EMPLOYMENT TRIBUNALS

Claimant: **Mr Kenneth Badham**

Respondent: **Jaguar Land Rover Limited**

Heard at: **Midlands West** **On:** **4 to 8 July and 10 November 2022**

Before: **Employment Judge Woffenden**
Members: **Mr P Kennedy**
Mr R White

Representation
Claimant: In Person
Respondent: Ms J Duane of Counsel
Mr J Heard of Counsel (10 November 2022 only)

JUDGMENT having been sent to the parties on 12 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1 The claimant is employed by the respondent as an associate. His employment began on 19 January 2013. He presented a claim of disability discrimination to the tribunal on 19 October 2020.

Issues

2 The issues to be determined by the tribunal had been set out by Employment Judge Coglin QC in his order sent to the parties on 14 September 2021. They were as follows:
Time limits
1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 20 July 2020 may not have been brought in time.
1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus any early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?
The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?
2. Disability
2.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about?
The Tribunal will decide:
2.1.1 Did he have a physical or mental impairment?
2.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
2.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
2.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
2.1.5 Were the effects of the impairment long-term?
The Tribunal will decide:
2.1.5.1 Did they last at least 12 months, or were they likely to last at least 12 months?
2.1.5.2 If not, were they likely to recur?
3. Direct disability discrimination (Equality Act 2010 section 13)
3.1 The acts of detriment relied on by the claimant are as follows:
3.1.1 On 19 May 2019 John Glasby refused to report an accident at work sustained by the claimant.
3.1.2 On 16 July 2019 Tony Bradley made a remark to the claimant “go away, some of us are here to build cars”.
3.1.3 On 17 July 2019 the respondent terminated the claimant’s SVO role early (4 weeks into a 12 week contract.
3.1.4 A few days after the claimant went off sick on 18 July 2019, the respondent required the claimant to make daily contact with the process leader (Mr Ian Bradley) every working evening at 9pm.
3.1.5 On 22 July 2019 the respondent sent a letter to the claimant telling him that his pay was being suspended (though in fact his pay was not suspended).
3.1.6 On about 23 July 2019 Emily Brown (in HR) told the claimant that he would have to phone a Lead PAM (Process Area Manager). This was unnecessary, stressful and was in any event outside Ms Brown’s remit. Ms Brown then failed to respond to the claimant’s request for clarification the next day.
3.1.7 The respondent failed to resolve the claimant’s grievance dated 16 July 2019 in a timely manner, a failure which was continuing as of the date of the ET1.
3.1.8 On 25 August 2020 the respondent wrote to the claimant and informing him that his pay was being suspended on the grounds that he had not maintained contact with the respondent.
The questions set out below apply in relation to each of these alleged acts and omissions.
3.2 Did the act or omission in question occur?

3.3 Did the respondent thereby subject the claimant to a detriment (disadvantage)?

3.4 Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated in the same circumstances. The claimant has not named anyone in particular who he says was treated better than he was.

3.5 If so, was it because of disability?

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

4.1 Did the acts or omissions set out in paragraphs 3.1.1 to 3.1.8 above occur?

4.2 Did the respondent thereby treat the claimant unfavourably?

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

4.3.1 the claimant's absence from work from around June 2018 to April 2019 (which he says was due to IBS);

4.3.2 the claimant needing to take frequent toilet breaks (which he says was due to prostatitis)?

4.3.3 the claimant being unable to work above shoulder height (which he says was due to arthritis in his shoulder) (NB: this is of relevance only to the alleged detriment set out at paragraph 3.1.1 above);

4.3.4 the claimant being in the respondent's restricted worker process from around May 2019 (which he says was due to his back injury) (NB: this is of relevance only to the alleged detriments set out at paragraph 3.1.2 to 3.1.8 above);

4.4 Was the unfavourable treatment because of one or more of those things?

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

4.6 The Tribunal will decide in particular:

4.6.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.6.2 Could something less discriminatory have been done instead;

4.6.3 How should the needs of the claimant and the respondent be balanced?

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

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

5.1 Did the respondent know or could it reasonably have been expected to know that the claimant was disabled? From what date?

5.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: requiring the claimant to work in the FA1 build hall?

5.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that while working in the FA1 build hall he was exposed to an environment in which he was sustaining disability discrimination (as set out in paragraphs 3 and 4 above)?

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

5.5 What steps could have been taken to avoid the disadvantage? The claimant suggests that he should have been permitted to move out of the FA1 build hall and work elsewhere.

5.6 Was it reasonable for the respondent to have to take those steps, and when?

5.7 Did the respondent fail to take those steps?

3 The respondent has since conceded the claimant was disabled because of Irritable bowel syndrome ('IBS').

4 At the commencement of the hearing it became apparent that on 16 September 2020 the claimant had made an application to amend his claim to add stress anxiety and depression as a disability on which he wished to rely and that on 26 November 2021 the tribunal had indicated that it would be determined at the final hearing. Further the respondent had not served an amended response including any legitimate aim it wanted to advance although it had been given permission to do so by Employment Judge Coglin QC and now sought to amend its response to include a number of such aims. After discussion both parties consented to the other's applications and the list of issues was amended accordingly. The legitimate aims were that :accidents must be reported contemporaneously to avoid abuse of the system; SVO roles are set up to meet customer demand and cane be moved in accordance with operational needs and requirements and the attendance management procedure needed to be adhered to in order to ensure operational efficiency and staffing to ensure customer orders can be made for manufacturing demands.

5 Ms Duane in written submissions (for the first time) raised the issue of whether the tribunal had jurisdiction to hear the claim, submitting the claim form should have been rejected under Rule 10 (1) (c) (i) or 12 (1) (c) Employment Tribunal Rules of Procedure 2013 In her submissions. This was not an issue identified by Employment Judge Coglin nor was it mentioned at the commencement of the hearing as an additional jurisdictional issue to be determined. The claimant was not cross-examined about it. However ,as this is a jurisdictional issue, we have determined this issue in our conclusions below.

6 It was further agreed that the hearing would address liability only.

7 As far as reasonable adjustments were concerned the claimant asked for a bit of time to answer questions and to have ad hoc breaks as and when required to which the tribunal agreed and which were afforded to him during the hearing.

Evidence

8 We had a witness statement from the claimant. There was also a witness statement from Robert Douglas (trade union representative and employee of the respondent) who did not attend due to ill health. It was put in as evidence on behalf of the claimant. We gave it limited weight in those circumstances.

9 On behalf of the respondent we heard from Ian Bradley (Production Leader) and Genie Creamer-Hyland (former Manufacturing Operations manager, Body in White who heard the claimant's grievances).Mr Glasby Tony Bradley David White Emily Brown and Mr Sutherland (see paragraph 77 below) were not called by the respondent. Ms Duane told us that Mr Glasby and Tony Bradley were no longer employed by the respondent employment but gave no information about any efforts made to secure their attendance. She told us Emily Brown was on maternity leave.

10 There was an indexed paginated bundle of documents of 2 folders of 573 pages to which was added during the course of the hearing a grievance procedure for the avoidance of disputes -negotiated employees a restricted worker procedure booklet and a flowchart Restricted Worker Process (total 576 pages).

11 On 16 May 2022 the claimant applied for a strike out of the response because of a failure by the respondent to comply with case management orders about the agreement /sending to him a final copy of the bundle and exchange of witness statements. ~~That application was refused on 20 May 2022 and when renewed refused again on 25 May 2022 for reasons we gave at the time~~. **That application was refused by Employment Judge Dimbylow on 20 May 2022 and when renewed refused again by Employment Judge Perry on 25 May 2022 for reasons they gave at the time.**

12 At the commencement of the hearing the claimant complained that further documents had recently been added to the bundle of documents and the respondent was in breach of the case management order for the date for its finalisation. He confirmed he was not making an application for strike out or costs (at that stage) nor was he asking for a postponement. The prejudice he said he had suffered was not having had time to prepare using the hard copy bundle. Mrs Duane said documents had been omitted from the hard copy bundle which had been sent to him but had been included in the electronic bundle which he already had. She had an amended index and copies of the documents for inclusion in the bundle. Since the tribunal needed to do attend to its pre-reading we suggested the claimant use that time to familiarise himself with the hard copy bundle and on completion of our pre-reading we would discuss the issue again. By the morning of second day of the hearing the claimant had agreed the documents in question could be included in the bundle and the hearing proceeded.

13 In his written submissions the claimant complained again about the respondent's failure to adhere to dates for compliance with case management orders and applied for an order for costs. Although he did not explain what sort of costs order he applying for, he has not been legally represented so it appears he is making an application for a preparation time order (Rule 75(2)) for time spent working on the case (excluding time spent at the final hearing). For the avoidance of doubt we have not determined that application.

Findings of Fact

14 The claimant started working for the respondent as an agency worker at its Solihull site on 16 January 2012 and was employed by the respondent from 19 January 2013. His job title was Production Operator. From 2013 he was also a trade union representative.

15 From 13 June 2018 to 22 April 2019 the claimant was absent from work (315 days). The respondent's attendance records states the reason for his absence as IBS.

16 On 30 November 2018 the claimant attended a long term absence case management meeting conducted by his manager Tony Bradley in which he said he had been diagnosed with arthritis in his right shoulder following a scan. The notes refer to an existing restriction to which his work was subject in that he was allowed to use the lavatory urgently due to IBS and an enlarged prostate.

17 It was the claimant's case that he had had the impairment of arthritis in his right shoulder since the end of 2018.Although his General Practitioner ('GP') confirmed that as at 3 November 2021 he had osteoarthritis of his right shoulder, the GP medical notes contain no such diagnosis. Reference was made to

degenerative joint disease of the shoulder as at 17 September 2021.When he went to see the GP on 11 October 2018 and 14 December 2018 the medical problem was identified as rotator cuff syndrome (and subsequently shown in his GP records as a 'minor past problem').

18 On 20 November 2018 the claimant had an X-ray and the resulting report indicated that he had 'mild degenerative changes of the acromioclavicular joint with subchondral sclerosis and subchondral cystic changes demonstrated'. He had a steroid injection into his shoulder joint on 28 March 2019. The claimant's evidence described the effect of the injection as lessening the pain' a touch' but did not completely eradicate it. There is no evidence that the claimant sought any other treatment for his shoulder after that date. He chose not to use Ibuprofen except occasionally and used a topical medication on the shoulder (Deep Heat).The evidence in his impact statement about the effects of the alleged impairment of arthritis on his normal day to day activities in the period between 2018 and 19 October 2020 was scant. However, he did describe the pain as severe enough to cause sleep deprivation (though no evidence was given about its persistence or severity). He said he found it difficult to get dressed lost his appetite was unable to exercise /swim was unable to work above shoulder height shop or wash correctly but again he provided no evidence about the persistence or severity of these difficulties.

