EMPLOYMENT TRIBUNALS

Claimant: Mr S Bridges

Respondent: Asda Stores Ltd

Heard at: Newport **On:** 24, 25, 26, 27 and 28 April 2023

Before: Employment Judge S Moore
Mrs B Currie
Mr A McLean

Representation
Claimant: In person
Respondent: Ms A Stroud, Counsel

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

REASONS

Background and Introduction

1. The ET1 was presented on 16 June 2022. ACAS early conciliation commenced on 29 April 2022 and the date of issue of the certificate was 9 June 2022.

Claims and Issues

2. The claimant was at all times a litigant in person. His ET1 had been presented in a narrative form. The claimant was directed to provide further and better particulars of his claim by 26 September 2022. This information was discussed at the preliminary hearing on 24 October 2022. Judge Harfield discussed the claims with the parties and clarified them in her order and list of issues. The claimant brought the following claims:

    i. Constructive unfair dismissal and discriminatory dismissal;
    ii. Direct disability discrimination;

iii. Discrimination arising from disability;
iv. Failure to make reasonable adjustments;
v. Harassment related to disability;
vi. Victimisation.

3. The list of issues were discussed and agreed at that hearing subject to permission to amend. It was noted that the Respondent needed to confirm their objective justification to the S15 claim and the Respondent had permission to file an amended response on or before 6 December 2022. A request was granted to extend time until 9 December 2022. By way of an earlier order, the Respondent was required to confirm whether they conceded the claimant was a disabled person.

4. A further case management hearing was listed for 22 December 2022. The respondent had filed their amended response and confirmation they did not concede disability on 21 December 2022 which was well beyond the date for compliance. Judge Sharp raised these matters with the Respondent as recorded in the order. The claimant was given permission to amend his claim with the issue of time being reserved for the final hearing. Judge Sharp specifically noted in her order that the amended grounds of response had not set out the respondent's objective justification to the S15 claim.

5. The respondent continued to dispute the issue of disability on the basis the impairment was not long term or that the effect on the Claimant's day to day activities was not substantial at the material time between 2 July 2018 and 3 April 2022. Their position was not set out in the amended response as such we set it out here:

"In accordance with the Tribunal's Case Management Orders of 30 October 2022, we write on behalf of the Respondent to confirm the Respondent's position in respect of disability, as follows:

The Respondent denies that the following impairment amounts to a disability at the material time:

• * Parsonage Turner Syndrome

Long Term / Material Time

The Respondent concedes that the physical impairment previously substantially affected the Claimant's ability to carry out day-to-day activities. It does not however accept that the impairment is long term or that the effect on the Claimant's day-to-day activities was substantial at the material time, namely 2 July 2018 to 3 April 2022…."

6. An Unless Order then had to be issued against the Respondent on 31 March 2023 as the respondent had not complied with the orders to agree documents for the bundle by 16 February 2023 and prepare a bundle and send a copy to the claimant by 3 March 2023.

7. The bundle had been received by the claimant on 4 April 2023. The claimant was asked if he had sufficient time to prepare for this hearing given the late provision on the bundle and he confirmed he that whilst this had impacted on his time to produce his witness statement he was content to proceed.

Evidence and Witnesses

8. There was an agreed bundle of 503 pages. The Claimant was his only witness. The Respondent's witnesses were:

i. Nicola Price;

ii. Michael King;

iii. Mark Vickery.

Applications / matters arising during the hearing

Application by respondent to amend the response

9. The claimant had brought a claim for discrimination arising from disability (s.15 EQA 2010). That claim had been clearly set out since the start of these proceedings, discussed at two preliminary hearings and partially addressed in the original response and amended response.

10. The matter of the lack of a pleaded "legitimate aim" was raised with the respondent by Judge Sharp at the preliminary hearing on 22 December 2022. In the original response the respondent did not set out what the legitimate aim was in regard to the alleged unfavourable treatment. The respondent also had the opportunity to file an amended response. That also did not plead a specific legitimate aim.

11. On the first day of the hearing this matter was highlighted by the Tribunal when discussing and agreeing the issues in the claim with the parties. Later that day, after a break for reading and just before evidence was due to be heard, Counsel made an application to amend the response and handed up a handwritten wording.

