-examination or made specific submissions in reliance upon any other conditions.

5.4. The Tribunal was not asked to reach a judgment as to whether or not the claimant was a disabled person by reason of asthma, dermatitis or (specifically and as a separate disability), anxiety. The tribunal has not been able to make a judgment upon these matters in the circumstances.

5.5. Judicial notice is however taken that anxiety is very often a corollary to ASC and ADHD; furthermore the Tribunal accepts that the claimant displayed symptoms of anxiety both during employment as described by him, and during the final hearing as was evident to us. The Tribunal has adjudged it is more likely the case than not, that the claimant lives with anxiety as an intrinsic consequence of ASC, where autism is the principal disabling condition. In this judgment when refence is made to ASC, or autism, or to Mr Lokkason being autistic, the judgment shall be read as reference also to consequential anxiety.

6. There was insufficient time for the Tribunal to consider the respondent's costs application. Consideration is deferred to a date to be set.

REASONS

B)

Introduction:

1. Mr Lokkason presented his claim to the Tribunal on 29th November 2019.

2. There have been several preliminary hearings in relation to case management. The details of those hearings are set out in their own minutes and Orders.

3. Mr Lokkason is autistic. Amongst case management issues we have obtained the benefit of an Intermediary's Report from Mr R Thomas. Mr Thomas was expected to attend the final hearing to assist the Tribunal with any communication issues that arose. For his own reasons Mr Thomas did not attend the final hearing.

4. Mr Lokkason proceeded in Mr Thomas' absence. We, the parties and the Tribunal, adopted the recommendations in the Intermediary's report. Counsel framed her questions as recommended and agreed in advance.

5. Mr Lokkason is familiar with the Equal Treatment Bench Book (ETBB). We have discussed it at preliminary hearings. I revised relevant parts of the ETBB in preparation for the hearing and reminded my colleagues how best to put into practice its advice and guidance.

6. During the hearing we had regular breaks.

7. When Mr Lokkason was giving evidence I would periodically read back to him what he had said in answer to questions from Counsel to check my note for understanding and accuracy. When Mr Lokkason was asking questions I would sometimes re-read his partial or complete question to assist him to remain focussed when he appeared to be losing his way. Sometimes he said he was losing his way; in that circumstance I also re-read my notes to him. Each time Mr Lokkason asked for or required a reminder as to what had been said or was being said we agreed on an acceptable summary. I corrected or amended my notes to reflect that understanding when needed.

8. Mr Lokkason, Counsel, witnesses, and the Tribunal each took time and care to ensure clarity of delivery and to make clear each one's understanding of what had been said and intended.

9. The Tribunal is satisfied that the interests of justice were served; with the co-operation of both parties, guided by the Tribunal, there was a fair hearing. Mr Lokkason and Counsel (and her instructing solicitor during the preparation, including of the hearing bundle) contributed fully to ensuring that the Tribunal achieved the overriding objective; I thank them.

10. The Tribunal concludes that the presence of the Intermediary was not required for a fair hearing.

11. Neither party was prejudiced by Mr Thomas' absence. Proceeding in his absence was the stated preference of both parties. At the hearing, and with hindsight, the Tribunal is satisfied that they were correct in their stated preference to proceed with the hearing. The alternative would have been to postpone the hearing and seek the appointment of another Intermediary; both parties preferred not to take those steps.

The Issues & the Law:

12. The List of Issues was agreed during a series of preliminary hearings. The last version followed a hearing on 19th December 2022. I have added it as Appendix 1 to this judgment.

13. Appendix 2 is the Legal Submission of the respondent. Counsel also produced an Authorities Bundle. I would not usually append one parties' written submissions; this is an exceptional step in the circumstances I explain below. I consider that it is wholly in line with the overriding objective of the Tribunal, to do justice and with clarity of explanation.

14. Counsel took the time and care to draft a statement of the applicable law that is clear and concise. More importantly in the view of the Tribunal, the statement of applicable law is correct and appropriate; it was drafted with the claimant in mind; I thank Counsel for doing so.

15. Counsel sent her legal submissions to Mr Lokkason in advance of oral submissions on the facts. I am confident that Mr Lokkason will have read and understood the legal submissions and that he has had the opportunity to consider them in the light of the Authorities Bundle.

16. In all the circumstances the Tribunal does not consider it could better express the applicable law for Mr Lokkason's benefit, or for its own benefit; it does not consider it fair or proportionate to re-phrase the neutral statement of applicable law; it considers that our attempt at paraphrasing may cause avoidable confusion.

17. For these reasons and after careful consideration of the respondent's legal submission we adopt it, with thanks, as the statement of applicable law. For the avoidance of doubt, we do not accept, in full, the respondent's submissions on facts and the application of law to facts which were made orally on the last day of the hearing.

18. Mr Lokkason made both oral and written submissions on facts and the application of the law to the facts. We have taken these into account fully too. His written submissions are not appended for the same reason that a note of the respondent's oral submissions are not appended – the Tribunal does not fully endorse them. We endorse the appendices.

C)

The Facts: I will now set out the Tribunal's findings of fact. These reflect our findings of the essential facts; these are the findings we needed to make to answer the questions set out in the List of Issues (Appendix 1). They are not intended as a literal account of every word or action of the parties; they reflect our understanding of the essence of what occurred.

1. <u>The respondent</u> (referred to henceforth as R):

1.1. R's business is in the management of a bowling alley and providing other gaming facilities for public entertainment.

1.2. R is a large employer. It is part of a larger group of companies operating on numerous sites in the United Kingdom. Some of its managers were employed by a parent company, QLP Holdings Ltd; at all material times they were acting for and on behalf of R. In this judgment we do not differentiate between R and QLP Holdings Ltd in our findings of fact.

1.3. R has a management structure including site managers and regional managers.

1.4. It has documented policies and procedures supplemented by working practices These include policies in respect of grievances, disciplinary matters, and standards of conduct. We make further findings below about the application of the mobile phone policy in particular.

1.5. R has a professional HR Department. It issues statements of terms and conditions of employment. New recruits, and recruits to new roles, would generally be subject to a probationary period.

1.6. R issues and abides by (subject to our findings below in respect of the mobile phone policy) an Employee Handbook. The handbook is updated periodically. When the claimant commenced employment R was using version 6 (page 173 of the hearing bundle, to which all page references relate unless otherwise stated). Version 6 is the updated version of the handbook as at October 2018. The next revision was version 7; this was drafted and approved by management in August 2019; it was rolled out for operational purposes to staff in late September 2019 (page 123).

1.7. R required its employees to exhibit what it considered to be acceptable standards of behaviour and conduct; by doing so they could avoid disciplinary action. The required standards were set out in the handbook in various policies including a disciplinary policy and provisions relating to mobile phones.

1.8. Where disciplinary action was invoked, R generally applied its disciplinary policy and procedures.

1.9. The requirements in respect of standards of behaviour and conduct, and the disciplinary policy and procedure, are provisions, criteria and practices (PCPs) for the purposes of the Equality Act).

1.10. A cast list is set out in Appendix 4 to this judgment.

1.10.1. SG was the claimant's line manager.

1.10.2. Luke Costello was Regional Technician and partly responsible for the claimant's management from July 2019 when he became a Technician. He gave evidence to the Tribunal. We found him to be a straightforward, conscientious and plausible witness.

1.10.3. Only Mr Costello and Mr Newton (below) gave evidence for the respondent.

1.10.4. Owen Newton was the Regional Manager for QLP Holdings Ltd. He gave evidence to the Tribunal. We found him to be a straightforward, conscientious and plausible witness.

The judgment will refer to individuals consistently throughout by their initials, (other than the claimant).

2. Mr Lokkason: during the hearing I addressed the claimant formally as Mr Lokkason and tried not to refer to him as "the claimant". I hope that he will accept I mean no disrespect when I abbreviate his name, as I have with the respondent, but to "C", not his initials. Both parties are being treated alike and neither is being disrespected. I will now set out brief general findings of fact in relation to C:

2.1. C is autistic. He is now aged 31 years. He was 27 to 28 years old at the material time of his employment. C received a diagnosis of ASC in his mid-20s. Years earlier he was diagnosed as living with ADHD.

2.2. C describes his autism profile as Pervasive or Pathological Demand Avoidant. He sometimes gives the perception to others that he is being awkward and challenging in circumstances where he will challenge what he considers to be illogical or inconsistent. We accept that description. The Tribunal found that C was not challenging but was entirely cooperative throughout the final hearing. He researches topics neurotically, by his own admission. He presents well and can articulate his thoughts. He masks difficulties caused to him by autism. Having to consider what he is being told, comparing that to what he has researched, and factoring in what he believes to be the literal fact of any situation is mentally and physically tiring for C; it causes symptoms of anxiety. He finds that in every day interactions with others there is a lot to compute; that is taxing. He is often resistant to instructions put to him as demands or expectations; this is especially true when any such orders are not explained logically, or when they are inconsistent with known policies and procedures. C's resistance to instruction may appear abrupt and insubordinate. That apart, he may sometimes deliberately speak abruptly or be insubordinate as might any person whether autistic or not.

2.3. On occasions during C's employment, he was perceived by some managers as being insubordinate. We did not hear direct oral evidence from his line manager, SG. There is a written statement that she provided for a disciplinary hearing in our hearing bundle; we have other oral evidence and documentary evidence about her. SG is no longer employed by R. From the available evidence we infer that she perceived C to be insubordinate. On at least some of those occasions this was a consequence of his disabling condition. It is also evident that the claimant was capable of being stubborn and insubordinate when, for example, having been repeatedly challenged, he took against SG. Ultimately, he indicated to colleagues that he wanted her removed from her post. We infer this from all the available evidence and the claimant's failure to deny it when put to him; we find that this was borne out of a wish to avenge himself or get even.

2.4. C developed successful masking and mitigating practices in his early life and prior to diagnosis of ASC when he was in his 20s. He was always aware that he struggled in communicating with other people. He has always been aware of difference. Because of his difficulties he undertook and obtained a degree in psychology. He wanted to better understand himself and other people.

2.5. Before his diagnosis and understanding of his condition C felt that his comments, assertions and challenges to other people were dismissed and written off. He believed he lacked credibility according to other people's perception of him. To counter this, C would study subjects such as learning rules, policies, and procedures so that he could talk authoritatively if he was challenged. He described this (his neurotic research and learning of authoritative resources so as to prove provenance of his arguments and challenges) as similar to implanting a recorder and likened it to a particular character in a superhero film. The Tribunal finds that this coping strategy was employed by C consistently. It relates also to his understanding of policies and procedures as they applied to him in his job role. It explains, in large part, his behaviour to his managers. He accepts that this behaviour may have seemed to them to be challenging.

2.6. C convinces himself that his understanding is the correct one. He believes that divergence from his understanding implies that he is being intentionally misled or, as he put it, "gas lit". He has what he describes as an "abnormal desire to correct what is incorrect". Having a literal understanding of any situation that he is in, and with his knowledge of the abiding rules and guidance, C seeks to resolve inconsistencies and to correct what he considers to be mistakes.

2.7. C also assumes that people will find him to be awkward and challenging even when that is not the case; he says this at times when he is not actually being perceived as either. He anticipates challenge or correction and can be profusely apologetic in anticipation of either. The Tribunal saw this in C's conduct of his case and in his behaviour addressing the Tribunal.