19 On 13 September 2016 the claimant's GP notes record as a significant past problem 'benign prostatic hypertrophy'. This did not feature in his medical notes again until 6 March 2019 when again it was shown as a significant past problem. The claimant's GP wrote to the respondent on 10 October 2018 and commented that the claimant had a diagnosis of benign prostate hyperplasia which caused prostatism type symptoms requiring him to have a frequent urge to urinate. There is no evidence that the claimant sought any treatment about this between 13 September 2016 and 6 March 2019. The evidence he gave in his impact statement about its effects on his normal day to day activities in the period between 2018 and 19 October 2020 was again scant. He said there was a frequent urge to urinate without warning and that he had the habit of not drinking to try and stem toilet visits which he said resulting in dehydration fatigue concentration and memory loss and pain in the abdomen groin lower back and testicles sleep deprivation low mood and depression. However he provided no evidence about the frequency urgency persistence or severity of any of these difficulties or about the normal day to day activities which were affected. His GP did not refer to any symptoms or consequences other than the urge to urinate.

20 Following a referral for long term absence, on 12 February 2019 an Occupational Health ('OH') report was prepared on the claimant which recorded he was not fit for work for the foreseeable future (3 to 6 months) and that he had been diagnosed with osteoarthritis of the shoulder and was waiting to see his GP, he also had a problem with his prostate (though it was noted he had not been referred by his GP) and suffered from a bowel condition made worse with stress. It would appear that the diagnosis relating to the shoulder was derived from information provided to its author by the claimant although at this time he had not (on the evidence before us) received a diagnosis of osteoarthritis of the shoulder.

21 The claimant attended another long term absence case management meeting on 2 April 2019 at which he confirmed he was fit to return to work on 24 April 2019 on a phased basis.

22 Having returned to work in FA1 Zone 7, on 30 April 2019 the claimant underwent a workplace assessment carried out by a physiotherapist. He was noted as being subject to a permanent restriction (which had been put in place 20 August 2018) allowing the claimant to go to toilet urgently (and therefore work in close proximity to it). The assessment said he could not undertake 2 work processes which contained elements involving working above shoulder /head level .If suitable alternative duties could not be allocated to him it said he was to be progressed through the respondent's Restricted Workers Process ('RWP').

23 RWP is a procedure whereby employees who become unable to perform their job on a temporary (or in severe cases ,a permanent) basis because of ill health or incapacity may be placed on a role with restrictions. Line managers get an OH report which confirms the employee in question has a restriction that requires an adjustment to their role, they check whether the role can accommodate the adjustment and ,if that is not possible, the team leader then identifies a role in their area (stage 1) If there are no such opportunities a search for a suitable role in the employee's technology function area (stage 2).If there are no such opportunities then a plant/site wide search for a suitable alternative role is carried out. If there are no suitable opportunities an Employee Review meeting is conducted which can result in 'action' being taken which could include dismissal for capability (Stage 3). A Process Area Manager (PAM) kick off meeting is held when a suitable role is not found to discuss the next steps of the RWP.

24 On 17 June 2019 the claimant went to see his GP with what the GP described in his medical notes as 'low back pain'.

25 On 18 June 2019 the same physiotherapist who carried out the assessment on 30 April 2019 carried out another work place assessment on the claimant. It referred to a permanent restriction which was said to have been imposed on 20 May 2019 (no work above shoulder height and no forceful /sustained work with right arm above shoulder level). The assessment confirmed he was not capable of performing manual handling of the cabin harness and if suitable alternative duties could not be allocated he was to be progressed through the RWP.As a result of that report the claimant was placed in the RWP to find a role for him that met the restriction of no work above shoulder height.

26 On 19 June 2019 the claimant went to see John Glasby (his then Process Leader) to discuss his restrictions and the physiotherapist's report. In a manuscript letter which he gave to John Glasby the claimant referred to having had a back injury about 6 weeks previously and having gone to see the physiotherapist. He said he believed that he had strained the muscles in his back as a result of the cabin harness process and had gone to the doctors about it on 17 June 2019 .He said his GP diagnosed muscle strain in his back but sent him for more tests as a precaution. He said Mr Glasby had given him the physiotherapist report about taking him off the cabin harness process and onto the RWP. He said he had told Mr Glasby that once he had had the results back if he had a strained back he wanted to report an accident and asked him to involve Health and Safety to prevent a recurrence.

27 The claimant was told on 20 June 2019 in a letter of that date that from 24 June 2019 his temporary place of employment was SVO /MPL Solihull. 'SVO' means Special Vehicle Operations. The letter said this would be for a period of

up to 12 weeks. The respondent has the right to require employees to move for a period of up to 12 weeks under a mobility of labour agreement . The SVO role involved driving and fixing any problems with the vehicle in question. The claimant very much enjoyed the SVO role which he perceived as a career opportunity.

28 Process leaders deal with holiday requests by team members. They have to ensure there is enough absence cover within the team for holidays and any sickness absence. The respondent operates a shift pattern and consideration has to be given to the impact on the wider team before a holiday request is granted.

29 On 10 July 2019 the claimant texted Ian Bradley (who was by this time the claimant's Process Leader in FA1) to tell him that he had left his holiday forms in his office and that he would pop over the next day. That same day Mr Bradley texted the claimant to say that he'd been told by Tony Bradley that he had to wait until a PAM kick off meeting because he might be straight into a role. Tony Bradley had told Mr Bradley that the claimant's holiday request should be dealt with when the respondent knew where he was going to be working because consideration of the request would depend on the manning staffing levels relevant to the role in question. The claimant was to attend such a meeting on 12 July 2019. The claimant then texted Tony Bradley saying he had tried to contact him on several occasions that day about his holiday requests but he had been unavailable. He asked to see him the next day saying that it had been more than 3 months for his request to be signed off.

30 On 12 July 2019 the claimant attended a PAM kick off meeting. It was explained his production leader had not been able to find a suitable role which accommodated his restrictions. He would be referred to OH for a full restrictions review. The claimant said the sole reason he was there was because he had had an accident at work and had pulled his back on the cabin harness process. He said he had spoken to Mr Glasby 3 or 4 weeks ago. He couldn't remember the exact date but he had written it down. He was asked whether it was registered as a works related accident and he said he didn't know.

31 On 15 July 2019 the claimant emailed Mr Glasby to say he wanted to report the back injury he had suffered 'whilst on my process' as an accident and for it to be properly recorded as such and that he would discuss it with him the next day. The investigation meeting notes dated 10 December 2019 made during the subsequent investigation conducted by Ms Creamer-Hyland (see paragraph 62 below) record Mr Glasby said the claimant had given him a letter in which he had requested raising an accident and he had said to the claimant (on an unspecified date) how did he know he had done it on the job 8 or 9 weeks ago and that he did not agree with that ,saying 'you have not followed procedure'.

32 On 16 July 2019 Tony Bradley was conducting a handover shift meeting in an office. Pete Glover was also present .A handover shift meeting is held to discuss the planning of the number of cars to be built that day and working manning and quality issues. The claimant did not know that a handover shift meeting was being held, knocked on the door and went in, interrupting the meeting. A discussion ensued between the claimant and Tony Bradley.

33 That same day the claimant reported on the respondent's externally managed Whistleblowing help line ('the Whistleblowing helpline') that after receiving the

outcome of tests from his GP he told Mr Glasby and asked him if the accident (which he had described as back strain due to the amount of weight carried at work) would be recorded in the accident book and was told Mr Glasby had sought advice from his manager (Pete Glover) who had told him no further action was necessary and he would not do anything with it. He wanted the respondent to record his accident in the accident book. He also said that when he went to see Tony Bradley to ask for a response to a holiday request Tony Bradley had responded 'some of us are here to build cars, I am busy.' He felt the remark was 'personal' and the way he was spoken to was harassing and unfair. This report was passed to a Group Confidential Reporting team at the respondent.

34 In his witness statement the claimant said the words used by Tony Bradley were 'some of us are here to build cars.' In a document dated 13 October 2020 prepared by the claimant for his subsequent grievance appeal before John Sutherland the claimant said the remark was 'some of us are here to build cars.' In an undated diary of events made by the claimant he gave a longer account of the discussion on 16 July 2019 in which he said the conversation had begun with him saying 'Alright Tony I have been trying to contact you over the last couple of days' to which Tony Bradley responded 'Yes I know you have -some of us are here busy to build cars in FA1 though '.He said that Tony Bradley told the claimant to go and see his Process Leader and that he was busy. The clamant had said that he did not like the tone of his voice that it was a reasonable request and asked if he could have a meeting with Pete Glover .Tony Bradley had repeated 'we are busy go and see your Process leader'. Tony Bradley denied in the investigation meeting conducted by Ms Creamer-Hyland on 9 October 2019 that he had said anything to the claimant which he might have found inflammatory; he said the claimant had told him he did not like his attitude and he said he did not like his either. He said the claimant had been quite rude and abrupt waving his holiday form around stating he needed to get this sorted out. In an investigation meeting with Pete Glover conducted by Ms Creamer-Hyland on 22 October 2019 when he was asked about what had happened with the claimant's holidays he said the claimant had barged in started shouting ,and that having his holiday 'is all he talks about.'

35 Tony Bradley was not called as a witness. The failure of a party to call an obvious witness is something on which a tribunal can base an adverse inference. However although we have not had direct evidence from Tony Bradley about the allegation against him there was other evidence available to us as set out in paragraphs 33 and 34 above. We find that the words said to the claimant by Tony Bradley on 16 July 2019 were those set out in the contemporaneous account made by the claimant to the Whistleblowing helpline. The clamant did not dispute the accuracy of the contents of any of the Whistleblowing reports and the version of events he provided to the Whistleblowing helpline was on the day in question when his recollection of what was said by Tony Bradley must have been freshest in his mind.

36 On 17 July 2019 the claimant had a meeting with David White who needed to reduce the number of SVO roles by one. In his investigation meeting Mr White said he had been told by Donna Griffin (senior union representative) to 'lose' the claimant from the (SVO) team . She had said he was a lot more hassle that he was worth ,was counterproductive and spent a disproportionate time on union business. The union had advised him how to break it to the claimant . In their

meeting David White referred to the mobility of labour agreement and told the claimant he was going back to FA1 and that he had not been singled out for any reason. The claimant left work. He contacted Mr White to tell him that he would not be in in the morning and that he would be going to the doctors and he would let him know after what the doctor had said. The claimant did not dispute in his witness statement that the conversation which Mr White had with Ms Griffin had taken place describing it as 'sickening' and complaining of not being involved in a discussion about his trade union activities and his need for toilet breaks which he had not had the chance to discuss with his manager.