12. The legitimate aim advanced was described as follows: "to ensure a formal and consistent process is followed when managing employees on restricted duties". It should be noted that this was the only legitimate aim advanced and would only apply to some of the alleged unfavourable treatment (the decision by the respondent to embark on a capability process and invite the claimant to a meeting on 25 February 2022). There are other alleged unfavourable treatments pleaded that could not rely upon this legitimate aim.

13. The relevant law for considering the application to amend is as follows.

14. **Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT** provides in deciding whether to exercise discretion to grant leave for amendment of an originating application, a tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include:

a. The nature of the amendment, i.e. whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.

b. The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

c. The timing and manner of the application. Although the tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the applicant at the time the originating application was presented.

15. We also had regard to:

16. **Abercrombie and others v Range Master Limited [2013] EWCA Civ 1148** which provides that when considering applications to amend which arguably raises new causes of action the focus should not be on questions of classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old; the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted and;

17. **Vaughan v Modality Partnership [2021] IRLR 97.** In deciding whether to exercise the discretion to allow an amendment, the Tribunal has to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Such relevant circumstances include consideration of the nature of the amendment, the applicable time limits and the timing and manner of the application. The real practical consequences of allowing refusing amendment should underlie the entire balancing exercise.

Decision

18. In regards to the nature of the amendment, we considered it was a major amendment to make. It introduced a significant new ground for defending the section 15 claim, and we are not able to agree with Ms Stroud that that would have been “wholly unsurprising” to the claimant given the contents of the bundle that we were referred to or indeed the contents of Mr Vickery’s witness statement. It was a wholly new, never before pleaded defence introducing a new legitimate aim.

19. ET3 responses must be filed within 28 days of notice of the claim. There are obvious reasons as to why a claimant needs to know at an early stage, the reasons for defending the claim.

20. In terms of the timing and manner of the application, although the claimant did not oppose the application we were very concerned that the claimant as a litigant in person was not (and this is no criticism of the claimant) aware of the potential impact on the case of allowing the amendment. We considered that the application amounted to an ambush on the claimant. The respondent had chosen not to present a legitimate aim in the grounds of resistance not once but twice. They were reminded of this omission by Judge Sharp in December 2022, months before the final hearing and instead sought to plead the defence on the first day of the hearing.

21. We considered that the balance of prejudice weighed heavily with the claimant. To allow the amendment at this stage would have necessitated an adjournment and further disclosure which was effectively a further chance for the respondent to put their case in order which was unfair given that witness statements had been exchanged. For those reasons we refused the application.

Application by the respondent to admit new evidence not previously disclosed

22. Also on 24 April 2023 the respondent made an application to admit a new document, a policy titled “Absence and Sickness Policy”. It had not been previously disclosed. The explanation was it was the relevant policy applied to the claimant and there had been “confusion of information between the client and solicitor.” The claimant had not seen the policy before and was given time to consider it. He did not object to it’s inclusion. The document was admitted and added to the bundle.

Application by the claimant to admit new evidence not previously disclosed

23. On 24 April 2023 the claimant made an application to admit a letter sent by Ms Price to a former colleague which he maintained supported one of his complaints regarding not being sent a thank you / exit letter. There was no objection from the respondent. The document was admitted and added to the bundle.

Conduct of the respondent during cross examination of the claimant

24. The claimant was cross examined from 3pm on 24 April 2023 and all day on 25 April 2023. Counsel for the respondent sought to put new evidence in questions to the claimant on multiple occasions. This was evidence that was not included in the respondent’s witness statements or referenced in any documents in the bundle (for example but not limited to) detail as to how the delivery runs were planned and the purported ability to return to depot with a full lorry of goods if an agreed adjustment had not been put in

place. Counsel was warned about this practice. Despite this warning, further new evidence was sought to be introduced regarding the direct discrimination claim, whereby it was put to the claimant that Mr Cullen had told the claimant the incident "had been dealt with" (see paragraphs xx below). When the Tribunal asked where this was in the evidence, Counsel accepted it was not and a further warning was given. The questions had not been prefaced with an explanation that the witness would later say the new evidence when they gave their evidence. Later that afternoon this happened again. Counsel sought to put to the claimant that Ms Price told the claimant about an invitation to a capability meeting in a private office. This differed significantly from Ms Price's witness statement and the Tribunal intervened. Counsel then told the Tribunal that Ms Price was going to change her witness statement. It was pointed out that Ms Price would need permission to do so.