2.8. The panel did not consider that C was either awkward or challenging. As C's conduct during the hearing was commented upon by R in submissions it is appropriate for the Tribunal to find

as a fact that C conducted himself wholly appropriately at the final hearing; his conduct was consistent with what the panel knows to have been his research into the practice and procedure of the Employment Tribunal including studying the ETBB, considering the Intermediary's report and from an understanding of the preliminary hearings and the minutes produced thereafter. C explained his preference for an in-person or hybrid hearing where he would attend a hearing-room setting; he felt he could better perform in such an environment with known expectations and a relatively formal and consistent format and etiquette. Even when the final hearing had to convert to a remote hearing C preferred to participate in an otherwise empty hearing room with a clerk available to him if needed; this gave him a continued context of legal proceedings. The Tribunal finds that, with such a structure and in such an environment, C acted wholly appropriately as a litigant in person. The Tribunal further finds that this structure and environment was not the same as that experienced by C whilst employed by R. This latter finding is not intended as a criticism of R. The Tribunal finds that R had a set of policies and written standards such that there were some expectations at work but, necessarily, dealing with numerous people in various circumstances over a lengthy shift, the etiquette and expectations adopted by management were more day-to-day and less structured than say at a final hearing before an Employment Tribunal. The Tribunal finds that it would be unfair to make a finding of fact or to draw an inference about C's behavioural traits and conduct by comparing the environment at the final hearing with that of the workplace and C's conduct in either. In fact, the working environment is not comparable to the Tribunals environment. The same applies to the application of policies and procedures in relation to conduct.

2.9. The Tribunal found C to be credible, conscientious and generally reliable as a witness. Sometimes his expression of his evidence was convoluted, technical, or worded in a complicated manner which required reasonable clarification. Overall, we find that C's evidence about events was plausible and we have believed him. He seemed only once to prevaricate, but he did then clearly explain what he had done and his explanation is accepted (this again is over the mobile phone policy and it is covered below).

2.10. C commenced employment with R on 21 January 2019 as a General Assistant, and his employment was terminated on 8 December 2019. He worked at the Newport site.

2.11. C's resignation letter referred to resignation with immediate effect and went on to refer to one week's notice (page 384). R acknowledged and accepted resignation with immediate effect on 8 December 2019. C was at that time subject to a fit note showing he was incapable of working; he did not work any notice period. He did not challenge or question R's acceptance of his resignation with immediate effect. The effective date of termination was 8 December 2019.

3. C was initially employed as a General Assistant; he became a Technician in July 2019; when he resigned, he was a Technician.

4. On 21st January 2019 C completed a Health Questionnaire as part of his Employee Induction Book (page 158). He declared that he was asthmatic and autistic. He disclosed that he had mild eczema. R knew that C had these conditions from this date.

5. At no stage from that date until the disciplinary hearing in September 2019 did R engage with C in detail enquiring of him or considering with him and/or Occupational Health advisers as to how ASC affected him in his daily activities at work; there was no consideration of reasonable adjustments until after the second disciplinary hearing that led to C's resignation letter. At the first disciplinary hearing in August 2019, he had an informal conversation with LC about autism as an aside. That was personal because of LC's own experience of another autistic person.

6. Over time, in particular with regard to his relationship with his line manager SG, R ought reasonably to have known that C was disabled by autism. C repeatedly raised issues over the availability of PPE and there was a running issue over the application of the mobile phone policy (further findings are set out below regarding PPE and phones). In respect of both PPE and the application of the mobile phone policy C reacted persistently making his point and stating reliance on written rules and Regulations. It is evident from emails, shift reports, and disciplinary statements (pp 313 – 316)

in the hearing bundle that from mid-August 2019, at the latest, C was exhibiting autistic traits and that managers and colleagues considered C to be difficult and challenging.

7. Other employees may also have required instruction or correction (evident from shift reports), but SG reached the point where she would ignore C or else she felt that she would risk losing her temper with him. SG said this in written comments disclosed to us. From early July 2019 onwards C persistently, and on occasions by reference to statutes and Regulations, raised issues regarding PPE (LC even commented on this in a disciplinary statement at p.313) . On 19th August 2019 such was R's concern at C's apparent ignorance of, or unwillingness to follow, the mobile phone policy that he was confronted by four or more managers about it. On 25th August 2019 LC refers to C's "very poor attitude", his being unwilling to listen and take instructions from managers and others (p303). From mid-August 2019, at the latest, R had direct knowledge and experience of C that could have (and in our judgment below, ought reasonably to have) alerted it to the effects of autism on C's performance and conduct at work.

8. Trainee Manager recruitment:

   8.1. in May 2019 R commenced the recruitment process for a Trainee Duty Manager.

   8.2. The successful applicant would work with SG.

   8.3. C applied.

   8.4. SG encouraged at least two other applicants, including LB who was eventually appointed. Encouraging colleague personal and career development was part of SG's managerial role.

   8.5. SG considered that both C and LB interviewed well and asked ON whether she could give each of them a trial shift to help her decide upon an appointment. ON agreed.

   8.6. Following the trial shifts SG reported, with a commercial rationale, that she considered that LB had "the edge" over C (P289). On that basis LB was appointed.

   8.7. C was disappointed. He believes that he was the better candidate. He believed that SG had shown a preference for LB.

   8.8. The Tribunal has not seen any evidence to support C's suspicion; from the above circumstances which are documented we infer that the non-appointment of C was conscientiously deemed appropriate for sound business reasons unrelated to any protected characteristic or disclosure of information whether protected or not.

   8.9. It appeared to the Tribunal, and it finds, that C remained disgruntled about this matter for the remainder of his employment.

9. Technicians' role:

   9.1. C was appointed to the role of Technician on 8 July 2019. A new statement of the terms of employment were issued (page 170). The statement erroneously stated that no previous employment prior to 8 July 2019 counted as part of continuous employment.

   9.2. In any event, as it was a new role, it was subject to a six-month probationary period.

   9.3. At this time the claimant was applying for a mortgage, and he had some concern that being a probationer would adversely affect the application. At his request and to assist C, on 15 July 2019 J0, HR & Payroll Manager, confirmed that C was on a permanent contract and had passed probation. The waiving of the probationary period was agreed with senior management. This was advantageous to C.

9.4. The Technician's role involved the repair and maintenance of equipment including automated equipment behind the bowling alley. This therefore brought the claimant into proximity with machinery and away from front of house.

10. PPE:

10.1. R issues uniforms to its staff. Uniforms are branded. From the evidence of LC and C it appears that R would require staff to wear a branded uniform T-shirt or top of some sort but that it was more relaxed about trousers and footwear, provided the trousers were in the corporate colour.

10.2. R also issues PPE. Those working with machinery, namely technicians, were supposed to be issued with and to wear a properly fitting branded T-shirt or polo shirt, particular trousers, and toe-capped boots or shoes. The employee Handbook at page 191 paragraph B stipulates with regard to standards of dress that where uniforms are provided these must be worn at all times whilst at work; where uniforms are not provided employees are to wear clothes appropriate to their job responsibilities. At page 192 of the handbook, Health, Safety, Welfare and Hygiene, under paragraph A 2) there is a requirement to wear protective clothing which is issued, and failure to do so is considered a contravention of health and safety responsibilities. Technicians were generally issued Tee-shirt and trousers (so no lose-fitting clothing was worn that would risk being caught in moving equipment) and toe-capped boots. LC requested members of his team to specify their needs in a WhatsApp message dated 15 February 2019 (page 492). The claimant responded within minutes, confirming that he required boots and providing sizes he required in respect of boots T-shirt, and trousers.

10.3. R did not issue any PPE to C. R did not issue a uniform to C.

10.4. From July 2019 onwards C told, amongst others, LC and SG that he needed PPE for his health and safety. He told them he considered there was a safety risk if he did not wear properly issued PPE. He referred to the regulatory requirements in respect of PPE. He did this on multiple occasions.

10.5. LC says that he examined C's boots and considered that as they were toe-capped they counted as suitable PPE. He said that he had not received C's measurements for the clothing or boots. He had stated this in a WhatsApp message on 12th September 2019 (p493). C had already confirmed requirements and measurements on 15th February 2019 (see above). LC did not tell C that he was assessing his boots; C was unaware of any such check; it is not documented; LC only ascertained that C's boots had toecaps. C's boots were in poor state of condition, the uppers being secured to the sole (of at least one boot) with duct-tape.

10.6. Bearing in mind his duties, his understanding of statute law and regulations regarding health and safety at work, his reading of the handbook, his interpretation of the February request for measurements and requirements, C believed that clothing and boots formed personal protective equipment to which he was entitled and which he was required to wear at all times in the execution of his duty as a Technician.

10.7. C was older and more experienced at work than some of his colleagues whom he described as mostly "young and vulnerable". He assumed a role as spokesperson. The Tribunal does not know whether others considered him to be their spokesperson. He was critical of management and in particular what he considered to be the inconsistent application of various policies. He considered that some of his colleagues also were not given due protection whilst at work. C raised the issue of PPE because in part he needed it, but also because he believed it to be a requirement that all employees be issued appropriate safety equipment. C raised the non-issue of PPE to him on a regular basis to anyone who would listen believing it would be better for all concerned if R acted strictly in accordance with the handbook and health and safety law.

10.8. C made his concern that he was not issued with PPE known to the Chief Technician (JB) orally on numerous occasions between early July and September 2019.

10.9. C complained about the non-provision of PPE to ON (Regional Manager as before). He prepared a written statement for the second disciplinary hearing, in September 2019, that he read out to ON. In this statement and at that hearing C again complained that in contravention of the law he had not been given PPE that he ought to have worn at work.

10.10. C's understanding of the law was that an employer could be prosecuted for breaches of health and safety laws and regulations. To his mind the fact of potential prosecution and conviction meant that breaches of health and safety legislation amount to criminal offences. He believed that it was a criminal offence not to issue appropriate PPE.

10.11. From his experience of the workplace, including working on moving-machine parts, C believes that his health and safety was endangered when he did not wear PPE properly issued by R.

11. Mobile phone Policy:

11.1. R's written mobile phone policy prior to September 2019 is at page 195 at paragraph L). It says that personal mobile phones should be switched off and kept with personal belongings during working hours and not carried on one's person. The policy makes clear that failure to adhere to it would lead to disciplinary action. Employees were able to leave their personal possessions in a staff room in a locker.

11.2. On many and varied occasions C queried with SG and LC whether that policy applied to everybody. He was repeatedly told that the policy applied to everybody without exception. That message was reinforced by LC in a WhatsApp message to his technicians group.

11.3. C observed that SG wore a smart watch. On occasions she showed colleagues, including C and LC, photographs on her smartwatch. She did not routinely leave her smartwatch turned off with her personal possessions.

11.4. Technicians would often take photographs on their phones of parts and equipment when raising a query or seeking help. This included sending photographs to LC. They would take the photographs on their mobile phones. Some technicians considered that they could carry their phones for this purpose, switched on whilst at work.

11.5. C witnessed other managers and colleagues carrying or using their mobile phones during working hours both front of house and behind the bowling alley where the Technicians worked.

11.6. C understood that these practices contravened the mobile phone policy. He considered the policy to be illogical and he knew that it was applied inconsistently.

11.7. R sought to clamp down on misuse of mobile phones at work. C and others were told to leave their mobile phones in the manager's office in a box or basket. This area and these arrangements were not as secure as storage with personal possessions in a locked employee locker. C was very concerned and dubious about leaving his mobile phone in an insecure place. He valued it over £1000. It contains personal data including in respect of autism, coping strategies and masking. C thought he had seen SG looking at other people's mobile phones even if only responding when one went off. C was suspicious that his privacy would be unnecessarily infringed. He was not prepared to leave his phone in the manager's office.