37 The claimant made a further report on the Whistleblowing help line on 17 July 2019.He said he had been called in by Mr White who told him his temporary driving role was finished. He said he was the only one of the 4 employees who had started the driving role at the same time who was being sent back to restricted duties which he thought was suspicious given it was the day after he had made his original report. He had told Mr White he was going to take his doctor's advice and go off sick and was trying to get a doctor's appointment to get signed off work. He was also going to seek support for stress he was suffering ;it was really getting to him and he feared reprisals. This too was passed to a Group Confidential Reporting team at the respondent.

38 Mr White was not called as a witness so we had no direct evidence from him about the allegation against him but we had other evidence as set out in paragraphs 27 35 and 36 above. We find that ,although the respondent terminated the SVO role on 17 July 2019, it did not do so 'early' as alleged by the claimant. There was no contractually binding agreement in existence between him and the respondent that the duration of the SVO role was 12 weeks ; although this might have been the claimant's expectation as to duration ,12 weeks was simply the maximum length of any temporary move the respondent was able to impose under the mobility of labour agreement.

39 On 18 July 2019 the claimant's GP issued a Fit Note advising him he was not fit for work for 4 weeks because of ' back injury and stress at work'. The claimant did not attend for work that day.

40 There is no evidence that the claimant ever sought treatment from his GP again concerning his back although he said in his impact statement that until 19 October 2020 the effects of his back condition were such that he could not dress himself was unable to bend and put his own socks on could not do his job role was not able to use the gym no energy due to sleep deprivation (the cause of which was not explained in relation to his back problem) and did not have the confidence to lift things afterward. He had some physiotherapy having been referred by his GP on 22 July 2019 and was advised to try and do stretching exercises every day but there was no evidence before us about the frequency or duration of any physiotherapy or what he would have been like without that treatment . Under cross examination he described himself as being able to go up and down stairs with a bit of difficulty for 12 months. In his grievance appeal Stage 3 grounds dated 13 October 2020 he said Tony Bradley's remark to him on 16 July 2019 was a clear attack on him due to his 'temporary disability of having strained my back' .

41 We formed the view that the claimant was exaggerating the effects of his back condition. We did not find the claimant's evidence about the severity of those effects throughout the period in question credible.

42 Under the respondent's attendance management policy, employees have to contact their supervisor /line manager personally by telephone prior to the start of their first shift/working day of absence .If their absence is longer than one day they need to contact their supervisor /line manager regularly 'as agreed'. The general guidance given by the respondent's HR team to managers was that for shorter term absences daily updates were appropriate and for longer term absences a weekly conversation may be more appropriate. It was Ian Bradley's practice to ask employees to make contact on a daily basis for the first week of absence in the absence of a fit note having been received.

43 On 18 July 2019 the claimant did not call David White before the start of the shift (which would have been at about 5.30 in the morning) but at 11 am. At 13.55 that day Ian Bradley asked the claimant in a text to call him at 9 am on 19 July 2019 'when you make the daily contact.' The claimant responded 'Hi mate. Daily is a bit excessive don't you think -you have my sick note of 4 weeks -I feel under the circumstances it's a bit excessive mate'. Ian Bradley asked if it was ok to call him 'now' but the claimant responded 'No its not is there an issue?' Ian Bradley explained 'Just wanted to clarify process with you in line with HR policy. Are you able to call at 9 am tomorrow?' The claimant made a report on the Whistleblowing help line on 18 July 2019 in which he said that he said he felt Mr Bradley's behaviour constituted harassment and he felt as if a certified sick note was not good enough for him. He said the harassment was getting him down and there was a possibility that Mr Bradley knew he made a report and suggested the continued harassment could be related to his report of previous harassment. This too was passed to a Group Confidential Reporting team at the respondent.

44 The claimant and Ian Bradley had a telephone conversation on 19 July 2019 (of which we had a transcript) during which Ian Bradley explained to the claimant the sort of questions to be asked of an absent employee on the first day of absence, one of which was about the reasons for the absence. The claimant told him the reason why he was off work was due to work related issues which were connected with Mr Bradley that he had raised with HR which was going to investigate the issues. He said he was also off with a strained back due to an accident at work. Mr Bradley asked him to elaborate and he said he had had an accident 6 weeks previously gone for tests and went to speak to John Glasby regards an accident at work and he turned the request down .When questioned about whether he had raised it on the day of the accident he said he was unsure .He referred to a statement he had written on that day which he had given to John Glasby and told him that once he had confirmation of a back strain then he would wish to put in an accident at work .He confirmed this conversation had taken place on 19 June 2019.

45 Ian Bradley explained to the claimant that he had not contacted his manager before the start of the shift but as contact was made (albeit late) the matter would not be progressed through the 'non contact letter'. Mr Bradley was referring to an automatically generated letter sent out to any employee who failed to make contact with the respondent ,warning them pay would be suspended. He went to reiterate that the claimant had not called as required by the process before the shift began but that was not a problem because he had received authorisation to 'just leave it lie and sick note it.' He said as he was on nights the

claimant could contact him anytime from 9 pm onwards. Later in the conversation the claimant recapped his understanding of what Ian Bradley was saying about contact ie that he was saying it was procedure and company policy for him to telephone Ian Bradley on a daily basis. Ian Bradley confirmed yes for the first week and the claimant said 'OK ok'. After a further discussion the claimant said 'so you're still adamant that I telephone you on a daily basis next week even though you know my circumstances' and Ian Bradley said 'yes please that's what the process is yeah' to which the claimant replied 'OK'. The conversation then turned to a discussion about the claimant's work related issues and it was confirmed that the claimant could now book his holiday. The claimant said' brilliant thank you very much' to which Ian Bradley replied 'you're welcome' and the claimant thanked him again before saying good bye. We find the conversation ended entirely amicably.

46 We find that there was a requirement that the claimant make daily contact with Ian Bradley but that that could be anytime from 9pm onwards. Ian Bradley reduced daily contact to weekly contact with the claimant following an intervention by the claimant's trade union representative on 23 July 2019.

47 At an investigation meeting with Ms Creamer-Hyland and Ian Bradley on 15 October 2019 , the typed notes (which were not verbatim) indicate he was asked if he had escalated the no contact to HR and explained to the claimant; Ian Bradley said he had sent him a letter and to ignore it ;he'd made contact 'it would be booked as sick and not unpaid'.

48 The respondent did not call John Glasby as a witness**.** Although we have not had direct evidence from Mr Glasby about the allegation that he had refused to report an accident at work sustained by the claimant we had other evidence available to us. We had contemporaneous documents in the form of the manuscript letter the claimant gave to Mr Glasby the investigation meeting notes dated 10 December 2019 the claimant's report on the Whistleblowing help line the claimant's email to John Glasby dated 15 July 2019 and the transcript of the claimant's telephone conversation with Ian Bradley on 19 July 2019 . We find that the claimant began to experience difficulties in breathing in early May 2019 as a result of which he went to see his GP on 17 June 2019 who diagnosed low back pain and advised further tests. He went to see John Glasby on 19 June 2019 and told him that if it was confirmed he had a strained back he wanted to report it as an accident. In other words his reporting of the accident was dependent upon the confirmation of his back condition following the outcome of further tests . It was not until 15 July 2019 that the claimant told John Glasby that he wanted to report his back injury as an accident and John Glasby declined to do so. There was no such refusal by John Glasby on 19 May 2019 as alleged by the claimant.

49 Having left work on 17July 2019 the respondent's attendance records show the claimant did not return until 15 March 2020 (an absence of 242 days), the reason for absence being 'muscular skeletal (back)'.

50 The claimant knew Emily Brown (a member of the respondent's HR team) and had previously brought concerns to her attention. One of the tasks of the HR team is to support managers in absence management. The claimant alleges that on 23 July 2019 Emily Brown telephoned him at 8.36 am to tell him he would have to phone a Process Area Manager (Pete Glover) on a daily basis due to him not contacting Ian Bradley . He explained to her that he had been in contact with

Ian Bradley on 18 and 19 July 2019 and emailed her that same day asking her to explain to him why she rang and the information she had provided about non-contact and him now having to call Pete Glover. She did not reply. The claimant accepted under cross examination that Ms Brown's call arose following a miscommunication and his evidence in his witness statement also said the conversation in question was down to a miscommunication between her and Ian Bradley. On 23 July 2019 the claimant made a further report on the Whistleblowing help line in which he raised a letter from the respondent dated 22 June 2019.

51 This was an automatically generated letter which said that the claimant had not made contact on 22 June 2019 and that his absence had been recorded as unauthorised and his pay had been suspended. It purported to have been sent by Ian Bradley but had been initiated by a member of the respondent's HR team . Notwithstanding the claimant's pay was not suspended. The claimant said his senior union representative would be speaking to Mr Bradley about it that night. He did not mention a telephone call with Emily Brown. This too was passed to a Group Confidential Reporting team at the respondent. We find the respondent sent the letter in question to the claimant on 22 July 2022.

52 On 24 July 2019 the claimant made a further report on the Whistleblowing help line in which he said his trade union representative had contacted Ian Bradley and having had a phone call with Ian Bradley ,Ian Bradley said he should call him on 25 July 2019.He had been woken by a telephone call from Emily Brown who told him she had received an email from Ian Bradley saying the claimant had not contacted him and he should now phone Pete Glover about his absence. He had emailed Emily Brown but received an out of office reply. He referred to another conversation with Ms Brown on 23 July 2019 in which she told him his case would result in a grievance hearing at work. He did not know if that was the right process and did not want the issue 'watered down'. He also referred to the letter dated 22 June 2019 he had received from Ian Bradley in which Ian Bradley said his pay was being suspended due to no contact .He said he believed this was an error and the date should be 23 July 2019. This too was passed to a Group Confidential Reporting team at the respondent.

53 It was the claimant's evidence in his witness statement that the call from Emily Brown and his email to her both took place on 24 July 2019 . The respondent did not call Ms Brown as a witness; Ms Duane told us she was on maternity leave. Although we did not have direct evidence from her about the allegation we did have the claimant's own evidence and his report to the Whistleblowing help line. We find that the telephone call from Emily Brown was on 24 July 2019.

54 The claimant's evidence under cross examination was that the letter dated 22 June 2019 had caused him mental hardship even though his pay was not suspended. The claimant was aware that such a letter would be sent out if there was no contact during a period of absence .He had not contacted his line manager prior to the start of shift on his first day of absence on 18 July 2019. He knew from his telephone conversation with Ian Bradley on 19 July 2019 the issue of no contact would not be progressed and that he had been authorised to 'let it lie' . The letter itself was incorrectly dated and referred to an incorrect date on which the no contact was said to have taken place. We find he knew it was sent in error. In those circumstances we did not find his evidence about the effect of the letter on him credible.