25. At 15.15pm Counsel then sought to ask questions about the Absence and Sickness Policy that had been admitted on 24 April 2023. This was on the premise she intended to ask supplementary questions of her witness about the relevance of this policy as the respondent now wished to say that this was the policy that had been followed in the claimant's case. This was despite the fact that Mr Vickery's witness statement said that it was the capability policy (a different policy, included in the bundle) that had been followed, specifically referencing the policy by page number in his statement.

26. Counsel considered that she was entitled to ask permission to ask supplementary questions and she was entitled to put these matters to the claimant in cross examination.

27. The Tribunal was very concerned at this approach and considered it was prejudicial and unfair to ask the claimant questions in cross examination about which he had no prior knowledge based on new evidence that the respondent wanted to admit by supplementary questions of witnesses that had not yet been called. The Tribunal directed that if the respondent wanted to admit new evidence, in particular evidence that contradicted the evidence in their own witnesses statements, the appropriate and fair process would be to produce written amended statements and ask for permission for it to be admitted. The claimant would be given time to read the new evidence and make submissions on whether he objected or would be prejudiced, or needed any additional disclosure.

Application by respondent to admit an amended witness statement for Ms Price.

28. On 26 April 2023 the respondent applied to admit an amended witness statement for Ms Price (see above).

29. Having regard to rule 41 of the Employment Tribunals Rules of Procedure 2013 we first of all considered whether the amended evidence was relevant to the issues in the claim as well as necessary. It was relevant to one of the alleged acts of unfavourable treatment (Ms Price was alleged to have told the claimant in a busy office he had an upcoming capability meeting). We went on to consider, having reached that decision, whether to then admit it

in accordance with the overriding objective, and we weighed the balance of prejudice to allow the statement in and not allowing it in.

30. The explanation from the respondent as to why Ms Price needed to amend her statement was as follows. The Tribunal were told that on 24 April 2023 Ms Price realised that the statement that she had thought she had authorised was not in fact the statement before the Tribunal or the statement that had been exchanged with the claimant. This was not raised with the Tribunal and when the Tribunal asked counsel why the explanation appears to have been that it was anticipated that this could be dealt with on supplementary questions in the way that the Tribunal would ordinarily and frequently deal with minor amendments to witness statements at that stage.

31. The claimant was given sufficient time to consider the amended statement. He considered he was able to deal with the amended evidence given time and the opportunity to produce a supplementary statement addressing the amended evidence.

32. The respondent's application was granted as the evidence was relevant and the prejudice to the claimant was ameliorated by the extra time given and supplementary statement. The claimant had to be sworn back in on 27 April 2023 to be asked questions about the amended statement of Ms Price and his supplementary statement.

33. We address the amendments and differences in the statement below in our findings of fact.

Application by the respondent to admit a different grievance policy

34. On 26 April 2023 the respondent applied to admit new evidence namely a different grievance policy titled "Retail grievance policy". This had not been previously disclosed. There was no objection and it was admitted.

Findings of Fact

35. The claimant commenced employment on 9 March 2001 as an HGV Driver. He was based at the respondent's distribution centre in Chepstow. The claimant was classed as a nine hour driver which meant he could be planned up to a maximum of ten hours[1]. The claimant had an unblemished work record and a good working relationship with his managers save for those matters he now complains of in these proceedings.

36. The findings of fact in relation to the disability are as follows.

37. In August 2017 the claimant developed significant pain and very limited movement in his right shoulder and arm. By November 2017 he was unable to lift the arm at all and had limited rotation. There was an Occupational Health report on 13 November 2017 which relayed that the claimant displayed functional restriction within his right upper limb and had minimal

[1] This was confirmed by Ms Price when she gave evidence

physical capacity to do his role. On 23 November 2017 the claimant funded a private MRI scan and was referred for physiotherapy.

38. The claimant was invited to a stage one capability meeting on 23 January 2018. The note of the meeting records he had lost use of his right arm and could not lift his arm or shoulder. On 6 February 2018 in a letter from the claimant's GP to Mr Kulkarni, who was a Consultant Orthopaedic Surgeon, it was recorded that the claimant had seen the GP that day and had been referred for injections into his spine but on attending that appointment the radiographer had observed there was no movement whatsoever in his shoulder and that he needed to see a specialist.

39. The second Occupational Health report was on 8 February 2018 and recorded that the claimant had no power in his right arm at all and was in significant pain, taking co-codamol, amitriptyline and ibuprofen, and at that stage the opinion was that there was spinal stenosis.