11.8. C queried the applicable policy. He was repeatedly told that no one was ever allowed to carry their mobile phone about their person and switched on during working hours, without any exceptions; he was told that this applied to all employees including managers.

11.9. Despite being told to leave his phone in the manager's office C carried on for a while leaving it, switched off, with his personal belongings. This was in line with the written policy but not the oral instruction given to him.

11.10. SG would challenge C as to the whereabouts of his phone and ask him for it when it was not left in the manager's office. There is no evidence before this Tribunal that C was ever seen, or reported for, using his mobile phone whilst at work, or having it switched on and on his person.

11.11. While the written policy was that mobile phones could be switched off and placed with personal belongings, and the oral policy as explained to the claimant was that mobile phones should be kept in the manager's office, in practice several managers retained their phones on their person switched on and some technicians would use them for the purposes of taking photographs to assist them in their repair and maintenance work. We accept C's evidence that he saw these practices. This was a day-to-day practical relaxation of a strict written and stricter oral instruction to staff. As there were therefore three policies, the Tribunal concludes that there was an apparent illogicality insisting on saying there was one policy; there was an inconsistency of approach by management.

11.12. The apparent illogicality and inconsistency frustrated C. He challenged management and stated his views about the policy and the practice. The claimant's reaction was entirely consistent with his autistic traits. R's reaction of insistence and frustration, finding C to be challenging and apparently awkward, was consistent with how C described stereotypical views some people take of autistic traits.

12. 25th July 2019 – incident with DS (then a General Manager at another site providing cover at Newport):

12.1. On this date a customer complained to a member of staff about a booking. The customer did so in a way that C felt could intimidate a colleague he considered to be young and vulnerable. C believed that he could defuse the situation using his experience and training. He intervened. To his satisfaction he calmed the situation and placated the customer. The customer's complaint however had not yet been dealt with.

12.2. As acting manager at the time DS came over from his office to see the customer and to deal with the confrontation, or what may have been a confrontation if in fact C had not calmed it. C's perception is that DS inflamed the situation again and he believes made the matter much worse than it had been. He briefly intervened.

12.3. When leaving the scene of the confrontation, DS told C that it was his, DS's, job to deal with customer complaints and not C's. He also told C that C had undermined him and that he must not do that again. C did not like being corrected let alone ordered. He criticised DS to his face telling him that he had mismanaged the situation. He challenged DS's authority, handling of the matter, decision-making and the way he had spoken to C.

12.4. The Tribunal finds that C's conduct was deliberate, insubordinate and thus was potentially a misconduct issue.

13. 26 July 2019:

13.1. C practice was to leave his mobile phone switched off and with his personal belongings in his bag in the staff area while at work.

13.2. SG approached C and asked him to hand over his phone.

13.3. There was another dispute about the illogicality of the mobile phone policy and its consistent or inconsistent application. C sought clarification of the policy.

13.4. C did not have the phone on his person and did not hand it to SG. He said he would take it home with him during the break and that is what he did, with permission. It appears that SG and R's Management believed from what C had told them that he had the phone on his person and was refusing to hand it in but would take it home. That was a misunderstanding. There is no evidence before the Tribunal as to why SG found it necessary to demand that C hand over his phone on this occasion. C was not accused of using his phone inappropriately at work. There is no evidence before the Tribunal that any other employee was required to hand over their phone on this or any other date to a manager.

14. 5 August 20219 – first disciplinary hearing (Notes at 294-297):

14.1. R's disciplinary procedure, as at this time, is at page 201. The policy refers to the maintenance of standards of performance and behaviour, stating that the objective is to encourage improvement rather than merely to impose punishment for breaches of standards. At paragraph A) 4) d) the policy provides that an employee will only be disciplined after careful investigation of the facts and an opportunity for the employee to present their side of the case.

14.2. At section c) there is a non-exhaustive list of conduct that would be considered unsatisfactory conduct or misconduct. This list includes failure to abide by the general health and safety Rules and Procedures, rudeness to, amongst others, other employees and objectionable or insulting behaviour, and a failure to carry out all reasonable instructions or follow R's rules and procedures.

14.3. R commenced disciplinary proceedings against C. On 29 July 2019 J0 wrote to C requiring him to attend a disciplinary hearing on Friday 2nd August in respect of two matters of concern namely:

14.3.1. the incident with DS on 25th July and
14.3.2. the incident with SG on 26 July 2019.

14.4. The letter confirmed that R retained the right to vary its procedures and to impose a sanction in respect of formal warnings up to and including termination for a first breach of conduct rules. The letter confirmed entitlement to be accompanied and confirmed that LC would be the disciplining officer with ON in attendance as notetaker. The Tribunal takes notice that it would have been unusual for a Regional Manager to act as a notetaker at a disciplinary hearing for a first offence. The conduct complained of was described as "matters of concern" rather than gross misconduct. In the event the notetaker was LB.

14.5. LC asked C about the incident on 25 July 2019 with DS. The allegation of undermining senior management and contradicting DS was put to C. LC confirmed (page 296) that he could not discuss with C what DS had said about the altercation. There is no evidence before the Tribunal of an investigation or that any details of an investigation were disclosed to C before or at the first disciplinary hearing. C confirmed that he had disagreed with the way that DS had handled the situation. LC gave an oral disciplinary warning in relation to this conduct which was to stay on his personnel record for six months.

14.6. LC asked C about the incident on 26 July 2019 with SG regarding his mobile phone. C confirmed again that he did not have the phone on his person when he was challenged (p295). He again said that he did not understand the point of the policy when for example he was required to install software on his phone for work purposes. He confirmed that he had asked SG why the policy existed and that she said she did not know. In the event there was no sanction or other disciplinary action with regard to the mobile phone policy and the incident with SG.

14.7. C confirmed that he would accept the oral warning on this occasion. He did not want to "drag this out" although he finished by stating that he felt DS acted unprofessionally and was aggressive, antagonising him.

14.8. R did not issue formal confirmation of the outcome and the Tribunal has not seen what note was placed on C's employment record.

14.9. LC discussed autism in general terms with C. LC had some personal experience of an autistic person. This was in terms of a chat and in the context of the ending of the disciplinary hearing. It was not a welfare meeting or a consideration of C's needs, disadvantages at work, or the need for any adjustments.

15. 19 August 2019:

15.1. Without prior notification, or evidenced justification, SG told C to come into the managers' office and to hand over his phone. We do not know why SG thought that C had his phone on him at the time and why she considered it necessary to challenge him on this occasion.

15.2. SG (General Manager) was accompanied by DS, ON, LC (Regional Technician), and LB (Trainee Duty Manager). C was overwhelmed.

15.3. Those present reiterated the mobile phone policy. C confirmed again that he disagreed with the policy. DS removed his tie from around his neck with some force trying to illustrate a point that he was subject to a policy regarding a dress code as he was a manager. C recognised that DS was agitated; his perception of DS' behaviour was that it was aggressive. Having considered all the evidence the Tribunal concludes that DS's removal of his tie was probably done in exasperation and that it did display what could reasonably be taken as irritation and frustration.

15.4. C formed the belief that this whole incident was a "targeted attack" on him.

15.5. In August 2019 R devised the new mobile phone policy referred to above. It is at p234 (section L) . Whilst it was agreed by management in August 2019 it was not "rolled out" until the last week in September 2019. The new policy stated that personal mobile phones must be switched off and left in the manager's office before the start of any shift; they should not be carried by an individual on their person during working hours and failure to adhere to this provision would lead to disciplinary action. This policy was in line with the oral policy explained to the claimant when he was told to either hand in his phone to the manager or leave it at home.

16. C had a decided view on how best his duties could be performed in line with expressed job descriptions, the handbook policies, and his understanding of various laws. He considered that he was sufficiently experienced to exercise his discretion in the execution of his duties as he saw fit. He was critical of the practices employed by other managers and their general management style. He was critical of the respondent's policies and procedures where he felt they were illogical or inconsistent with practice.

17. C saw SG as a protagonist, and even a perpetrator of mistreatment towards him. Based on evidence obtained by R for disciplinary purposes and C's noncommittal response to questioning about it, we find on balance that C said to more than one colleague on more than one occasion that he would be leaving employment and that he was going to see to it that SG was dismissed; it is more likely than not that he used expressions such as "bringing her down", but whether he did or not that was the implication of comments that he made.

18. R's managers viewed C's behaviour as described above as tantamount to a failure to cooperate such as with training, to carry out reasonable instructions even to the point of refusing to cooperate with managers. It became aware that C was making derogatory comments regarding SG and members of head office staff and a colleague(s).

19. 19 September 2019 disciplinary invitation (p309) & suspension (P310):

19.1. On this date JO wrote to C inviting him to a disciplinary hearing the following day to discuss allegations of misconduct as described above. He was warned that the disciplining officer ON could impose any sanction up to and including termination of employment. He was afforded his statutory rights.

19.2. On the same date JO wrote to C suspending him on full pay until the disciplinary hearing.

19.3. The Tribunal finds that, based upon the available evidence, including statements of derogatory remarks to managers or about managers and a colleague, the reason for the hearing and the suspension was the nature and extent of complaints made by colleagues about C's conduct.

20. 23 September 2019 – second disciplinary hearing part 1:

20.1. The disciplinary hearing that was to have taken place on 20th September was postponed, initially to 21st September and then to 23 September at C's request. C required more time and also clarification of the allegations against him.

20.2. In advance of the hearing R obtained a number of statements from employees about C's behaviour and their perception of both C and his behaviour. Statements were obtained from LC, JC, GK, SG.

20.3. These witness statements and a copy of the handbook were sent to C in advance of the hearing. These statements were sent as the requested clarification.

20.4. C produced a written " Disciplinary response" (P320 – 331). C highlighted his autism and requirement of support at work; he explained his autistic traits and the difficulties encountered by him in the absence of reasonable adjustments. C's overriding point was that R had not engaged with him in seeing how best to assist him as an autistic person at work but instead proceeded down a disciplinary route when management found that his conduct was not acceptable to it. He explained that he was confused by various matters at work, and he had sought advice and assistance. He stated his view that the problem was with management and not with him. C raised issues that he considered came within R's "whistle-blower policy". He commented on each of the witness statements that R had disclosed, stating his version of events and opinions.

20.5. ON read the relevant documentation and listened to C. He was conscientious in his consideration of matters at a disciplinary level. ON realised that R required advice and assistance, perhaps with recommendations, from an OH professional concerning C and his autistic traits. He considered that this was necessary before considering any future management of C and any sanction in respect of the allegations facing C. The hearing was adjourned pending consideration of an OH report. This was not a "failure" to reach an outcome as C alleges; it was a deliberate and constructive attempt to obtain appropriate additional information to better inform ON. He required an OH report and that necessitated an adjournment.

21. OH Report 15 October 2019 (p363):

21.1. The OH report followed an appointment with C and his wife.

21.2. In the report there is a clear statement regarding the broad spectrum of difference among autistic people. It confirms the difficulty in answering specific questions about a specific employee's attitude and behaviour without an opportunity to shadow that individual over a period of time.

21.3. The report made clear that its comments on autistic traits were generalised or stereotypical rather than specific to C.

21.4. Reasonable adjustments were recommended.

21.5. R was recommended to attain an understanding of autism with particular reference to C.

21.6. The specific recommendations were:

21.6.1. that there be a consistent method of communication, preferably by the same person,
21.6.2. The appointment of a mentor,
21.6.3. appropriate training with clear and consistent guidance and good communication, and supportive management, that is colleagues being made aware of difficulties experienced by C so as to avoid unnecessary conflict or misunderstanding.