55 On 12 August 2019 the GP notes show the claimant saw his GP about what the GP recorded as a 'stress related' problem .
56 On 19 August 2019 the claimant raised a further complaint using the Whistleblowing help line concerning further contact from Ian Bradley. This too was passed to a Group Confidential Reporting team at the respondent .

57 On 12 September 2019 the GP notes show the claimant saw his GP about stress at work. He contacted the GP again on 6 November 2019 6 January 2020 6 February 2020 7 May 2020 4 November 2020 and 16 December 2020 (all said to be for a stress related problem). He did not attend the GP again about this until 17 September 2021.

58 On 27 November 2019 an OH report was prepared on the claimant which stated he was absent from work with work related stress. On examination his symptoms were said to be 'consistent with moderate anxiety and depression' ; the claimant was described as not sleeping very much and feeling exhausted his focus concentration mood appetite and energy level was very low 'at present'. He was said not to enjoy the things he used to enjoy ,was anxious about issues going on at work and not motivated to do anything. He was currently unfit to work but the hope was expressed that he would be able to return to work in the next 4 to 6 weeks ,provided the ongoing operational issues were discussed and resolved. The issues preventing a return to work were described as not predominantly medical in origin but operational and related to the claimant 's perception of work related relationships.

59 The claimant's evidence in his impact statement was that he had a mental impairment since 2018 but did not identify the nature of the mental impairment in question and as far as the effects were concerned said he had been signed off work since July 2019 and in 2018 due to stress and IBS. He went on to say 'no concentration struggle to get out of bed no drive feeling underwhelmed afraid to go out to do basic things like shopping and eating out. Panic attacks no focus and 'complete inability to do normal day to day tasks .'

60 The respondent's standard conditions of employment (signed by the claimant on 27 January 2014) has a section about grievances which provide that if an employee has a grievance in relation to their employment it must first be raised with the employee's supervisor. If the matter is not resolved it says the employee may pursue the grievance in the manner detailed in the procedure agreement ,a copy of which is available from the respondent's HR department.

61 The procedure agreement in question says it is for the avoidance of disputes for negotiated employees. Under it an employee raises the issue in the first instance with their supervisor. If matters are not resolved there are a series of subsequent stages including an Extended Plant Conference (EPC) up to National Meeting level. It says the respondent undertakes that matters that require detailed evaluation and negotiation staffing arrangements will be such that where necessary, all the stages up to and including the EPC 'can operate within a period of 20 working days'.

62 The matters raised by the claimant in the reports to the Whistleblowing helpline (the last of which was raised on 19 August 2019) were dealt with by the respondent as if the claimant had raised a grievance and were investigated by

Ms Creamer-Hyland. She conducted an investigation meeting with the claimant on 13 September 2019.She was unable to progress the investigation before then because the respondent was on a mandatory shutdown in July and August 2019 which affected her ability to get an appointment in her diary and the claimant was not available for the original proposed date of 9 September 2019.

63 At the investigation meeting on 13 September 2019 the notes of the meeting record the claimant told Ms Creamer-Hyland (among other things) that he had an inflamed muscle in his back so he had gone to the doctors. He said he could not do the job ,referring to 'arthritis' and he'd sat John Glasby down to report an accident and he 'was a bit funny about it' ;he'd spoken to Pete Glover and said 'I'm not going to do anything about it' -he'd 'state' him down a few weeks after 19 June 2019.He had been taken off the role.

64 Investigation meetings were held with Tony Bradley Emily Brown David White Pete Glover and John Glasby between 9 October 2019 and 10 December 2019.It was difficult for Ms Creamer-Hyland to arrange meetings any more quickly because of the shift patterns of the individuals concerned. An initial feedback meeting was arranged for 21 October 2019 but the claimant's trade union representative could not attend so it was rescheduled to 14 November 2019 but did not take place because the claimant was on holiday and not due back till 26 November 2019.

65 On 18 November 2019 the claimant offered to come in for the meeting but his trade union representative and the respondent's HR advisor were not available. and it was eventually rearranged for 5 December 2019.As a result of that meeting Ms Creamer-Hyland decided the claimant had raised further matters which needed investigation.

66 There was then a further meeting with the claimant and his trade union representative on 16 December 2019 and again Ms Creamer-Hyland decided there further matters that needed investigation .The respondent was on a further shut down over Christmas and New Year. The last investigation meeting took place with Tony Bradley on 21 January 2021.

67 On 28 November 2019 the claimant was issued with an ACAS EC certificate R591335/19/84.It had been received by ACAS on 28 October 2019 ('the first certificate') .He was attending meetings with his trade union representative around this time. His evidence under cross examination initially was that he was unaware of time limits for presenting claims and had not made enquiries or sought advice because of his state of mind at the time. Despite this assertion his state of mind was not such that he was unable to contact ACAS in order to obtain a certificate nor was he incapacitated from active engagement in meetings with the respondent and its OH department . Later under cross examination he said he knew he had to contact ACAS before making a claim in 2019 and that he knew he had three months to make a claim subject to 'process'.

68 On 9 January 2020 the claimant was again seen by OH and a report was prepared in which it was recorded that he had raised a concern about returning to work in FA1 due to the nature of his work related concerns and he was advised that this should be discussed further with HR and management .It was said a move to a different area might expedite a return to work.

69 On 4 February 2020 the claimant was seen again by OH and a report was prepared on him in which it was recorded that he had been due to return to FA1 in July 2019 but became ill and had since been signed off sick .He thought his illness related to the way he was being managed and felt bullied by managers. He was found fit to return to work but it was said this was only likely to be successful if the underlying issues were resolved .His ill health could deteriorate and become chronic if he remained in the same 'perceived hostile environment'. It went on to say it might be helpful to relocate him.

70 On 5 February 2020 the claimant attended a grievance meeting with Ms Creamer-Hyland, the typed notes of which were erroneously dated 5 December 2019.He explained to her that his back strain had come on over a few weeks and that he had difficulty breathing. He said he went to hospital for a scan and physio and that 'they think I have had an accident at work' .GCH asked him if that was when he reported it and he confirmed yes – he wanted it in the accident book and had contacted John Glasby .

71 On 13 February 2020 a grievance outcome meeting took place between the claimant and Ms Creamer-Hyland and she wrote to him to tell him the outcome. In her letter she said that David White told the claimant on 17 July 2019 that his temporary SVO role was to end and that he was required to return to FA1.In relation to the Emily Brown and Ian Bradley phone calls and the incident with Tony Bradley she concluded that she did not believe that he had been victimised or harassed by the management team in FA1. However she said she did feel that from his perspective there may have been an aspect of bullying within the working environment and this would be investigated as a separate issue .She went on to say she partially upheld 'this point of the grievance' based on his perception of the treatment he received while he was attempting to book his holidays. In the section of the claimant's witness statement dealing with his reasonable adjustments claim the claimant makes it clear he took this to mean that his grievance of bullying in FA1 had in fact been upheld by Ms Creamer-Hyland and his reluctance to return to work in FA1 was because he thought the OH requests to relocate him should not have been ignored and that consideration under the respondent's Dignity at Work policy should have been given to move or transfer one of the employees concerned.

72 On 2 March 2020 a stage 2 feedback meeting took place under the RWP before Mr Bell in which the claimant was informed that his Production Leader had been unable to identify a 'full upstanding' role for him within their area .It was pointed out to him that his most recent OH report said he was currently fit for work .The claimant replied that once his issues had been fully resolved he believed he would be able to return to work. He went on to say once his grievance had been fully resolved in a way that was satisfactory to him he could consider returning and if it was not he would have to make a decision about whether he wanted to continue working there. Mr Bell confirmed no suitable roles had been identified within FA1 and that Stage 3 of the process would involve a search of the rest of the site.

73 The claimant appealed against Ms Creamer-Hyland's grievance outcome on 10 February 2020 . On 6 April 2020 the respondent's HR team emailed him and told him that as a result of Covid and the subsequent stand down across manufacturing his grievance had been put on hold.

74 The claimant had confirmed to the respondent that he was fit to work as of 17 July 2020 and was treated as on furlough from that date .As a consequence he was no longer recorded by the respondent as absent due to sickness .When ,having been sent an email saying he had been 'unfurloughed', he did not return to work and in the absence of a fit note, on 25 August 2020 he (together with 13 other employees) was sent a letter by Aaron Taylor in the respondent's HR team which said he had not tried to make contact with the respondent and the respondent had not been able to make contact with him and that his absence was recorded as unauthorised and his pay suspended. In section 8.2 of his claim form the claimant referred to this as a as a threatening letter which turned out to be 'Maladministration?' In his witness statement the claimant describes this as a continuation of direct discrimination while he was off sick with mental health of which the respondent had 'full knowledge'. Under cross examination the claimant was asked if he accepted that the sending of the letter was an administrative error. He said it was an act of direct discrimination against him and had been sent to 13 other people to conceal this notwithstanding the upset it might cause them.

75 The claimant's outstanding grievance appeal was determined in writing by Pete Fellingham (BW launch operations manager) in his letter dated 9 July 2020 . In particular he explained the chronology of the grievance and that the claimant's appeal had been placed on hold due to the majority of the case management team being furloughed. The claimant raised some points about the outcome in an email and a grievance appeal meeting took place to discuss this on 22 July 2020.

76 On 26 August 2020 a grievance appeal feedback meeting took place before Mr Fellingham. He was told the outcome and of his further right to appeal within 5 working days.

77 The claimant appealed again and there was an appeal hearing on 13 October 2020 which reconvened on 27 November 2020 and was conducted by John Sutherland (Manufacturing manager -Plant).

78 In his witness statement the claimant referred to the procedure for avoidance of disputes for negotiated employees. It is clear that he thought the benchmark time frame for the timely conclusion of a grievance process in its entirety was 20 working days. He said the Covid disruption and appeal stages should not be to blame for the length of delays to the investigation.

79 By 1 September 2020 OH had reported that the claimant had confirmed he was fit to return to work. Other than finding himself preoccupied with work related matters often drifting off and daydreaming about it he described 'little other impact on his normal day to day activities' reporting he was getting out of the house and had returned to playing tennis .He was described as not feeling the need for mental health support.

80 On 16 October 2020 a report was prepared on the claimant by OH which noted that he told OH that he had been absent from work since 18 July 2019 with anxiety /stress triggered by work related issues. We find this is not a diagnosis by OH of his condition or its cause. This records what the claimant told OH .It went on to say that 2 issues were aggravating his anxiety /stress ;the ongoing grievance and the length of time taken to conclude it and a disagreement with his trade union representative . The author of the report noted he had not been

referred medication or counselling. OH said that in their opinion the claimant's condition of anxiety / stress was unlikely to be considered a disability because it had not lasted 12 months and was not having a significant impact on ability to perform his daily activities. The main barrier to the return to work was his perception of work related issues rather than a medical condition or symptoms. A return to work in the near future was more likely if the work related issues could be addressed and resolved promptly and agreed to by all parties. He was to be referred for a course of cognitive behavioural therapy.