40. The claimant saw Mr Kulkarni on a private basis on 19 February 2018 and he recorded in a report before the Tribunal that the claimant could not use his shoulder for anything at all, he had almost no movement and he was struggling with day-to-day activities. This remained the case and recorded at a home visit on 21 February 2018. A further MRI scan took place on 22 February 2018. The report from that scan said that the results were highly suggestive of denervation and said that the diagnosis was either Parsonage Turner Syndrome or possibly inflammatory myositis.

41. On 16 March 2018 there was an email from a Dr Thomas to Mr Kulkarni's secretary. This recorded that the claimant's pain had eased but he had wasting and marked weakness of his shoulder muscles and he had been examined on that basis. There was obvious wasting of the deltoid and spinate muscles. The conclusion was a severe denervation of C5 with again possibilities of Parsonage Turner Syndrome or C5 radiculopathy.

42. It was put to the claimant that there had been no follow-up diagnosis by Mr Kulkarni of Parsonage Turner Syndrome as there was no letter or medical evidence in the bundle from Mr Kulkarni at the contemporaneous time confirming that he had gone back to see Mr Kulkarni.

43. The Tribunal noted in the claimant's timeline produced at the time (and referenced in one of the review meetings with his line manager Mr Samuels) that the claimant had gone back to see Mr Kulkarni on 19 March 2018 and he also made reference to this at a later capability meeting with Mr King on 21 March 2018. In those notes it records that the claimant told Mr King that he had been back to an appointment with Mr Kulkarni on 19 March 2018 "to piece together the MRIs and the nerve conductors", and at that point the Parsonage Turner Syndrome was diagnosed. In light of these corroborative documents we find that the claimant did see Mr Kulkarni on 19 March 2018 and was diagnosed with Parsonage Turner Syndrome by the consultant.

44. On 13 April 2018 there was a stage two capability hearing with Mr Cullen. The notes record that in the previous two months the function had gone from "nothing to much better" and the pain had reduced from "8-12 to 1-2."

45. On 30 April 2018 the Occupational Health referral also records that the claimant had been off work with Parsonage Turner Syndrome.

46. An Occupational Health report of 2 May 2018 recorded the claimant's range of movement in his right arm and shoulder to be “grossly restricted.” No pain relief was needed and otherwise the claimant was fit and well and had started to walk the dog. He was only able to move his right arm from the elbow down, and it recorded that the deltoid muscle was completely wasted. The claimant had been doing exercises in the gym, was finding putting on socks difficult, and he was able to do small amounts of cooking.

47. On 2 October 2018 in the return to work notes it was recorded that there was an 80% range in motion in the claimant’s right arm but it was still weak, and that he needed to continue to avoid cage stores, George (which is a reference to the clothing range of the respondent) and curtains (a reference to curtains on trailers which were very heavy plastic material which needed to be moved across from raising an arm above shoulder height). Mr Samuels recorded that an email would be sent to Planning and the Duty Managers as regards the type of work that the claimant could and could not do.

48. The next Occupational Health report was 11 January 2019. It recorded that most muscles had returned to normal, but the deltoid muscle was still not performing well. Certain movements had much reduced strength in the right arm. The claimant had recovered remarkably quickly but the deltoid remained relatively inefficient, and it was advised the restrictions needed to continue with the shoulder still being described as “vulnerable”.

49. A review on 15 April 2019 recorded that all the restrictions were still required.

50. The next Occupational Health report was 21 October 2019 and recorded the claimant had a good level of function, but had difficulty performing overhead activities and had a functional restriction with his right shoulder and any activities involving actual rotation.

51. There was a review with Mr Samuels on 27 November 2019 and 23 May 2020 where restrictions continued. In the May 2020 review the claimant said he still had no muscle growth but he was stronger.

52. There was a return to work review in December 2020 after the claimant had had some time off with the same issue, and on 30 January 2021 again the review records restrictions as needing to continue.