21.7. It was reported that, whilst C was fit to carry on his duties, his specific interpersonal difficulties with individual members of the team would have to be addressed prior to his return to work, that C's issues causing him anxiety with four of his managers and ongoing problems with SG required appropriate investigation and management.

21.8. Reasonable adjustments tailored to his individual needs would have to take into account his difficulties with social interaction; better communication would be needed on a permanent basis. The importance of appropriate communication with and from C was stressed. Reference was made to the benefits to both parties of a better understanding of C's specific needs, with regular meetings to address arising needs.

21.9. The report concluded that C was likely to be adjudged a disabled person for the purposes of EqA.

22. 1 November 2019 – second disciplinary hearing part 2: on 29 October 2019

22.1. R invited C to a reconvened hearing following its receipt of the OH report. C was given three days' notice which is more than the standard in R's policy.

22.2. The note of the hearing is at pages 370-371. ON accepted that C's autism had affected matters and he referred to having obtained legal advice from a solicitor. He explained conduct that was considered to be gross misconduct that could have led to dismissal. ON explained that in view of the OH report the sanction would be mitigated to a final written warning. ON explained the right to appeal. C was required to return to work or be considered absent without leave. C explained that he could not return to work as things were; although there were no issues with his work, he had issues with management (the issue being that his condition caused him to say things as he saw them) but he was being blamed; this was despite having made known his autism from the commencement of his employment.

23. C's email 4 November 2019 (p376-7): C informed JO that he was unable to return to work in the circumstances and into an environment that he considered "demonstrably and falsely hostile towards myself". He did not consider that sufficient corrective action had been taken and as such he could not return to work. The Tribunal notes that the OH report specifically recommended various steps be taken before C was required to return to work; no such steps had been taken before ON stated that he must return forthwith (and subject to a final disciplinary warning).

24. 5 November 2019 Outcome of Disciplinary second hearing (commencing p373):

24.1. ON confirmed that in refusing to participate in training and carry out reasonable instruction C had committed acts of serious misconduct and that comments he had made about senior colleagues constituted gross misconduct.

24.2. Whilst ordinarily ON would have dismissed an employee, taking into account "potential implications" of autism, he would substitute a final written warning.

24.3. The warning was to be placed on C's file for a period of 12 months and then disregarded provided there was no further misconduct, albeit the duration of the warning could be extended.

24.4. C was required to attend work in accordance with rotas to be circulated with effect from 6 November 2019.

24.5. Expectations for future conduct were stated.

24.6. ON confirmed that practical training would be given to C and that he would have a mentor "likely to be based in head office".

24.7. The Tribunal notes that the implication of this latter provision was that C's mentor would be a member of senior management not placed on the site where he was working; he would still have to deal on site with management by others whom he did not trust and in respect of whom confrontation had led to this stage of the disciplinary process. ON confirmed that "further misconduct while this final written warning remains valid" would lead to further disciplinary action and "you are likely to be dismissed". C's right to appeal was restated.

25. R's response to C saying he could not return to work without "sufficient corrective action" – 6 November 2019 (p 378): JO confirmed by letter sent as an email attachment that if C sought corrective action, he should raise a formal grievance but whether or not he did he was required to return to work in accordance with the circulated rota. C was required to return to work on Thursday, 7 November 2019.

26. C's sickness absence: C submitted a GP sicknote for two weeks from 7 November 2019 (page 379) where the conditions rendering him unfit to work were stress and anxiety. That sicknote was due to expire on 21 November 2019. On 20 November 2019 C submitted a sicknote for the period 15 November 2019 to 15 December 2019; the conditions that rendered him unfit to work were stress and anxiety.

27. 8 December 2019 – C's resignation (p384): C resigned by letter dated 8 December 2019. He gave as his reason fundamental breaches of contract and of trust and confidence. He referred to his resignation as being with immediate effect and also made reference to one week's notice. As previously stated, R accepted the resignation with immediate effect (acknowledgement of resignation letter dated 10 December 2019 at page 387) such that the effective date of termination was 8 December 2019. C accepted that situation; he did not challenge or grieve about R's understanding that the resignation was immediate. The Tribunal finds that this is what C wanted and intended in his letter.

D)

The Law: see Appendix 2 – this is a statement of the applicable law. Ms Williams kindly prepared it; R shared it with C at the hearing.

E)

Application of law to facts – this is how we reached our judgment, applying the law to the facts that we found. The judgment is set out formally above in section A):

28. The following paragraphs contain our rationale in answering the questions posed in the List of Issues to arrive at our judgment.

29. The Tribunal has made findings of fact in respect of:
    29.1. the "the alleged treatment",

29.2. alleged protected disclosures, and
29.3. allegations of wrongful dismissal, and
29.4. discrimination over and above "the alleged treatment" set out in the agreed list of issues.

30. The applicable law is set out in Ms Williams' legal submissions which both parties have had time to read and digest.

31. This exercise is to apply that law to the facts, and to address each issue and claim.

32. The successful claims:

32.1. Discrimination Arising from Disability (s.15 EqA):

32.1.1. The "something" that arose from C's disability by way of autism are the traits identified in the OH report at page 363 and following. The traits described are in general terms, covering the wide spectrum encompassed in ASC. To a greater or lesser extent all the traits of autism identified in the OH report are relevant to C. That said:

32.1.1.1. C is extremely capable and has developed successful masking techniques.

32.1.1.2. The traits arising in C's personal situation include problems with social interaction such as not understanding social rules "that others pick up without thinking", appearing insensitive and having difficulty recognising and expressing needs and feelings.

32.1.1.3. Social communication can be difficult on occasions with C finding it difficult to interpret and understand other people.

32.1.1.4. he struggles with change.

32.1.1.5. C's language and conduct are open to be misinterpreted as uncooperative or that he is unwilling.

32.1.1.6. A lack of preparation, explanation or training provided by another person may cause C to refuse to cooperate or at least appear to refuse to cooperate or to work.

32.1.1.7. He can be direct and literal.

32.1.1.8. C requires clear, consistent guidance with easy to interpret instructions.

32.1.1.9. He requires understanding management, in terms of management understanding autism and his personal requirements because of his individual behavioural traits and abilities.

32.1.1.10. C manages better with consistent communication preferably from the same manager.

32.1.1.11. He may panic or feel anxious such as when there are sudden changes or inconsistent communications, and this may affect his understanding and expression.

32.1.2. The incident with managers on 19.08.19: It was unfavourable for C to be confronted by managers and challenged over his understanding of the mobile phone policy and his adherence to it in the way he was confronted on 19 August 2019. It caused him to be anxious and upset. There were several managers, not all of whom were very familiar to

C, in the room. He was challenged. DS acted petulantly or in frustration in removing his tie to illustrate a point.

32.1.3. The reason that C was confronted as described was that in relation to the mobile phone policy he had consistently displayed traits of autism. He was treated unfavourably as described because of the something that arose from his disability.

32.1.4. Confrontation as it occurred was not a proportionate means of achieving a legitimate aim. Enforcement of a conduct policy such as the mobile phone policy for HR and commercial reasons would be a legitimate aim.

32.1.5. Given the history of C's interaction with management over the mobile phone policy and his autistic traits there were other proportionate means of achieving the aim including:

32.1.5.1. R should have ensured that there was clarity around the policy, and consistent application.

32.1.5.2. R should have ensured clear communication and if necessary, training for C.

32.1.5.3. R could have spoken to and perhaps more importantly listened to, C to better manage the implementation of the policy.

32.1.6. These steps would have been proportionate and would have provided justification for a manager speaking to C on 19 August 2019. The Tribunal notes that only a few weeks previously LC had spoken to C about the mobile phone policy in the context of a disciplinary hearing and decided to take no disciplinary action in relation to it, (the oral warning was for the DS incident).

32.1.7. There was no justification for R, with so many managers, confronting C in the manner it did.

32.1.8. <u>The Final Written Warning</u>: It was unfavourable treatment for the claimant to receive a final written warning and to be required to return to work subject to it before any attempted resolution of the problems identified in the OH report. It could be argued that this was more favourable than being dismissed. C required certainty. In this situation his future was in peril if he did not resign. The likely consequence of his returning to work before any attempted resolution of the ongoing concerns with management was that he would be summarily dismissed. Any return to work would more likely than not cause C further distress; it would likely give rise to potentially argumentative and challenging incidents involving C and managers. The final written warning put an onus on C while at the same time more likely than not tending towards the same outcome as if he had been dismissed. If he had been dismissed he would at least have had certainty and no burden at work. In general terms a final written warning of dismissal is unfavourable in any event. One would rather not be subjected to any disciplinary sanction let alone a final warning; it was open to ON to impose no sanction or a lesser sanction in the light of the OH report.

32.1.9. The final written warning was administered to C because of his conduct. His conduct was at all times affected by his autism. In the situations described C's conduct was indistinguishable from the autistic traits that arose from his disability. C was accused of using offensive language and making an improper suggestion about a colleague; the tribunal is unable to discount that his expression of his opinion was as a result of autistic traits.

32.1.10. Administering a final written warning was not a proportionate means of achieving a legitimate aim, where the aim was to ensure proper standards of conduct for HR and commercial reasons.

32.1.11. R says that the sanction was mitigated to a final written warning because of the OH report and C's submissions at the disciplinary hearing about his autism.

32.1.12. The Tribunal considers that the OH report highlighted that a proportionate means of addressing issues with the claimant included by mentoring, training, clear communication, and an understanding management, a management that understood the effects of autism on the claimant's conduct. OH recommended steps be taken before C's return to work.

32.1.13. Proceeding with a final warning and demanding that the claimant returned to work prior to resolution of the concerns raised and the matters highlighted in the OH report put the claimant under considerable pressure. If he returned to work in these circumstances he would have been in constant jeopardy. The likely outcome of all this would have been dismissal within a relatively short time of C's return to work. This was not a proportionate means of dealing with the matter. The Tribunal would have expected R to abide by the OH recommendations and effectively address the disciplinary matters afresh before any return to work.

32.2. <u>Failure to make reasonable adjustments (s20-21 EqA):</u>

32.2.1. R had the two PCPs alleged, requirements to exhibit a particular standard of behaviour to avoid disciplinary action, and also a disciplinary policy relating to conduct.

32.2.2. C was placed at a substantial disadvantage compared to someone without his disabilities because his conduct, displaying autistic traits, was being scrutinised and penalised through the application of the standard, and the policy to enforce that standard. C's autistic traits made it more likely that he would not exhibit the required standard of behaviour than a person who did not have his disability. The disciplinary policy and procedure put the claimant at a substantial disadvantage in terms of the time allowed by way of notice of hearings, explanation of disciplinary matters and in view of the lack of clarity, guidance and training. These matters were recommended by OH. Those things should have been in place before serious consideration of disciplinary sanction. C needed more clarity and more time than R's procedures allowed for.

32.2.3. R knew that C was autistic from the commencement of employment. It was on notice. It made no attempt to consider with C how best to ensure that he could abide by the required standard of conduct during his employment. As C stated quite tellingly, all that would have been required from the outset was for R to sit down and talk to him about his condition and to listen. It chose not to do so. In this sense it could be said that R's ignorance was culpable. By the date of the final written warning, R had the OH report. It was then on notice notwithstanding its culpable ignorance beforehand.