81 On 19 October 2020 the claimant was issued with an EC Certificate R199087/20/95 ('the second certificate').

82 The claim form was presented to the tribunal on 19 October 2020.It included the ACAS early conciliation number of the second certificate. In it the claimant said he believed the respondent had 'one eye on the clock' with regard to the 3 month less one day time limit of possible tribunal claims due to the 'ridiculous' length of time it had taken.

83 Before presenting his claim to the tribunal the claimant had written to his Member of Parliament telling him he had been told he had run out of time to go to the tribunal. He referred to this in the 'additional information' section of his claim form. Under cross examination he said the advice in question had 'probably ' been from ACAS. His evidence about when he received this advice was vague and inconsistent. He accepted under cross examination that when he presented his claim he already knew it was possibly out of time but said he had believed that there were continuing acts and then said he relied on his grievance and his mental health too. He accepted that his trade union had advised him that he had 'no case' after the Stage 3 meeting with John Sutherland but said it was not the union that told him his claim was out of time but ACAS and this had been at the time he presented his claim.

84 On 22 October 2020 the claimant sent an email to the tribunal in which he said that he had received the first certificate but had been unable to action it due to deteriorating mental health and poor trade union representation .He attached a copy of the first certificate . He said the time limit should be extended because of his adverse mental health for which he was receiving CBT counselling.

The Law

85 Section 18 A (1) Employment Tribunals Act 1996 imposes on claimants the requirement to contact and provide certain information to ACAS before instituting proceedings. It provides that:

'(1)Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

This is subject to subsection (7).

(2)On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.

(3)The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(4)If—

(a)during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b)the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.

(5)The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.

(6)In subsections (3) to (5) "settlement" means a settlement that avoids proceedings being instituted.

(7)A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

The cases that may be prescribed include (in particular)—

cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;

cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;

cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.

(8)A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).'

86 Under Rule 8 of the Employment Rules of Procedure 2013 ('the Rules'), ' A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.' The Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 came into force on 8 October 2020 ('the Regulations'). Under the Regulations no change was made to Rule 10 of the Rules which requires that a claim is rejected if it does not contain an early conciliation number and returned to the claimant with a notice of rejection explaining why it was rejected ;the notice containing information about how to apply for a reconsideration of the rejection. There was a change to Rule 12 of the Rules in that it now provides that if the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate the claim shall be rejected unless the judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

87 In **The Commissioners for HM Revenue and Customs v Serra Garau UKEAT/0348/16/LA** the Honourable Mr Justice Kerr considered in the context of a claim of unfair dismissal and disability discrimination whether more than one

certificate can be issued by ACAS under the statutory procedures and what effect, if any, a second such certificate has on the running of time for limitation periods. He held that the early conciliation provisions do not allow for more than one certificate of early conciliation per 'matter' to be issued by ACAS .If more than one such certificate is issued ,a second or subsequent certificate is outside the statutory scheme and has no impact on the statutory limitation period. He said 'It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4)'.He referred in his judgment to the cases of **Science Warehouse v Mills [2016] ICR 252**, in which it was held that an employee was not obliged to go through fresh mandatory early conciliation where she sought to amend her claim to add victimisation (a new cause of action) following her employer's response to her initial claim for discrimination on ground of pregnancy /maternity; **Tanveer v East London Bus and Coach Co Ltd [2016] ICR D11**,in which HHJ Eady said that the amount of time spent on early conciliation would not count in calculating the date of expiry of the time limit ;the clock simply stopped during the early conciliation period ; and **Compass Group UK and Ireland Ltd v Morgan [2017] ICR 73l** in which the then President of the Employment Appeal Tribunal ('EAT') held the word 'matter' in section 18 A(1) of the Employment Tribunals Act was very broad and could embrace a range of events ,including events that had not happened when the early conciliation process was completed .**Serra Garau** was followed in **EON Control Systems Ltd v Caspall UKEAT /003/19** in which the then President of the EAT made it clear that in a situation where the claimant had included in the claim form the EC certificate number of a second and therefore invalid EC certificate it had to be rejected and tribunals should consider this jurisdictional issue at any time.

88 A person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities (section 6 (1) (a) and (b) Equality Act 2010('EqA')).

89 In **Goodwin v Patent Office 1999 ICR 302** the EAT said that the words used to define disability in section 1 (1) Disability Discrimination Act 1995 (now section 6 (1) EqA) required a tribunal to look at the evidence by reference to 4 different questions:

(1) Did the claimant have a mental and/or physical impairment? (the 'impairment condition').
(2) Did the impairment affect the claimant's ability to carry out normal day-to-day activities (the 'adverse effect condition').
(3) Was the adverse condition substantial (the 'substantial condition'); and
(4) Was the adverse condition long-term (the 'long-term condition').

90 An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if a) measures are being taken to treat or correct it, and b) but for that, it would be likely to have that effect. 'Measures' includes, in particular medical treatment.

91 Under Schedule 1 EqA the effect of an impairment is long-term if a) it has lasted for at least 12 months, b)it is likely to last for at least 12 months or c) it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a persons' ability to carry out normal day

to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

92 The question of long term effect has to be answered as at the date of the alleged discriminatory acts and not with the benefit of hindsight at the date of the hearing: See **Richmond Adult Community College v Mc Dougall [2008] ICR 431**. 'Likely' means 'could well happen' (**SCA Packaging Ltd v Boyle [2009] ICR 1056 (HL)).**

93 The burden of proof is on the claimant to show that he was a disabled person in accordance with section 6 and with reference to Schedule 1 EqA at all relevant times. Whether a person is a disabled person is a question of fact for the tribunal.

94 Tribunals must take account of the Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability (the Guidance'). The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.The Appendix to the Guide provides an illustrative and non-exhaustive list of factors which if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities. These include difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage with one hand and persistent general low motivation or loss of interest in everyday activities and difficulty carrying out activities associated with toileting, or caused by frequent minor incontinence.

95 It also provides an illustrative and non-exhaustive list of factors which if they are experienced by a person, it would **not** be reasonable to regard as having a substantial adverse effect on normal day to day activities which include an inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley and infrequent minor incontinence. The examples are indicators not tests.

96 'Substantial' means 'more than trivial'.

97 Under section 13 EqA '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.' Section 23 EqA provides on a comparison of cases for the purpose of this section there must be no material difference between the circumstances relating to each case which includes a person's abilities for the purposes of section 13 if the protected characteristic is disability. There is an ACAS statutory Code of Practice on discipline and grievance procedures (2015) ('the ACAS Code') which provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. A failure to follow the ACAS Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals take the ACAS Code into account when considering relevant cases.

98 Under Section 15 EqA:

'(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.'

99 The meaning of the word 'unfavourable' cannot be equated with the concept of 'detriment' used elsewhere in EqA. It has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. It is necessary to identify the relevant treatment before deciding if it is unfavourable (**Williams**).

100 In the case of **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305,** Mr Justice Langstaff held that there were two separate causal steps to establishing a claim under section 15. Once a tribunal had identified the treatment complained of, it had to focus on the words "because of something" and identify the "something" and then decide whether that "something" arose in consequence of the claimant's disability.

101 In the case of **Hall v Chief Constable of West Yorkshire Police [2015] IRLR** the EAT held that the tribunal had erred in concluding that it was necessary for the claimant's disability to be the cause of the respondent's action and that it was sufficient for the claimant's disability to have been a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but was nonetheless an effective cause of the unfavourable treatment.

102 In the case of **Pnaisner v NHS England [2016] IRLR 170** the EAT stated that (a) the tribunal had to identify whether there was unfavourable treatment and by whom; (b) it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required; (c) the motive of the alleged discriminator acting as he did was irrelevant; (d) the tribunal had to determine whether the reason was " something arising in consequence of [the claimant's]disability", which could describe a range of causal links; (e) that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator; (f) the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

103 In **Hensman v Ministry of Defence UKEAT /0067/14/DM** the Employment Appeal Tribunal applied the justification test as described in **Hardy and Hansons Plc v Lax [2005] ICR 1565 ,CA** to a claim under section 15 EqA .Singh J held that when assessing proportionality while an employment tribunal must reach its own judgment ,that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer .

104 Section 39(5) EqA imposes a duty to make reasonable adjustments upon an employer. Where such a duty is imposed sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that duty comprises three requirements. Insofar as is relevant for us, the first of those requirements is that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

105 Section 21(1) EqA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments. Section 21(2) EqA provides that a failure to comply with a duty to make reasonable adjustments in relation to the disabled person constitutes discrimination by the employer.

106 As far as knowledge for the purpose of the claimant's claim of a failure to comply with the duty to make reasonable adjustments is concerned in **Secretary of State for the Department of Work and Pensions v Alam [2010]IRLR 283** (EAT) (again a case that preceded EqA) it was held that two questions needed to be determined:
Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A (1) DDA?
Only if that answer to that question is no then ought the employer to have known both that the employee was disabled and that his /her disability was liable to affect him/her in the manner set out in section 4 A(1)?
If the answer to both questions was also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in **Wilcox v Birmingham CAB Services Ltd [2011]EQLR 810 EAT).**

107 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .It would seem therefore that the analysis in **Alam** remains good law. The test for knowledge for reasonable adjustments is therefore a different test to that for section 15 claims.

108 However in relation to either claim the employer must do all they can reasonably to find out whether this is the case and what is reasonable will depend on the circumstances. The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Code'). Tribunals and courts must take into account any part of the Code that appears relevant to any questions arising in proceedings.

109 The Code states at paragraph 5.15 and 6.19:

> *" The employer must ,however ,do all they can reasonably be expected to do to find out [whether this is the case].What is reasonable will depend on the circumstances .This is an objective assessment .When making enquiries about disability ,employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

110 The burden is on the employer to show that it was unreasonable for it to have the required knowledge.

111 In **Gallop v Newport County Council EWCA Civ 1583** it was held that the responsible employer has to make his own judgment as to whether the employee is or is not disabled .In making that judgment the employer will rightly want assurance and guidance from occupational health or other medical advisers. That assistance and guidance may be to the effect that the employee is a disabled person; and unless the employer has good reason to disagree with the basis of such advice ,he will ordinarily respect it in his dealings with the employee. In other cases, the guidance may be that the opinion of the adviser is that the employee is not a disabled person the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled ;he cannot simply rubberstamp the adviser's opinion that he is not. It cautioned that employers when seeking advice from clinicians. It cautioned that employers when seeking advice from clinicians should not simply ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the case. In **Donalien v Liberata UK ltd [2018] IRLR 535 (CA)** it was made clear that the value of OH advice should not be generally discounted -rather an employer should not rely unquestioningly on an unreasoned report.