32.2.4. C has listed a number of adjustments all of which the Tribunal finds would have been reasonable save at paragraph 31.6 of the list of issues where it is suggested that R should not impose disciplinary sanctions for matters relating to his disability as a blanket prohibition. There may be circumstances in which it would have been appropriate, and the Tribunal considers that the oral warning in respect of the DS incident was appropriate. It could be said that the behaviour was in relation to the claimant's disability however C crossed a line knowingly. He received the minimum sanction. LC took into account his discussion with C about autism in general. R had failed until that point to take the opportunity to discuss autism specifically with C. The Tribunal considers that the first disciplinary hearing was probably the last golden opportunity to address matters in detail with C before it was too late. The reasonable adjustments that R could have taken to remove the substantial disadvantage included:

32.2.4.1. making allowances for the fact that his condition could manifest the behaviours that he did manifest.

32.2.4.2. maintaining consistency with rules and procedures
32.2.4.3. assigning a mentor
32.2.4.4. giving clear constructive guidance and explanations
32.2.4.5. affording him longer notice of meetings even than the extended notices that were given.

32.2.5. Those adjustments, in line with the OH report and ON's plans set out in the final written warning, would have been relatively low cost to R and likely to be very effective for C. It is likely he could have remained in employment if such actions had been taken prior to insistence on his return to work, or if they had been taken from the outset of his employment. Had those adjustments been made upon induction in January 2019, or upon the change of role to Technician in July 2019, or following the first disciplinary hearing in August 2019, there may have been no need for further confrontation and disciplinary proceedings that led to a final written warning.

32.2.6. R failed to engage with matters arising from C's disability. When it partially engaged by obtaining an OH report, it proceeded with the two PCPs that put C at the substantial disadvantage described before implementing the OH recommendations.

32.3. Harassment in relation to disability (s.27 EqA)

The confrontation with managers on 19 August 2019

32.3.1. The meeting or confrontation by managers on 19th August 2019 was unwanted conduct as far as C was concerned. There had been several previous conversations, some challenging, about the mobile phone policy already. C went through a disciplinary hearing concerning the policy and the DS incident. LC had decided not to impose any sanction in relation to the policy matters. There is no evidence before the Tribunal that R had any grounds to suspect, let alone evidence of C breaching the policy after 5 August 2019.

32.3.2. The Tribunal considers that C's description of that confrontation as a "targeted attack" may well be appropriate. The Tribunal considers it possible that C was being set up to fail but does did not make that finding of fact in the absence of evidence other than circumstantial; we decided not to draw an inference because only one of many involved in that confrontation was a witness and he came across reasonably. C maintained throughout the hearing that the main protagonist and perpetrator of misdeeds as he saw them was SG; we did not hear from SG. We cannot say therefore that the purpose of the confrontation was to have the harassing effect. We find that the confrontation did have the harassing effect.

32.3.3. The unwanted conduct related to C's disability in that he was being challenged about his behaviour in and around all matters pertaining to the mobile phone policy. In respect of the whole mobile phone policy episode C was displaying autistic traits. He read up on the policy. He asked for clarification. He checked whether the policy applied to everybody in all circumstances. He raised the inconsistent application of the policy and abuses of it where he recognised them. This all led him to question the logicality and efficacy of the policy. Concluding that the policy was illogical and inefficient and inconsistently applied he made it known that he had no regard for it. There is no evidence that he ever breached it, but he disparaged it to managers. His persistence and challenging behaviour with regard to the policy appears to have aggravated at least SG but also other managers such as DS. They were reacting to C's autistic traits. R's harassment of C was related to his disability.

32.3.4. The Tribunal took into account all the circumstances including C's perception in arriving at this judgment. Given C's disability and R's management's persistent pursuance of C in relation to the policy, the Tribunal considers that it was reasonable for the conduct to have the effect claimed by C.

The final written warning:

32.3.5. The final warning was unwanted by C.

32.3.6. ON was trying to uphold some disciplinary standards as discussed elsewhere. The Tribunal did not consider that his purpose was to create the harassing effect and as stated above there is insufficient evidence for us to find that others were behind deliberately creating the harassing effect. In the light of the evidence before us we do not draw that inference. We have a suspicion, but in general ON came across personally as a reasonable and conscientious manager. We do not believe that his purpose was to create the harassing effect.

32.3.7. The Tribunal is concerned as to whether there may have been other actors in play, but we did not hear evidence of this.

32.3.8. We find that the final written warning had the harassing effect. For all the reasons stated above we consider that it was reasonable for the conduct, the final written warning, to have that effect. R required C to return to work before any steps had been taken towards resolution of the issues highlighted in the OH report. The OH report itself was generic and not specific to C. It was incumbent on R to speak to C at the earliest opportunity and to address his personal needs and issues in the context of R's reasonable expectations and requirements. For C to return to work with the final written warning hanging over him in these circumstances certainly had a harassing effect on C; it was reasonable for it to have that effect. Such was the effect that C resigned.

32.4. Public Interest Disclosure:

32.4.1. C made protected disclosures to R.

32.4.2. C familiarised himself with aspects of the handbook and was aware that R issued clothing such as uniforms and PPE. He knew that toe-capped boots or shoes were required to be worn by technicians. He knew that baggy or inappropriate clothing could cause or contribute to accident or injury whilst performing the role of a technician servicing mechanical equipment.

32.4.3. C researched the Health and Safety at Work Acts and statutory regulations regarding PPE.

32.4.4. From all of this he reasonably believed that he ought to have been issued with a suitable top (a close-fitting T-shirt or polo shirt), serviceable hard wearing trousers and toe-capped boots. He believed that a failure to so provide would mean that R committed a criminal offence and a breach of statutory and regulatory provision in respect of PPE which can be prosecuted by the health and safety executive.

32.4.5. C believed that R was failing in its legal obligation to ensure the safety of its employees and safe working practices. These circumstances led him to believe that his and others' health or safety had been and was being endangered.

32.4.6. C was not issued with any such kit despite providing sizes and repeatedly asking several managers to provide what was required. In these circumstances C believed that R was failing in its duty to its employees including himself to ensure that they were properly dressed and equipped. C therefore reasonably believed in the commission of a criminal offence, failure to comply with legal obligation and endangerment to health or safety.

32.4.7. He thought he was an example of R's poor practice with regard to PPE. C considered himself something of a spokesperson for staff who he considered to be young, inexperienced and therefore vulnerable. C reasonably believed that making the disclosure was in the public interest in that it was for the benefit not only of himself but of his colleagues too.

32.4.8. From the date of his appointment as a Technician in July 2019, when PPE ought to have been issued to him, to his final disciplinary hearing in September 2019 (when C set out his disclosures in writing) C made numerous repeated and repetitive disclosures to several managers including SG and LC of information tending to show offence, breach of legal obligation, and endangerment.

32.4.9. C was persistent in raising these matters over that period of time on dates too numerous to identify and list. The respondent seems to accept that C raised the matter repeatedly and it is referred to by various of his colleagues, and witnesses to the Tribunal. R's argument is that the clothing was uniform save for the boots and that LC had assessed C's boots as being adequate. The Tribunal is not satisfied that there was an appropriate formal assessment of the safe standard of C's boots. If there had been such the Tribunal would have found any such assessment suspect as it accepts C's evidence that at least one of his boots, if not both, was held together by duct tape at the relevant time.

33. <u>The unsuccessful claims</u>:

33.1. <u>Automatic Unfair Dismissal – "whistleblowing" (s103A ERA):</u>

33.1.1. C was not employed by R for two years continuously to the date of termination of employment. He is not entitled to make a claim of "ordinary" unfair dismissal. His claim is dependent on:

33.1.1.1. the claimant proving a repudiatory and fundamental breach of contract;
33.1.1.2. that he resigned in response to that breach or those breaches;
33.1.1.3. that he did not affirm the contract after the last of those breaches;
33.1.1.4. that in being so constructively dismissed the reason, or if more than one, the principal reason for the dismissal was that he made a protected disclosure. There must therefore be a causative link between the disclosure, or disclosures, and the conduct of the respondent in fundamental and repudiatory breach of contract.

33.1.2. The Tribunal has found that the claimant made public interest disclosures.

33.1.3. C resigned because of the way that he was treated, culminating in a final written warning of dismissal and a demand that he return to work before resolution of the interpersonal relations between C and management had been resolved or before any attempt at resolution.

33.1.4. C relies on the "alleged treatment" listed in the List of Issues at paragraphs 1.1 – 1.15 as the alleged fundamental breaches of contract. He says that these breaches of contract occurred, and destroyed or seriously damaged the relationship of trust and confidence.

33.1.5. The Tribunal's finding is that the "alleged treatment" was not by reason of the claimant having made protected disclosure or disclosures. In respect of each of the matters listed as "alleged treatment" the Tribunal has made findings of fact in relation to causation that do not relate to any public interest disclosure.

33.1.6. C has not established that the reason, and if more than one reason, the principal reason for his constructive dismissal was that he had made a protected disclosure.

33.1.7. In the list of "alleged treatment" at paragraph 1.15 C says that there was a continuing failure on the part of R to address his "concerns".

33.1.8. The Tribunal accepts that C was dissatisfied about the PPE issue, but it appears to the Tribunal that this was more because he was not being taken seriously than that he felt he could not perform his duty safely. From July to September 2019 C continued to work regardless of the PPE issue.

33.1.9. C did not raise a formal grievance about the failure to issue him with PPE from his appointment as Technician to the date of the second disciplinary proceedings.

33.1.10. Albeit unsatisfactory, C was wearing toe capped boots and there is no evidence that either the top or trousers that he wore put him at risk, or that he ever suffered any injuries. The Tribunal understands that the unaddressed concerns leading to resignation related more generally to the lack of understanding shown by management. It also related specifically to the pressure being put upon him to return to work subject to a final written disciplinary warning before resolution of interpersonal issues.

33.1.11. The Tribunal does not consider that paragraph 1.15 of the List of Issues relates to a failure to address the issue of PPE. In all the circumstances the Tribunal finds in any event that this was not a fundamental breach of contract, at least absent a formal grievance at an earlier stage.

33.1.12. There is no evidence to suggest that R did not issue PPE because the claimant complained about what he considered to be the lack of PPE. R did not deal with the matter because it did not take it seriously and in its own way considered that C was suitably dressed.

33.1.13. For reasons stated below and consistent with the findings of fact above, the Tribunal finds that C was not subjected to detriment for having raised public interest disclosures. If anything, R ignored or dismissed his requests and concerns which in itself could be detrimental, but the claimant has not pleaded that as a detriment.

33.1.14. The Tribunal finds that R did not take the matter seriously. It considers that the issue of clothing was one of a requirement to wear uniform rather than PPE; the mere fact that C had boots with toecaps effectively ticked a box, without proper consideration of whether the boots met a safe standard.

33.1.15. For all these reasons, the Tribunal finds that the PPE issue was not the reason that C resigned.

33.2. <u>"whistle-blowing detriment s(s.47B ERA):</u>

33.2.1. In the list of issues it was identified that the alleged detriments done on the ground that C had made a protected disclosure was the "alleged treatment". The alleged treatment is set out at paragraph 1.1 - 1.15 of the list of issues.

33.2.2. The Tribunal has made findings of fact as to each of those matters. In each case the reason is given for the treatment which is other than that it was done on the ground of the claimant having been a whistle-blower as alleged. C has not proved to the satisfaction of the Tribunal that he was subjected to detriment on the ground of having raised protected disclosures. Insofar as he has proved facts from which such inferences could be drawn, R has satisfied the Tribunal that there was another explanation for the treatment.