112 In **Environment Agency v Rowan [2008] IRLR 20** a case concerning the provisions of the DDA the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

> *'27 …..In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:*
>
> *(a) the provision, criterion or practice applied by or on behalf of an employer, or*
>
> *(b) the physical feature of premises occupied by the employer,*
>
> *(c) the identity of non-disabled comparators (where appropriate) and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the Claimant.*
>
> *It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.' "*

113 It was held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at a) to d) above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

114 Paragraph 6.2 of the Code says that the duty to make reasonable adjustments is a cornerstone of the EqA and requires employers to take positive steps to ensure disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers ,job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled . It applies during all stages of employment. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's (Paragraph 6.16 of the Code).

115 Simler P in **Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT,** held:

"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.

The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see para 8 of App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

116 Once the duty is engaged employers are required to take such adjustments as it is reasonable to have to take, in all the circumstances of the case. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

117 Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;

the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer.

118 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

119 Under section 136 EqA if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred but that does not apply if that person shows the person did not contravene the provision.

120 The proper approach to the burden of proof has been addressed by the Court of Appeal in **Igen Ltd v Wong [2005 IRLR 258**, **Madarassy v Nomura International plc [2007] ICR 867** and **Laing v Manchester City Council [2006] IRLR 748**.
However it was explained in **Amnesty International v Ahmed [2009] ICR 1450** that where explicit findings as to the reason for the claimant's treatment can be made this renders the elaborations of the "Barton/Igen guidelines" otiose. This approach was expressly endorsed by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37**. Lord Hope emphasised again that the burden of proof provisions have a role to play where there is room for doubt as to the facts necessary to establish discrimination, but that in a case where the tribunal is in a position to make positive findings on the evidence one way or another, they have no role to play.

121 Accordingly although a two stage approach is envisaged by s.136 it is not obligatory.

122 Where the two stage approach is adopted Mummery LJ explained in **Madarassy** that the approach is as follows:
55. In my judgment, the correct legal position is made plain in paras 28 and 29 of the judgment in Igen Ltd v Wong:
'28 … The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the respondent 'could have committed' such act.
29. The relevant act is, in a race discrimination case …. that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example in relation to employment in the circumstances specified in section 4 of the Act),(b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those are facts which the complainant, in our judgment, needs to prove on the balance of probabilities.'
56. The court in Igen Ltd v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more,

sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

123 Therefore, the burden is on the claimant to establish facts from which a tribunal could conclude on the balance of probabilities, and absent any explanation, that the alleged discrimination had occurred. At that stage the employer's explanation for the treatment - the subjective reasons which caused the employer to act as he did - must be left out of the account. It was also explained in **Madarassy** that the facts from which discrimination could be inferred can come from any evidence before the tribunal, including evidence from the respondent, save only for the absence of an adequate explanation.

124 The need for there to be something more than a difference in treatment and a difference in status has been emphasised repeatedly by the EAT, see for example **Hammonds LLP & Ors v Mwitta [2010] UKEAT 0026_10_0110** and Mr Justice Langstaff in **BCC & Semilali v Millwood UKEAT/0564/11**, paragraph 25.
Whilst something else is therefore needed to reverse the burden "not very much" needs to be added to a difference in status and a difference in treatment in order for the burden to be on the respondent to prove a non discriminatory explanation, paragraph 56 **Veolia Environmental Services UK v Gumbs UKEAT/0487/12**. This might include the fact that the respondent has given inconsistent explanations for the treatment, although it is the fact of the inconsistency not the explanations themselves that move the burden across, paragraph 57 **Veolia**, as well as a finding that an explanation for the treatment is a false one or a witness is lying in relation to the explanation, paragraph 59 **Veolia**. It cannot, however, include a failure by the respondent to call a relevant decision maker as a witness. That may be relevant at the second stage but is not a matter from which an adverse inference can be drawn at the first stage as the failure to provide an explanation cannot be taken into account at this point, **Royal Mail Group v Efobi [2019] EWCA Civ 18**.

125 There is no requirement that there needs to be a finding of something happening that is obviously and blatantly discriminatory to reverse the burden, paragraph 55 **Veolia**. **Metropolitan Police v Denby UKEAT/0314/16**: "The authorities do not require the tribunal at the first stage to blind itself to evasive, economical or untruthful evidence from the respondent which may help the tribunal decide there are facts which suffice to shift the burden, paragraphs 43 and 49".

126 The issue of what can be taken into account at stage 1 was revisited by the EAT in **Nasir and anor v Asim [2010] ICR 1225**. In this case it was said that, paragraph 70:
It is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed.
See also **Metropolitan Police v Denby UKEAT/0314/16**, paragraph 48, "there is nothing wrong with the tribunal…. considering all the relevant evidence at the first stage … even if some of it is of an explanatory nature and emanates from the employer".

127 In considering the burden of proof each allegation or complaint should be looked at separately, **Essex County Council v Jarrett UKEAT/0045/15**, although in the event that a particular complaint is found to be substantiated that in itself may well be such evidence as justifies the reversal of the burden of proof in respect of other allegations, **Jarrett**. Likewise if a particular complaint is not substantiated that may equally inform a decision on the reversal of the burden of proof on another complaint, although it will not be decisive of it, **Jarrett**.

128 It is always important to look at the totality of the evidence. The Court of Appeal in **London Borough of Ealing v Rihal 2004 IRLR 642** paragraphs 31 – 32, applying the approach of the EAT in **Qureshi** is authority for the proposition that in determining whether the less favourable treatment was on the proscribed ground, a tribunal is obliged to look at all the material put before it which is relevant to the determination of that issue, which may include evidence about the conduct of the alleged discriminator before or after the act about which complaint is made. The total picture has to be looked at.

129 At the second stage, the respondent is required to prove that they did not contravene the provision concerned if the complaint is not to be upheld. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever because of, in this case, race since "no discrimination whatsoever" is compatible with the Burden of Proof Directive. That requires the tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that (in this case) race was not a reason for the treatment in question. If the respondent fails to establish that the tribunal must find that there is discrimination.

130 In **Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16**, in the context of whether unreasonable treatment supports an inference of discrimination the EAT said, paragraph 97;
It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings. Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.

131 In **London Borough of Islington v Ladele [2009] IRLR 154** Mr Justice Elias said this about unreasonable treatment;
"It may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one." As Lord Browne-Wilkinson stated in **Zafar v Glasgow City Council [1997] IRLR 229**:

" it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."

132 Section 123 EqA provides that:

> *"(1) Subject to sections…140B, proceedings on a complaint within section 120 (which relates to a contravention of Part 5 (Work) of EqA)may not be brought after the end of –*
> *(a) The period of three months starting with the date of the act to which the complaint relates ,or*
> *(b) such other period as the employment tribunal thinks just and equitable .*
> *…..*
> *(3) For the purposes of this section –*
> *(a) conduct extending over a period is to be treated as done at the end of the period:*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

133 In **Matuszowic v Kingston –upon Hull City Council [2009] EWCA Civ 22** the Court of Appeal found that a failure to make a reasonable adjustment is an 'omission' rather than a 'continuing act' so that the time limit for presentation of a claim starts from the expiry of the period within which the employer might reasonably have been expected to make the adjustment. In the case of **Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil and others UKEAT /0097/13BA** the then President of the EAT Langstaff P held that where an employer refused to make a particular adjustment but agreed to keep it under review rather than making a 'once and for all' refusal ,the failure to make that reasonable adjustment was capable of amounting to a continuing act ,although the refusal to make the reasonable adjustment had occurred more than three months prior to the presentation of the claim. In **Viridor Waste v Edge UKEAT 0393/14/DM** the EAT distinguished **Jamil** and held each case was to be decided on its facts. In that instance it was a refusal and that it might be reconsidered was irrelevant. It was not a case of a policy to review as in **Jamil**.

134 It was held in **Hendricks v Commissioner of Police for the Metropolis [2003]IRLR 96 CA** that in determining whether there was an act extending over a period ,as distinct from a succession of unconnected or isolated specific acts ,for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme of regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' Further 'the burden is on the claimant to prove, either by direct evidence or by inference from primary facts ,that alleged incidents of discrimination were linked to one another and were evidence of a continuing

discriminatory state of affairs covered by the concept of 'an act extending over a period.''

135 The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time **(Robertson v Bexley Community Centre [2003] IRLR 434).**

136 In the case of **British Coal Corporation v Keeble [1997] IRLR 336 EAT** it was suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980 .Those factors are consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case ,in particular the length of and reasons for the delay ;the extent to which the cogency of the evidence is likely to be affected by the delay ;whether the party sued had cooperated with any requests for information ;the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action ;and the steps taken to obtain appropriate advice once he or she knew of the possibility of taking action. However a tribunal is not required to go through the matters listed in section 33 (3) of the Limitation Act, provided that no significant factor is omitted **(London Borough of Southwark v Afolabi [2003] IRLR 220).**

137 Tribunals were reminded in **Chapman v Simon [1994] IRLR 124 CA** that the jurisdiction of the employment tribunal is limited to the complaints which have been made to it. It is not for us to find other acts of which complaints have not been made if the act of which complaint is made is not proven.

Submissions

138 We thank both parties for their oral and written submissions which we have carefully considered.

Conclusions

Time Limits and Jurisdiction

139 We conclude that the tribunal does not have jurisdiction to consider the claimant's claim. The claimant had obtained the first certificate and was therefore able to present a claim form to the tribunal .However when he presented his claim form he did not include its number. The number he included was that of the second certificate which is an invalid certificate. The claim form must therefore be rejected under Rule 10 of the Rules because it does not contain an early conciliation number. In our judgment it is not the case that the claimant has made an error in relation to an early conciliation number ;he has not included such a number at all. It is not in the nature of a transcription error where Rule 12 would afford us discretion .It is clear from the contents of the claimant's email dated 22 October 2020 that he had made a decision to obtain and include the number of the second certificate rather than the number of the earlier first certificate.

140 However, if the above conclusions are wrong, we have gone on to determine the issues in the claim.

141 We have found that the matters alleged at 3.1.1, 3.1.2, 3.1.3 3.1.4 and 3.1.6 above did not occur as alleged. However, if we are wrong about those conclusions and all of the allegations set out at 3.1.1 to 3.1.8 had occurred, we conclude that they are each 'one off' acts or omissions committed by different individuals at the respondent .Looking at the substance of the complaints (whether pursued as complaints of direct disability discrimination or of discrimination arising from disability) there was no evidence before us that they were linked to one another and constituted a continuing state of affairs or an ongoing situation such that we could find there was conduct extending over a period within section 123 (3) (a) EqA. We conclude the complaints about those matters that happened before 20 July 2020 are therefore out of time.