34.3 <u>Wrongful Dismissal</u>: C knew that he ought to have given one week's notice of termination. He knew also that he could resign with immediate effect and not give that notice. The letter of resignation may seem ambiguous, but the Tribunal finds that it was C's intention to resign from his employment on the date he sent the letter. This was clearly R's understanding. C did nothing to

disabuse R. R explained when it accepted the resignation why it considered that it was to have immediate effect. C did not complain or lodge a grievance and has accepted throughout these proceedings the effective date of termination was 8th December 2019. C effectively deprived R of the opportunity of honouring the notice period. There is no evidence to suggest that R would otherwise have failed to do so. C waived notice.

34.4 Direct disability discrimination (s.13 EqA):

34.4.1 C stated repeatedly during the hearing that he was not alleging that he had been subjected to less favourable, treatment or detriment because he was a disabled person, compared to how R treated, or would treat, comparators. C says that he was treated badly because of the traits of autism.

34.4.2 The Tribunal's findings of fact bear out C's concession, stated at the outset and at various points during the final hearing. R has put forward its explanation for the way that it managed C.

34.4.3 C has proved facts that could have led to a finding of direct discrimination because the Tribunal has found that his autistic traits were relevant to some of the treatment. R has however established to the Tribunal's satisfaction that the treatment found to have occurred was not because the claimant is a disabled person.

34.4.4 All the allegations in respect of the claimant's direct disability discrimination are better put in terms of discrimination arising from disability.

34.5 Indirect disability discrimination (s.19 EqA):

34.5.1 The Tribunal considers again that the allegation of indirect disability discrimination is better phrased as a claim of discrimination arising from disability. This is not surprising because C encountered the very difficult that s.15 EqA was designed to avoid.

34.5.2 It is established that R had the PCP of requiring its employees to exhibit a particular standard of behaviour and conduct to avoid disciplinary action.

34.5.3 That PCP was applied to C as well as to employees who did not live with C's disabilities.

34.5.4 C has failed to provide evidence to the effect that people with his disabilities are at a particular disadvantage when compared with people who did not share his protected characteristic. The Tribunal accepts that autistic people may display traits of behaviour that at face value appear to fall below what an employer may consider to be acceptable standard of behaviour from its employees. C has not shown that there was in fact group disadvantage. Ms Williams makes the point in her submissions that reliance can still be put on statistics or expert evidence or direct witness evidence, or that judicial notice may be taken.

34.5.5 As regards judicial notice the Tribunal considers that the PCP is somewhat vague. To find in favour of C might suggest that autistic people were not able to control their behaviour ever at all, to moderate it, or to comply with basic standards of conduct. That is not always the case. Part of the difficulty in this analysis is that no two autistic people are the same. This was stated repeatedly by C and is borne out by the OH report.

34.5.6 The Tribunal requires judges, non-legal members, representatives, parties and witnesses as well as members of the public to exhibit a particular standard of behaviour and conduct; C behaved impeccably within that standard; he was not disadvantaged compared to any other participant at the hearing in relation to the applicable standard. The Tribunal has already commented on the difference between the workplace environment and the formal Tribunal proceedings in a hearing room, however this point merely illustrates the difficulty for C establishing group disadvantage from the PCP as it is phrased. He has not done so.

34.5.7 In any event having the PCP as it is worded would appear to be a proportionate means of achieving the respondent's legitimate aim of maintaining a reasonable standard of conduct amongst its workforce for the good of its employees and sound commercial reasons.

34.6 Harassment (s.26 EqA):

34.6.1 C has succeeded with two claims of harassment in relation to disability. He made other claims that do not succeed. Specifically:

34.6.1.1 25th of July - the DS incident: C overstepped the mark. By his own evidence he had been in control of the situation and had come away from it. Having queried DS taking over the customer complaint C was then not directly involved. DS was entitled to assert his authority and instruct that C did not undermine him. It is clear from C's evidence that he wilfully then questioned DS management of the situation. The Tribunal considers C thought that he knew better, taking into account his own evidence. C had accused DS of handling a complaint improperly and he had undermined him. DS was accurate so describing that conduct. DS accusation was related to his being actually challenged rather than autistic traits displayed by C, and it is more likely than not he would have treated any insubordinate employee in a similar manner. DS did not give evidence to the Tribunal. The Tribunal has no direct evidence and does not infer that DS' purpose was to create an intimidating et cetera environment. In all the circumstances and taking into account C's perception the Tribunal does not consider that it was reasonable for the conduct to have the harassing effect.

34.6.2 26 July 2019 - a mobile phone incident: on this date there was still some uncertainty as to whether C understood and was complying with the policy. The policy was being enforced across the workforce. The Tribunal is aware that LC had emphasised the need to abide by the policy to all staff. From the evidence before us it appears that only C queried any lack of clarity and consistency. At this stage the Tribunal does not consider that R's actions were in relation to disability but rather setting the ground for clarification of the applicable policy and checking C's understanding. In all the circumstances, including C's perception, the Tribunal does not consider that it was reasonable for the conduct to have the harassing effect in any event. Events after the 5 August 2019 disciplinary hearings are of a different nature however for reasons already explained.

34.6.3 An allegation of persistent threats of disciplinary action for breaches of procedure by SG: there is a lack of evidence to support this allegation. We did not hear from SG. There is no documentary evidence to support this allegation. C said he was threatened with disciplinary action but was non-specific and too vague for us to make a positive finding of harassment as alleged.

34.6.4 ON persistently threatening disciplinary action for breaches of procedure and for being unable to return to work: the Tribunal does not see evidence of persistent threat from ON. We have criticised the final written warning and requirement to return to work before remedial steps were taken. ON indicated to C that he was required to return to work. That was further emphasised by JO. The allegation of persistent threat however takes matters too far. The allegation is not proven.

34.6.5 SG LC and ON disciplining him in relation to disability traits: SG did not discipline C under R's disciplinary policy. LC disciplined C only in respect of the DS incident and the Tribunal considers that that was appropriate; it related to behaviour that was not necessarily related to disability and an oral warning was the minimum sanction for what was clearly behaviour undermining a senior manager and doing so purposefully not inadvertently because of autistic traits. The Tribunal has already made a finding of harassment in relation to ON disciplining C with a final written warning.

Employment Judge T.V. Ryan

Date: 24 April 2023

JUDGMENT SENT TO THE PARTIES ON 25 April 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

Appendix 1
Agreed List of Issues (19.12.22)

"**The alleged treatment**" of the claimant by the respondent: The claimant alleges that the respondent did each of the things listed at paragraph 1 .

The claimant says that the alleged treatment taken individually and cumulatively amounted to:

A. repudiatory breach(es) of the implied term of trust and confidence (conduct intended or likely to destroy or seriously damage the relationship of trust and confidence).

B. detriments done on the ground that he made protected disclosures.

C. Unfavourable treatment in respect of discrimination arising from disability.

1. The Tribunal will have to make findings of fact in relation to the alleged treatment. Did it happen and, if so, why?

1.1) In May/June 2019, Ms Gardner failed to appoint the Claimant to the role of Trainee Manager and left the position open and attempted to persuade Ms Davies, General Assistant, and Ms Baker, General Assistant, who had both declined. Ms Baker was persuaded to apply.

1.2) In May/June 2019, Ms Gardner failed to arrange the Claimant's trial shift timeously and took longer to finalise it than that of Ms Baker, the other Trainee Manager candidate. It was finally arranged for 8 June 2019; however Mr Costello cancelled and rescheduled it for the 12 Jun 2019 the day before (7 June 2019 3pm). The Claimant was discouraged from speaking to Ms Gardner about or during the trial, who remained in the office, despite having assisted Ms Baker before and during her trial.

1.3) In June 2019, appointing Ms Baker to the position of Trainee Manager despite her having less experience and not performing as well on the work trial. Again, the Claimant was rejected for the position without substantive explanation.

1.4) In July 2019, Ms Gardner told the Claimant he had commenced a new period of probation and thereby causing anxiety about his job security and potentially
jeoparded his mortgage application, when his probation had in fact been completed.

1.5) On 25 July 2019, Mr Scrivens aggressively accused the Claimant of handling a customer complaint improperly and 'undermining him'.

1.6) On 26 July 2019, Ms Gardner called the Claimant into the manager's office to demand the Claimant's mobile phone, which he did not have. Ms Gardner then followed the Claimant to the Technician's office to hand him a printout of the Mobile Phone policy and threatened him with disciplinary action despite him emptying his pockets to show he did not have his phone on his person.

1.7) On 5 August 2019, seeking to discipline the Claimant, outside its own internal policy and procedures, and issuing him with a verbal warning in relation to
alleged misconduct he has not committed, namely: undermining Dan Scrivens and breaching the mobile phone policy. Once the disciplinary concluded, Mr Costello told the Claimant about autism as he has an autistic relative.

1.8) On or around 19 August 2019, inviting the Claimant to a meeting with managers, without warning, and confronting him in relation to alleged misconduct relating to phone use, which he had not done.

1.9) On 19 September 2019, suspending the Claimant and inviting him to a disciplinary meeting at short notice (23 hours).

1.10) On the 20 and 21 September 2019, insisting that 48 hours was sufficient notice of a disciplinary meeting without any consideration of his autism and insisting that Mr Newton would chair the meeting despite his involvement in the matters under investigation.

1.11) Failing to make any decision further to the disciplinary meeting of 23 September and continuing to suspend the Claimant.

1.12) On 29 October, inviting the Claimant at short notice to a reconvened disciplinary hearing on 1 November 2019.

1.13) On 1 November 2019, issuing the Claimant with a final written warning and requiring his return to work on Monday 4 November 2019, despite OH advice about how the Claimant's autism manifests itself including by exhibiting behaviours or traits commonly misinterpreted as negative, challenging or anti- social. The Respondent also demanded the Claimant's return or face further disciplinary action despite it not having addressed the Claimant's concerns or having issued PPE.

1.14) on 6 November 2018 sending an email to the claimant which mischaracterised and misrepresented the claimant and which demonstrates a lack of understanding of typical autistics traits which have been misinterpreted and used to penalise and punish him and threatened him with further disciplinary action if he did not return to work, which he was unable to do because of the way he had been treated including issuing him with a final disciplinary warning, and having still not been issued with the legally required PPE. The failure of the latter, as well as being a risk to health and safety, caused particular distress due to his autism,
.

1.15) Continuing to fail to address the Claimant's concerns up to his resignation on

8 December 2019.

Time Issues:

a. 'Have any of the claims brought by the Claimant, whether set out in the ET1 or the Further and Better Particulars of Claim, been brought out of time, with reference to the limitation dates as prescribed by s.123(1) Equality Act 2010, s.48(3) Employment Rights Act 1996, or otherwise?'

b. 'If so, does the Tribunal have jurisdiction to hear such claims?'

Automatically unfair constructive dismissal (s. 103A of the ERA 1996)

2. Did the alleged treatment amount to a repudiatory breach of the implied term? Did the respondent have a reasonable and proper cause for doing so?

3. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

4. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

5. If the claimant was dismissed what was the reason and was it a potentially fair one?

6. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

7. Was the reason or principal reason for dismissal that the Claimant made a protected disclosure? If so, the claimant was unfairly dismissed.

Wrongful Dismissal:

8. What was the Claimant's notice period?

9. Was the Claimant paid for that notice period?

10. did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

a. 'Did the Claimant resign from his employment with immediate effect?'

b. 'If so, was the Claimant entitled to be paid for his notice period?'

'If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Protected Disclosure – "whistleblowing"

11. Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide whether the claimant disclosed information tending to show criminality, breach of legal obligation, or endangerment to health and safety, which he reasonably believed he was disclosing in the public interest and when he had a reasonable belief it was true. 'If any of the Claimant's alleged disclosures at paragraphs 11.1 to 11.4 were qualifying disclosures, were such disclosures also protected disclosures in accordance with sections 43C to 43H of the Employment Rights Act 1996'? The claimant says that he made the following disclosures:

11.1 since starting the technician's role on 26 January 2019 claimant reminded Ms Gardner verbally that he had not been issued with his legally required PPE including work boots, trousers, and that the issued large polo shirt was far too big for him and therefore a further danger to his health and safety, as explicitly noted in their risk assessments; Ms Gardner was also privy to the technician's WhatsApp groups and therefore the messages mentioned below.

11.2 on the infrequent occasions from 26 January 2019 that they were both on the same site together the claimant reminded Mr Costello verbally and on each occasion they were together that he had not been issued with his legally required PPE which was a danger to his health and safety. The claimant specifically stated that his polo shirt was too large which was a further danger. He was messaged by WhatsApp by Mr Costello on 20 March 2019 for his polo shirt size, since this had yet to be provided. On another occasion the claimant also complained of the risks to his health and safety in respect of the non-provision of PPE and incorrectly sized uniform as mentioned in his risk assessments, and he again provided his sizes to Mr Costello, who then noted on a small piece of scrap paper before leaving. Mr Costello later messaged(12 September 2019) at 14:15 claiming that the claimant had failed to provide him with his sizes despite the claimant having provided these are a number of occasions.

11.3 on the infrequent occasions when they were both on site together from 26 January 2019 the claimant reminded Mr Bromley verbally, on each occasion that he saw him that he had not been issued with his legally required PPE including work boots and trousers which was a risk to his health and safety. This was despite the claimant having promptly provided all of his sizes in response to Mr Bromley's WhatsApp message requesting such on 15 February 2019 12:34.

11.4 On the infrequent occasions when they are both on site together from March 2019 the claimant reminded Mr Newton verbally on all occasions that they were together that he had not been issued with his legally required PPE including work boots and trousers, and that the issued large polo shirt was far too big for him and therefore a further danger to his health and safety as explicitly noted in their risk assessments. The respondent has also conceded that he made qualifying disclosures in his disciplinary response document presented on 23 September 2019 which formalised earlier complaints and stated that "I see neglect and risk in the workplace I report it time and again by your own admissions, and the only action taken is against me for reporting it".

"Whistle blowing" Detriment

12. Did the respondent do the alleged treatment of the claimant on the ground that he had made protected disclosures?

Disability

13. Is the claimant a disabled person within the definition of section 6 equality act 2010 by virtue of generalised anxiety disorder, chronic atopic dermatitis, and asthma? It is conceded that the claimant is a disabled person by virtue of ASC.
Did the Respondent know, or could the Respondent reasonably have been expected to know, that the Claimant was a disabled person within the definition of section 6 Equality Act 2010 by virtue of generalised anxiety disorder, chronic atopic dermatitis, and asthma?

Direct Discrimination:

14. Did the respondent do the following the alleged treatment (some of which is listed at para 1 above):

14.1 in May 2019 Ms Gardner failed to appoint the claimant to the role of trainee manager unless the position open and attempted to persuade Miss Davies, general assistant, and Ms Baker general assistant, who had both declined. Miss Baker was persuaded to apply. It is averred that Ms Gardner search for an alternative candidate because of her perception and stereotypical assumptions of the claimant's ability, his behaviour, and his suitability because of his autism. Accordingly, Ms Gardner treated the claimant less favourably than non-disabled Ms Davies, Ms Baker by actively encouraging them to apply whilst ignoring and delaying the claimant's application.

14.2 in May 2019 Ms Gardner failed to arrange the claimant's trial shift timeously and took longer to finalise it out of his non-disabled, Ms Baker, the other trainee manager candidate. It was finally arranged for 8 June 2019, however Mr Costello cancelled and rescheduled it for 12 June 2019 on the day before, that is he cancelled and rearranged it on 7 June 2019. The claimant was discouraged from speaking to Ms Gardner, who remained in the office, yet have assisted Miss Baker before and during her trial.

14.3 25 June 2019 Ms Gardner appointed Miss Baker to the position of trainee manager despite having less experience and not performing as well on the work trial. The claimant was rejected for the position without substantive explanation due to Ms Gardner's perception and stereotypical assumptions of his abilities, his behaviour, and his suitability because of his is autism.

14.4 on 25 July 2019, Mr Scrivens aggressively accused the claimant of handling a customer complaint improperly and undermining him.

14.5 on 26 July 2019 Ms Gardner demanded the claimant's mobile phone under threat of disciplinary action when he did not have it on his person and it is averred that this belief stemmed from her perception and stereotypical assumptions of his behaviour because of his autism and that non-disabled colleagues were not accused in this way without foundation. Accordingly the respondent treated him less favourably because of his disability and failed to respond appropriately line with policy or compassionately to the claimant's good faith, genuine and polite and appropriate direct perceived challenges.

14.6 on 5 August 2019 Ms Gardner Mr Scrivens and Mr Costello sought to discipline the claimant, outside its own internal policy and procedures, and issued him with a verbal warning in relation to alleged misconduct he had not committed mainly undermining Mr Scrivens and breaching the mobile phone policy. It is averred that non-disabled employees would not have been accused of this misconduct or issued with any warning. Accordingly the respondent treated him less favourably because of his disability and failed to respond appropriately line of policy or compassionately in relation to the claimant's perceived challenges.

14.7 19 September 2019 suspending the claimant and inviting him to a disciplinary meeting at short notice, 23 hours, with Mr Newton, in relation to alleged refusal to take part in training following reasonable instructions, which are autism traits and it is averred that he was disciplined because of his condition. The claimant denies making derogatory statements about senior managers or saying that he would get someone fired but rather says that his comment was that its policies were applied to everyone some managers "should" be fired.

14.8 on 1 November 2019 Mr Newton issued the claimant the final written warning in relation to his alleged conduct whilst noting the implications of his autism on his communication with others and thereby knowingly issuing the warning because of his condition.

14.9 on 6 November 2018 sending an email to the claimant which mischaracterised and misrepresented him and which amounted to an ill formed the opinion which demonstrated a lack of understanding of typical autistic traits which had been misinterpreted and used to penalise and punish him; threatening the claimant with disciplinary action if he did not return to work which he was unable to do because of the way he had been treated including the issuing of a final disciplinary warning and having still not been issued with the legally required PPE.

14.10

15. if so, was this less favourable treatment compared to the treatment Ms Davies, and Miss Baker or a hypothetical comparator?

16. If so, was it because of disability?

Discrimination arising from Disability

17. Did the respondent do the alleged treatment of the claimant? Did such treatment constitute unfavourable treatment of the Claimant?

18. Do the claimant's behaviours or traits l, as described in the OH Assist report received by the claimant on 23 October 2019 arise in consequence of his disability?

19. Was the unfavourable treatment because any of those things?

20 Was the treatment a proportionate means of achieving a legitimate aim? **The respondent is required to state its purported legitimate aim**.

Indirect Discrimination

21 A "PCP" is a provision, criterion or practice. Did the respondent have a PCP requiring its employees to exhibit a particular standard of behaviour and conduct to avoid disciplinary action?

22 did the respondent apply the PCP to the claimant?

23 did the respondent apply the PCP to its employees who did not live with the claimant's disabilities or would it have done so?

24 Did the PCP put people with the claimant's disabilities at a particular disadvantage when compared with people who did not share that protected characteristic?

25. Did the PCP put the claimant out that disadvantage?

26. Was the PCP a proportionate means of achieving the respondent's stated legitimate aim?.

Reasonable Adjustments

27. Did the respondent know or could it reasonably have been expected to know that the claimant had the disabilities in question and if so from what date?

28. Did the respondent have the following PCPs:

28.1 the requirement that the claimant exhibit a particular standard of behaviour and conduct to avoid disciplinary action

28.2 a disciplinary policy relating to conduct?

29. Did the PCPs put the claimant at a substantial disadvantage compared to someone without is disabilities in that:

29.1 the claimant was subjected to a disciplinary process
29.2 disciplinary process was unfairly applied
29.3 the claimant was notified of meetings in line with the policy which did not give him adequate time to prepare and which increases anxiety;
29.4 the claimant was given a disciplinary sanction was dismissed.

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

31. Was it reasonable for the Respondent to take any of the following steps? :

31.1 making allowances for the fact that the claimant's condition can cause him to manifest behaviours or traits commonly misinterpreted as negative, challenging or antisocial.

31.2 maintaining consistency with rules and procedures

31.3 assigning a mentor

31.4 giving the claimant clear constructive guidance and explanations of what is expected and why it says he is falling short

31.5 affording him proper notice of meeting some proper time to prepare

31.6 not imposing disciplinary sanctions for matters relating to his disability

32. Did the Respondent fail to take those steps?

Harassment

33. Did the respondent do the following things (some of which is alleged at para 1):

33.1 on 25 July 2019 Mr Scrivens aggressively accusing the claimant of handling a customer complaint improperly and undermining him.

33.2 of 26 July 2019 Ms Gardner, Mr Scrivens, Mr Newton pursuing the claimant regarding its mobile phone policy without justification and despite the claimant proving the contrary.

33.3 on 19 August 2019 Mr Scrivens berating and mocking the claimant for allegedly not understanding the policies.

33.4 Ms Gardner persistently threatening disciplinary action for alleged breaches of procedure

33.5 Mr Newton persistently threatening disciplinary action for alleged breaches of procedure and for being unable to return to work

33.6 Ms Gardner, Mr Costello, and Mr Newton disciplining him in relation to disability traits.

34. If so, was it unwanted conduct?

35. Did it relate to disability?

36. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The tribunal will take into account the claimant's perception the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Unauthorised deductions

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

38. REMEDY:

If the Claimant succeeds with any of his claims, what compensation should he receive? The Tribunal will need to consider:

a. the extent to which the Claimant has mitigated his losses;

b. whether the Claimant's resignation from his employment on 8 December 2019 constituted a break in the chain of causation;

c. any required Polkey reductions;

d. any failure to comply with the ACAS Code;

the appropriate level for an injury to feelings award, if applicable.

39. Costs: Should a costs award be made in favour of the Respondent in accordance with rule 76(1) of the Employment Tribunal Rules of Procedure 2013, on the basis that the Claimant has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of proceedings against the Respondent and the way in which those proceedings have been conducted, and/or that his claim had no reasonable prospect of success, resulting in the Respondent incurring extensive and unnecessary costs?

Appendix 2

The Law

In the Wales Employment Tribunal **Case Number: 1602196/2019**

Between:

Mr B Lokkason

Claimant

and

Superbowl UK Newport Limited

Respondent

SUBMISSIONS ON BEHALF OF THE RESPONDENT

1. These submissions are made on behalf of the Respondent in response to the claims brought by the Claimant. He makes the following claims:
   - whistleblowing detriment pursuant to section 43B and 47 of the ERA 1996;
   - automatic unfair constructive dismissal pursuant to section 103A of the ERA 1996;
   - wrongful dismissal;
   - direct disability discrimination pursuant to section 13 of the EQA 2010;
   - discrimination arising from disability pursuant to section 15 of the EQA 2010;
   - indirect discrimination pursuant to section 19 of the EQA 2010;
   - failure to make reasonable adjustments pursuant to section 20 & 21 of the EQA 2010;
   - harassment related to disability pursuant to section 26.