142 As far as the claim of a failure to make reasonable adjustments is concerned, the PCP that the claimant work in the FA1 hall was applied to the claimant by David White on 17 July 2019. There is no evidence of a refusal to make the adjustment in question. The time limit runs form the expiry of the period within which the respondent might reasonably have been expected to make the adjustment .In our judgment the respondent might reasonably have been expected to make the adjustment within two weeks from 9 January 2020 (see paragraph 68 above). By 2 March 2020 the PCP was no longer applied to him because the respondent had concluded there were no roles the claimant could do in FA1 and the search for suitable roles for him was widened elsewhere. If there was any duty on the respondent to take such steps as it was reasonable to have to take to avoid any disadvantage to which the PCP put the claimant , that duty ceased with effect from that date as did any failure to comply with that duty. The complaint of a failure to make reasonable adjustments is therefore significantly out of time.

143 The claimant has not persuaded us that we should exercise our jurisdiction to extend time in his favour on just and equitable grounds. His witness statement contained no evidence about why such an extension should be granted although this was identified as an issue the tribunal would address at the final hearing and he had set out in his claim form the correspondence from his MP which included the fact he had been advised his claim was out of time. He had been a trade union representative since 2013 and was (or should reasonably) have been aware of his rights to bring a claim to the tribunal .He was supported by his trade union until shortly after 13 October 2020 so had access to advice about time limits. He was aware in 2019 that there were time limits and of the need to contact ACAS. There is no evidence to support his assertion in his letter of 20 October 2020 of poor union representation at the time of the first certificate or that his health was deteriorating to the extent he was too unwell to present a claim. He may have been unfit to work at the respondent but there is no evidence that his health (either physical or mental) was such that he was incapable of managing his own affairs. He was well able to respond to correspondence and participate in hearings with the respondent and had obtained the first certificate. If his health had deteriorated such that he was unable to present a claim following the first certificate there is no evidence about when that state of affairs ceased such that he was able to do so. There is no evidence to support the assertion in the claim form that the respondent had deliberately delayed matters by having an eye on the clock as far as time limits are concerned. There was no evidence before us about why the claim form itself was presented when it was. The claimant has provided no reasonable explanation why the claims which were out of time were not presented in time.

144 As far as prejudice is concerned there is obvious prejudice to the claimant if he does not secure an extension of time on just and equitable grounds but there has also been some prejudice to the respondent in that there is an inevitable impact on the cogency of the respondent's evidence given the time which has elapsed in relation to the allegations, although to an extent ameliorated by the contemporary documentation available. Tony Bradley and John Glasby for example are now no longer employed by the respondent and Emily Brown is on maternity leave.

145 We remind ourselves there is a public interest in the enforcement of time limits which are exercised strictly in employment tribunals.

146 Having considered all of the above relevant circumstances, the claimant has not persuaded us that it would be just and equitable to extend time in his favour and allow his out of time claims of disability discrimination to proceed. They are therefore dismissed .However if we are wrong about that conclusion we have gone on to determine the substantive issues below.

Disability

147 The claimant claims that he has had arthritis in his right shoulder since the end of 2018. The respondent has accepted in its letter to the tribunal that while he may have a physical impairment with his shoulder there is no evidence of arthritis. However, we are not concerned with the cause of the physical impairment with the claimant's shoulder. He first began to experience problems with his shoulder in late 2018 though the cause of those problems were not identified and were minor. Contrary to what he told Tony Bradley on 30 November 2018 and OH on 12 February 2019 he had not been diagnosed with osteo arthritis of the shoulder . However by 28 March 2019 a steroid injection was administered to reduce the pain in his shoulder (though his unchallenged evidence was that it was of little effect) and by 30 April 2019 when assessed by a physiotherapist he was unable to undertake tasks working above shoulder level. We conclude that at that date any normal day to day activity which required the claimant to undertake tasks above shoulder level (such as elements of getting washed and dressed and shopping) was substantially adversely affected. Although the claimant's evidence was the pain had an effect on his sleep we are unable to conclude on the evidence before us whether that the effect was more than minor.

148 However we conclude that the cumulative effect of his shoulder problem was that the claimant's normal day to day activities were substantially adversely affected from 30 April 2019. The question of long term effect has to answered as at the date of the alleged discriminatory acts and not with the benefit of hindsight. Although an OH assessment on 18 June 2019 referred an earlier imposition on 30 May 2019 of a 'permanent' restriction on working above shoulder height, there was no documentary evidence that such a restriction was imposed on that date or what was meant by 'permanent 'in this context or of the reasoning behind any such restriction. We are not satisfied that as at the date of the alleged discriminatory acts , the substantial adverse effects were likely to last for at least 12 months or were likely to last for the rest of the claimant's life. There is no evidence of any change to the substantial adverse effects of the claimant's shoulder problem on his normal day to day activities from 30 April 2019 and he received no treatment . By 30 April 2020 therefore the effects of the impairment on the claimant's normal day to day activities were long term. We conclude that

as from 30 April 2020 the claimant was a disabled person in relation to his shoulder problem.

Prostatitis

149 The claimant claims he has he has had prostatitis since 2016 . The respondent contends there is no medical evidence to support a diagnosis of prostatitis. On 13 September 2016 the claimant's GP notes show as a significant past problem benign prostatic hypertrophy .It did not feature again in those notes until 6 March 2019 when again it is shown as a significant past problem. The claimant's GP had written to the respondent on 10 October 2018 and commented that the claimant had a diagnosis of benign prostate hyperplasia causing prostatism type symptoms requiring him to have a frequent urge to urinate. We conclude that, although the claimant has used the word prostatitis, he had the physical impairment of benign prostatic hypertrophy and has had this since 2016. There was no evidence of incontinence or of difficulty carrying out activities associated with toileting. In the absence of evidence about the frequency urgency persistence or severity of the urge to urinate and the effect of such an urge on normal day to day activities and what the effect would be if the claimant ceased the habit of not drinking , we are unable to conclude on the evidence before us that this impairment had a substantial adverse effect on the claimant's normal day to day activities and we do not conclude that he was a disabled person at the material time because of benign prostatic hypertrophy.

Back Injury

150 The claimant claims he sustained a back injury in May 2019.On the evidence before us we are unable to conclude that the claimant suffered an injury to his back at that time. We conclude that around that date he began to experience breathlessness and was then diagnosed as having low back pain on 17 June 2019 but he was able to attend work until 17 July 2019 when he was signed off as unfit work because of it (but also stress related reasons) for 4 weeks. We see no reason why the claimant would describe his back injury as at 13 October 2020 as having been temporary in nature unless that was indeed the case. We conclude that from May 2019 the claimant had a back condition. However, we are unable to conclude on the evidence before us that any substantial adverse effects lasted 12 months or more or the effects were likely to last for at least 12 months or were likely to last for the rest of the claimant's life. We do not conclude that he was a disabled person at the material time in relation to a back injury.

Stress anxiety and depression

151 Although the claimant claimed in his impact statement he had an unidentified mental impairment in 2018, by 24 April 2019 he was fit to return to work. There is no evidence of any effect on his normal day to day activities and we conclude that by this date there was no such effect. By 17 July 2019 he was signed off work because of a back injury and stress at work. There was no diagnosis of either anxiety or depression. The claimant's evidence in his impact statement about the effect of the mental impairment on his normal day to day activities was generic in nature and lacking in detail. We found it of little evidential value. There is no evidence to corroborate any adverse effect of any mental impairment on the claimant's normal day to day activities as at 17 July 2019. The claimant was upset at the decision prematurely (in his view) to terminate his SVO role and

went to see his GP who certified he was not fit for work because of two conditions, one of which he described as 'stress at work'. We are not satisfied the claimant had a mental impairment as at 17 July 2019;being upset about an employer's decision is not a mental impairment. However, by 27 November 2019 he was displaying symptoms which were said to be 'consistent with moderate anxiety and depression' and was unfit to work .We conclude that as at that date the claimant had a mental impairment of moderate anxiety and depression .The evidence in the OH report of that date indicates that at this point his normal day to day activities were substantially and adversely affected in that he was experiencing persistent general low motivation or loss of interest in everyday activities. He was not fit to return to work. However by 4 February 2020 he was fit to do so. We note that throughout his GP continued to describe his problem as 'stress related' ;there is no evidence that at any time the GP referred the claimant to any mental health specialist for treatment or prescribed any treatment for any mental health condition.

152 We are not satisfied that the claimant had any mental impairment after 4 February 2020 or that if he did have a mental impairment it had any substantial adverse effect on his normal day to day activities .We conclude that though fit to do so he was not prepared to consider returning to work while his grievance had not been resolved to his satisfaction because of his perception that he had been treated badly at work following his return to work after his lengthy absence. The mental impairment of moderate anxiety and depression had a substantial adverse effect on the claimant's normal day to day activities but only from 27 November 2019 to 4 February 2020.The effects did not last 12 months or more nor was there any evidence before us that the effects were likely to last for at least 12 months or were likely to last for the rest of the claimant's life. We do not conclude that he was a disabled person at the material time in relation to stress anxiety and depression.

Direct Disability Discrimination

153 We have found in paragraph 48 above that there was no such refusal by John Glasby on 19 May 2019 as alleged in paragraph 3.1.1 above. We have no jurisdiction to consider the allegation **(Chapman v Simon)**.

154 If however we are wrong about that conclusion, the claimant has failed to discharge the burden of proof on him. In his submissions the claimant referred to Mr Glasby's knowledge of the reason for his previous absence (IBS) but even if Mr Glasby had that knowledge that is not sufficient for an inference to be drawn. His absence as a witness is not something we can take into account in deciding whether the claimant has discharged the initial burden of proof on him to prove facts from which we could conclude (absent an explanation) that the respondent has committed an act of discrimination. There was no evidence before us from which we could conclude or infer that John Glasby's refusal was because of any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant's. However ,on the assumption the claimant has discharged the burden of proof we conclude that the reason why John Glasby refused to report an accident was because he did not know when any such accident had taken place , believed the claimant had not followed procedure and had been told not to do anything with it by his manager. This had nothing whatsoever to do with any disability (or condition) of the claimant's. Any hypothetical employee who requested John Glasby to report an

accident in the same material circumstances would have been treated in the same way.

155 We have found in paragraph 35 above that the remark made by Tony Bradley was not as alleged in paragraph 3.1.2 above. We have no jurisdiction to consider the allegation **(Chapman v Simon)**.