2. The Tribunal has heard evidence from the Claimant, Mr Luke Costello and Mr Owen Newton.

THE LAW

Whistleblowing detriment and automatic unfair dismissal

3. Section 43B ERA stipulates as follows:
43B Disclosures qualifying for protection.

(1)In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

……..

d)that the health or safety of any individual has been, is being or is likely to be endangered

4. Section 47B ERA stipulates as follows:

47BProtected disclosures.

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

5. Section 103A ERA stipulates as follows:

103AProtected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

6. Under section 47B, the Claimant must prove that there was a protected disclosure made and that he was subject to detriment. If he is able to prove these elements, the burden of proof will shift to the Respondent to show that the Claimant was not subject to the detriment on the grounds that he made the protected disclosure concerned. Sometimes, it is appropriate for the tribunal to draw inferences from the evidence as to the real reason for the employers' actions. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default — ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14.***

7. Under section 103A, a dismissal, including a dismissal under section 95(1)(c), will only be automatically unfair if the sole or principal reason for dismissal was that the Claimant made a protected disclosure. However, where an employee claims that he

was constructively dismissed contrary to section 103A, it is not strictly possible for a tribunal to examine the employer's reason for dismissal, because the decision that triggers the dismissal is the employee's resignation. Instead, the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair.

8. In terms of fundamental breach, in order to establish a breach of trust and confidence the burden is on the Claimant to satisfy the tribunal that the alleged conduct is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee – see ***Malik v Bank of Credit and Commerce International SA*** [1998] AC 20**.**

9. In **Kaur v Leeds Teaching Teaching Hospitals NHS Trust (2018) EWCA Civ 978,** Lord Justice Underhill summarised the approach to be taken by Tribunals in constructive dismissal claims. He stated as follows:

I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ;

(2) Has he or she affirmed the contract since that act ?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

Direct Discrimination

10. Section 13 of the Equality Act 2010 contains the prohibition of direct discrimination as follows:

"*13 Direct discrimination*

(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".

11. There are in fact two elements which need to be considered in a case of direct discrimination:
    a. the less favourable treatment, and
    b. the reason for that treatment.

12. Direct discrimination claims require a comparison as between the treatment of different individuals i.e., individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (see Equality Act 2010 s 23). The Tribunal therefore must compare 'like with like'.

13. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285** it was held that:

> "the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class."

14. It is submitted therefore by way of example, the mere fact that a woman is not successful in applying for a vacancy, but a man is, would not be enough to raise an inference of discrimination that had to be rebutted by the employer, unless it could be shown that she was as well qualified. If not, her circumstances would not be similar (see **Adebayo v Dresdner Kleinwort Wasserstein Ltd [2005] IRLR 514)**.

15. In cases where an actual comparator is identified by the Claimant (as is the case here) the tribunal needs to carefully consider the circumstances of that alleged comparator. However, whether or not an actual comparator is identified the tribunal needs to look at how, hypothetically, a person without the particular protected characteristic whose circumstances are otherwise the same would have been treated. It is submitted that it is for the claimant to show that the hypothetical comparator would have been treated more favourably. As a part of that process, it is quite appropriate for the claimant to invite the tribunal to draw inferences from all the relevant circumstances of the case.

16. In respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. In **Madarassy v Nomura International plc [2007] IRLR 246** 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it which means a prima facie case. Furthermore, it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons. In other words, only at the second stage does the Respondent bear any burden (see **Efobi v Royal Mail Group Ltd (2021) ICR 1263** which confirmed that the reverse burden of proof remains good law under the EQA 2010).

Section 15 : discrimination arising from disability

17. Section 15 of the Equality Act 2010 stipulates as follows:
15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

18. In **Secretary of State for Justice v Dunn (2017) 1 WLUK 573**, the EAT identified the four elements that must be made out in order for the Claimant to succeed in a section 15 claim. They are as follows:

- There must be unfavourable treatment
- The must be something that arises in consequence of the Claimant's disability
- The unfavourable treatment must be because of (caused by) the something that arises in consequence of the disability and
- The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

19. In **Pnaiser v NHS England 2016 IRLR 170**, Mrs Justice Simler considered the authorities and summarised the proper approach to establishing causation under section 15. Firstly, the tribunal must identify whether the Claimant was treated unfavourably and by whom. It must then determine what caused that treatment (the reason), focusing on the mind of the alleged discriminator. Having established that, the tribunal must determine whether the reason for the treatment was something arising in consequence of the Claimant's disability. At this stage, the test is objective and does not depend on the thought processes of the alleged discriminator.

20. In **T-Systems Ltd v Lewis (2015) 5 WLUK 669**, the EAT examined the phrase "something arising in consequence of the disability" and noted that the key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously to a significant extent. It must be part of the employer's reason for the unfavourable treatment or the effective cause of it.

21. In respect of objective justification, the burden shifts to the employer to show that the unfavourable treatment to which a Claimant is subject is a proportionate means of achieving a legitimate aim. It is necessary for an employer to identify the legitimate aim/s upon which it relies so that the tribunal can go onto consider

whether the needs of the employer as represented by the aim/s pursued are in fact proportionate. This requires an objective assessment balancing the needs of the employer against the discriminatory effect of the treatment on the Claimant. Consideration of whether a lesser measure could have achieved the legitimate aim is a relevant factor in this balancing exercise (see the EHRC Employment Code which sets out guidance that largely reflects the authorities).

Indirect Discrimination

22. Section 19 stipulates as follows:
Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

23. The case law establishes that the burden lies with the claimant to establish the first, second and third elements of the concept of a PCP listed above. Only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim (the fourth element) — see ***Dziedziak v Future Electronics Ltd EAT 0270/11; and Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704, SC***.

24. In respect of the pool for comparison , the Claimant must show that the PCP put persons who share the Claimant's disability, namely, autism at a particular disadvantage when compared with persons who do not share that disability, namely, persons who are not disabled and persons who are disabled by virtue of a different disability to depression (see section 6(3)(a) and (b) of the Equality Act 2010).

25. In order to prove group disadvantage, the Claimant would need to lead at least some evidence that the PCP caused a disparate disadvantage to those employees who have the disability of autism when compared with those who are not suffering from autism. The EHRC Employment Code makes it clear that the old statistical approach is still a useful tool, stating: 'The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may in some circumstances be necessary to carry out a formal comparative exercise using statistical evidence' — para 4.20. The Code also confirms that

statistical analysis is not the only method of establishing disparate impact. Claimants may rely on evidence from expert and other witnesses, and tribunals will continue to take 'judicial notice' of certain matters that are well known, such as the adverse impact caused to women by a refusal to allow part-time working.

26. In ***Dobson v North Cumbria Integrated Care NHS Foundation Trust 2021 ICR 1699, EAT***, Mr Justice Choudhury, then President of the EAT, made it clear that a claimant will not necessarily be able to establish group disadvantage on the basis of his or her own evidence of disadvantage. He emphasised that individual disadvantage is not inextricably linked to group disadvantage: the claimant's disadvantage might provide support for the contention that there is group disadvantage but the final conclusion on group disadvantage will depend not only on the quality and reliability of the evidence in question but also on whether any meaningful conclusions about the group picture may be drawn from it. He pointed out that the individual's disadvantage may arise in circumstances that are unusual or unique to him or her, and which do not exist in, or are not comparable to those of, the wider group.

Failure to make reasonable adjustments

27. Sections 20 and 21 of the Equality Act stipulate as follows:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

……..

21 Failure to comply with duty

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

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

28. In these sort of claims a tribunal must consider the following:

- The PCP applied by or on behalf of the employer
- The identity of non-disabled comparators (where appropriate)
- The nature and extent of the substantial disadvantage suffered by the Claimant. (See **Environment Agency v Rowan 2008 ICR 218**)

29. In **HM Prison Service v Johnson 2007 IRLR 951**, it was made clear that it is insufficient for a Claimant to simply point to substantial disadvantage caused by a PCP and then place the onus on the employer to think of what possible adjustments could be put in place to ameliorate the disadvantage.

30. In **Project Management Institute v Latif 2007 IRLR 579**, Mr Justice Elias (as he then was) stated as follows:

"*In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".*

31. It is accepted that the Claimant is not under a duty to show how the employer had failed to comply with a reasonable adjustment but the law requires him to raise the issue, in broad terms at least, as to whether a specific adjustment should have been made. If a Claimant is successful in doing so the burden then shifts to the Respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

32. In respect of the reasonableness of the adjustments proposed, an employer is not required to take disproportionate measures and the focus must be on the practical result of the measure/s that can be taken. In considering what is reasonable the tribunal must do so objectively (see **Smith v Churchills Stairlifts Plc 2006 ICR 524**). There will be a range of factors relevant to this question although the tribunal are not bound to take account of specific factors in every case. The factors listed in the EHRC Employment Code are always of assistance (see paragraph 6.23 of the Code). It should be remembered that in some cases there are simply no reasonable adjustments that can be made which will alleviate the disadvantage identified.

Harassment

33. Section 26 of the Equality Act 2010 stipulates as follows:

26 Harassment

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

34. In **Richmond Pharmacology v Dhaliwal 2009 ICR 724**, Mr Justice Underhill, then President of the EAT identified the three elements of a harassment claim as being,
    - Unwanted conduct,
    - that has the proscribed purpose or effect, and
    - which relates to a relevant protected characteristic.

    He expressed the view that it would be a "healthy discipline" for a tribunal to specifically address each element in turn whilst acknowledging that in some cases there will be considerable overlap between the elements.

35. Unwanted conduct can take many forms. The Equality and Human Rights Commission's Code of Practice on Employment (ECHR) provides a range of behaviour which could constitute such conduct. Unwanted means conduct that is unwanted by the employee and therefore largely requires a subjective assessment.

36. In order for the unwanted conduct to have the proscribed effect as opposed to purpose, a tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that affect. The test therefore is both subjective and objective. In **Pemberton v Inwood (2018) ICR 1291**, Lord Justice Underhill stated as follows:

'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by

reason of sub-section (4)(c) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

37. The other circumstances of the case will usually be used to cast light both upon the Claimant's perception and on whether it was reasonable for the conduct to have the necessary effect. The EHRC Employment Code notes that relevant circumstances can include the Claimant's mental health, mental capacity, cultural norms and previous experience of harassment.

38. In order to have the proscribed purpose, the tribunal will need to consider the intentions of the perpetrator which will likely involve drawing inferences from the surrounding circumstances as to what those intentions may be.

39. Finally, unlawful harassment will only be established if the unwanted and offensive conduct is related to a relevant characteristic. This is to be judged by the tribunal by drawing upon all the evidence before it (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam 2020 IRLR 495**). The fact that the Claimant considers or perceives that the conduct relates to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be features of the factual matrix which can properly lead to the conclusion that the conduct is related to the particular protected characteristic concerned.

Time Limits

40. In respect of the detriment claims, the time limit is three months from the date of the act complained of; time can only be extended if it was not reasonably practicable to present in time (see section 48(3) ERA 1996). In respect of the discrimination claims, they too must be brought within three months of the act complained of but time may be extended if it is considered just and equitable to do so (see section 123 EQA 2010). In this case, all claims relating to the period of time prior to the 7th August 2019 are out of time (see paragraphs **6-11** of the Amended Response at pages **90-91** of the bundle).

JOANNE WILLIAMS

CIVITAS LAW

10th March 2023