156 If however we are wrong about that conclusion the claimant has failed to discharge the burden of proof on him . In his submissions the claimant referred to Mr Bradley's knowledge of the reason for his previous absence but as we have said above even if he had that knowledge that is not sufficient for an inference to be drawn. Mr Bradley's absence is not something we can take into account in deciding whether the claimant has discharged the initial burden of proof on him to prove facts from which we could conclude (absent an explanation) that the respondent has committed an act of discrimination. There is no evidence before us from which we could conclude or infer that Tony Bradley made the remark because of any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant. However on the assumption the claimant has discharged the burden of proof ,the circumstances in which the discussion between the claimant and Tony Bradley took place was that the claimant had interrupted his handover shift meeting without warning. The claimant was irritated by the delay in getting his holiday request sorted out and Tony Bradley was irritated at being interrupted at a time when he was engaged in a meeting about car production in relation to a holiday request which he had already instructed via Ian Bradley should be held in abeyance until it was known where the claimant was to be was working. The reason why he made the remark was to point out to the claimant that he was there in the office working to build cars while the claimant was there about his holidays. This remark had nothing whatsoever to do with any disability (or condition) of the claimant's. Any hypothetical employee in the same material circumstances would have been treated by him in the same way.

157 We have found in paragraph 38 above that there was no termination of the claimant's SVO role early (4 weeks into a 12 week contract) as alleged in paragraph 3.1.3 above. We have no jurisdiction to consider the allegation **(Chapman v Simon)**.

158 If however we are wrong about that conclusion the claimant has failed to discharge the burden of proof on him .There is no evidence before us from which we could conclude or infer that the reason for the early termination of the SVO role was because of any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant's. However on the assumption that the claimant has discharged the burden of proof we conclude that the reason why David White terminated the SVO role when he did was because he had to reduce his head count by 1 and the union representative had told him it should be the claimant because he was a lot more hassle that he was worth ,was counterproductive and spent a disproportionate time on union business . This had nothing whatsoever to do with any disability (or condition) of the claimant . Any hypothetical employee in the SVO role when there was a need to reduce the headcount and who had been identified by the union as the person to be selected would have been treated by David White in the same way.

159 We have found at paragraph 46 above that ,although the respondent did require the claimant to make daily contact with Ian Bradley it was not on every working evening at 9pm as alleged in paragraph 3.1.4 above. We have no jurisdiction to consider the allegation **(Chapman v Simon)**.

160 If however we are wrong about that conclusion the claimant has failed to discharge the burden of proof on him. There is no evidence before us from which we could conclude or infer that Ian Bradley imposed the requirement in question because of any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant's. However on the assumption that the claimant had discharged the burden of proof, we conclude Ian Bradley did so because that was what he understood to be the correct course of action and was in accordance with his usual practice before a fit note was received and the claimant had agreed to this requirement during the discussion on 19 July 2019 in accordance with the respondent's attendance management procedure. This had nothing whatsoever to do with any disability (or condition) of the claimant's. Any hypothetical employee in the same material circumstances would have been treated in the same way.

161 We have found at paragraph 52 above that on 22 July 2019 the respondent did send a letter to the claimant telling him his pay was being suspended as alleged in paragraph 3.1.5 above. However again the claimant has failed to discharge the burden of proof on him. There is no evidence before us from which we could conclude or infer that that this was done because of any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant's. However on the assumption that the claimant had discharged the burden of proof , Ian Bradley had believed that the claimant had not complied with the respondent's attendance management procedure as far as the first day of absence was concerned . However he did not intend that the matter would be progressed through the 'non contact letter'. We conclude that the sending of the letter dated 22 June 2019 to the claimant on 22 July 2019 was a mistake. This had nothing whatsoever to do with any disability (or condition) of the claimant's. Any hypothetical employee in the same material circumstances would have been treated in the same way.

162 We have found at paragraph 53 above that it was on 24 July 2019 that Emily Brown telephoned the claimant and not (as alleged in paragraph 3.1.6 above) on about 23 July 2019;there was a request for clarification from the claimant to which there was no response but it was made the same day as the telephone call , not the next day as alleged in paragraph 3.1.6 above. We have no jurisdiction to consider the allegation **(Chapman v Simon)**.

163 If however we are wrong about those conclusions , we conclude that HR (the department in which Ms Brown worked) supported managers as far as absence was concerned and in our judgment it was not outwith her remit to make such a call to the claimant as a member of that department. In any event the claimant has failed to discharge the burden of proof on him. There is no evidence before us from which we could conclude or infer that Emily Brown telephoned the claimant (or subsequently failed to respond to him) because of any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant's. Her absence is not something we can take into account in deciding whether the claimant has discharged the initial burden of proof on him to prove facts from which we could conclude (absent an

explanation) that the respondent has committed an act of discrimination. However on the assumption that the claimant had discharged the burden of proof, we conclude that she made the telephone call in question as a result of a breakdown in communication between herself and Mr Bradley.

164 Ms Duane has submitted that for the purposes of the allegation at paragraph 3.1.7 above we should limit our enquiry to the interrogation of the timeliness of the resolution of the claimant's grievance as conducted by Ms Creamer-Hyland only which was concluded (she contends) by 5 February 2020.She submits that to go beyond this would expand the claim as pleaded and as agreed and understood by the parties since September 2021.We do not agree. Employment Judge Coghlin's order makes it clear that the failure to resolve the claimant's grievance in a timely manner was alleged by the claimant to be continuing as at the date of the ET1 i.e. as at 19 October 2020.As at that date there was still no outcome to the claimant's stage 3 grievance appeal before John Sutherland .The hearing on 13 October 2020 had only just taken place. An appeal is part and parcel of an grievance process. However ,in our judgment the benchmark timeframe against which the timeliness of the resolution of the claimant's grievance should be considered is not 20 working days as the claimant maintains. He relies on the section in the procedure agreement set out in the last sentence of paragraph 61 above. In our judgment that agreement sets out the way unresolved employee grievances and other matters relevant to the agreement itself can be raised by either the respondent or the union in order to avoid trade disputes. It is a grievance procedure between an employer and a union rather than an procedure between employer and employee to resolve an individual grievance. The precise situation when it was intended that the 20 working days came into play was far from clear . In any event, the 20 working days is not expressed as a commitment but as indicative of the speed within which the process could (not would) be completed. It says 'can' not 'will' .

165 However ,the ACAS Code says that employers should deal with disciplinary and grievance issues promptly and should not unreasonably delay meetings decisions or confirmation of those decisions. In our judgment there was no failure by the respondent to resolve the claimant's grievance in a timely manner up to 13 February 2020 in the sense there was unreasonable delay in meetings decisions or their confirmation. From 6 April 2020 the claimant's grievance was placed on hold and he accepted under cross examination there was no delay during the months the respondent was affected by Covid and the furlough of relevant staff. He conceded there was no undue delay as far as the second stage appeal was concerned. Mr Sutherland was not called as a witness and there was no evidence to explain the course of events up to 19 October 2020 (by which time he had met with the claimant but had not determined his stage 3 appeal) when it appeared that that appeal had been made in late August 2020 . We conclude that in relation to the resolution of the stage 3 appeal there was a failure to resolve the claimant's grievance in a timely manner . The failure to call Mr Sutherland is not something we can take into account in deciding whether the claimant has discharged the initial burden of proof to prove facts from which we could conclude (absent an explanation) that the respondent has committed an act of discrimination. There is no evidence before us from which we could conclude or infer that his failure to do so had anything whatsoever to do with any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant's. He has failed to discharge the initial burden of proof on him.

166 We have found at paragraph 74 above that the respondent did write to the claimant on 25 August 2020 telling him his pay was being suspended on the grounds he had not maintained contact with the respondent. However again the claimant has failed to discharge the burden of proof on him . There is no evidence before us from which we could conclude that Aaron Taylor sent the letter in question because of any disability (or -for the sake of completeness -the back injury stress anxiety and depression and prostatitis conditions) of the claimant's. The claimant has not put forward any evidence that the latter had any knowledge of the claimant. The claimant acknowledged in his pleading that it was sent as a result of an administrative error . There is no evidence that the 13 other employees who received the same letter were also disabled persons. We conclude that any hypothetical employee who had not attended work had not contacted the respondent following the return from furlough and had not sent in a fit note would have been treated in the same way. The claimant's marked reluctance under cross examination to resile in any way from his allegation that this was an act of direct discrimination and his assertion (unsupported by any evidence) that the respondent would be prepared to upset the 13 other employees who received the same letter to conceal this leads us to conclude that the claimant has sought to rely on this letter in his claim form in order to assist him in contending that there was conduct extending over a period such that his claim was in time.

167 The claims of direct disability discrimination fail and are dismissed.

Discrimination Arising from Disability

168 The respondent accepted in submissions that the claimant's absence from work from around June 2018 to April 2019 was something arising on consequence of his disability (IBS) and that his inability to work above shoulder height was something arising in consequence of the disability of arthritis . The latter is of relevance only to the alleged unfavourable treatment that on 19 May 2019 John Glasby refused to report an accident at work. We have found there was no such refusal as alleged and that the claimant was not a disabled person until 30 April 2020 and then because of a shoulder problem rather than arthritis. If we were wrong about those conclusions there is no evidence on which we could conclude that the claimant's inability to work above shoulder height had anything whatsoever to do with any such refusal by John Glasby for the reasons set out in paragraph 153 above. Further there is no evidence on which we could conclude that John Glasby knew or ought reasonably to have known that the claimant was disabled by reason of arthritis. As far as the IBS is concerned we are unable to discern any causal link between any those factual matters which we found proven and the claimant's absence from work due to IBS.

169 As far as the other alleged 'somethings arising' are concerned we have concluded that the claimant was not a disabled person because of prostatitis or back injury. If we were wrong about that and the claimant was a disabled person because of prostatitis and back injury, again we are unable to discern any causal link between any of those factual matters which we found occurred and the claimant needing to take frequent toilet breaks and/or the claimant being in the respondent's RWP from around May 2019.We have found that initially at least the claimant placed in the RWP process not due to his back injury but because of his inability to work above shoulder height.

170 The claim of discrimination because of something arising from disability fails and is dismissed.

Reasonable Adjustment

171 We are concerned here only with the claimant's disabilities of IBS and arthritis.

172 We conclude that David White did impose a requirement on the claimant to work in FA1 .However we are unable to conclude on the evidence before us that while he was working in FAI he was exposed to an environment in which he was sustaining disability discrimination as he alleges. The claimant's concern about FA1 was not that the environment was one in which he was sustaining disability discrimination ;it was that he believed his bullying complaints as set out in the Whistleblowing helpline reports (in which he had made made no allegation whatsoever of disability discrimination) relating to FA1 had been upheld by Ms Creamer-Hyland and that under the respondent's dignity at work policy consideration should then have been given to move or transfer one of the employees concerned in accordance with the OH recommendations (see paragraph 71 above). There was no substantial disadvantage to which the claimant was put by the PCP compared with people who are not disabled as he alleged .It follows that the respondent's employees could not know or could not reasonably be expected to know of any substantial disadvantage.

173 The claim of a failure to make reasonable adjustments must also fail and is dismissed.

Employment Judge Woffenden

Date: 10th March 2023