53. The Tribunal had sight of a letter from Mr Chambler, Consultant Orthopaedic Surgeon dated 20 January 2023. After the respondent confirmed they contested disability the claimant sought a private report to confirm his diagnosis of Parsonage Turner Syndrome. Mr Chambler confirmed he suffered brachial neuritis (PTS) under the care of Mr Kulkarni and the diagnosis had been confirmed with MRI and EMG studies. He reported that:

- the claimant could undertake the majority of wishful day-to-day activities but he still had difficultly with isolated lifting of certain objects and with personal hygiene;

- he enjoyed a very healthy lifestyle competing at CrossFit and undertaking martial arts and gym use and mountain biking. All these activities initially had to be curtailed but he had slowly returned without adaptation to certain aspects of these recreational pursuit;

- the claimant had adapted some of his CrossFit exercises;

- He further stated:

"*I think overall Mr Bridges has engaged well with his physiotherapy in terms of the recovery from his Parsonage Turner Syndrome which diagnosis was confirmed in 2017. He appreciates that it is likely that he has plateaued in terms of his recovery and he will need to maintain his adaptations around his lifestyle to continue employment and his enjoyment of some of the recreational pursuits that he has managed to return to."*

The report concluded "no further treatment will benefit his recovery".

54. We had regard to the impact statement provided by the claimant and find as follows.

55. The position as of 10 October 2022 is that the claimant has no front or rear active deltoid muscle on his right, scapular weakness and his outer rotator muscle is inactive. The nerve damage has resulted in loss of nerve and muscle activity to his right shoulder and arm.

56. It was suggested that the claimant had not provided information on his day-to-day activities in terms of how they had changed from the initial diagnosis and onwards. The claimant's impact statement was written in some degree in the past tense. He talks about the initial diagnosis (in the period November 2017 - February 2018) and said that he had limited strength with being unable to lift and pour a kettle with his right arm, unable to wash himself with his right arm, shave his head or face, unable to lift pans of food and could not ride a bicycle. He had to give up his social activities of CrossFit training and kayaking. He says he has not been able to return to these activities although he had attempted, and he talks about his limits on his activities at work. The impact statement says that the effects have not stopped, and the claimant has not experienced any further physical improvement from the stage he reached two years ago (so as of October 2020). He continues to perform physiotherapy exercises to try and keep his current strength and mobility. He still has no strength is his right shoulder

57. We have also had regard to the claimant's witness statement. At paragraph 6, the claimant (prior to the onset of his impairment) had been an extremely fit and active individual, taking part in CrossFit, gym and many other physical activities, maintaining his fitness to a high level. His evidence under cross examination (which we accepted) was that he was able to put on his socks, but he still finds it very difficult. He cannot lift even empty pans with his right arm. He cannot put things in the oven if this requires two

hands. He has difficulty lifting objects. He did try cycling but he was unable to manage it, and he has not returned to cycling or kayaking.

58. In respect of how he walks his dog, he has made adaptions. Most of the time he goes out with his wife but if he does go alone he will go when it is quiet and he feels able to control the dog with his left arm and he is unable to do so with his right arm. He is still unable to lift a kettle with his right arm and struggles with clothing that requires to be put on overhead due to the extreme weakness in his right arm.

Events from May 2018

59. The claimant returned to work after his long term absence on 30 May 2018 after having taken two driving tests – the first of which he did not pass. Occupational Health had recommended a risk assessment. We have not had sight of that risk assessment. The respondent's reasonable adjustments policy provides that a reasonable adjustments assessment form should have been completed. None of the witnesses for the respondent had any knowledge about that form or the policy itself. Adjustments were put in place for the claimant, albeit they may not have been recorded in the form. They certainly were recorded in the Occupational Health reports and in Mr Samuels' notes.

Respondent's policies

60. We have had regard to a number of policies in the bundle during these proceedings.

Grievance Procedure - Distribution

61. This provided as follows:

Raising grievances Informally

Most grievances can be resolved quickly and informally through discussion with a Manager… If this does not resolve the issue, the colleague should follow the formal procedure below.

Formal Written Grievances

If the grievance cannot be resolved informally, the colleague should put it in writing and submit it to their Manager, indicating that it is a formal grievance. If the grievance concerns their Manager, they may submit it instead to the People Manager or an alternative manager.

And

A grievance meeting will normally be arranged within five days of receiving a written grievance. The purpose of a grievance meeting, is to enable the colleague to explain their grievance and how they think it should be resolved, and to assist in reaching a decision based on the available evidence and the representations made.

A written outcome will be provided, usually within five days of the final grievance meeting, to inform the colleague of the outcome of the grievance and any further action to be taken to resolve the grievance. The colleague will also have right of appeal. Where appropriate, a meeting will be held to give this information in person

Appeals

If the grievance has not been resolved to the colleague's satisfaction, they may appeal in writing to the General Manager, stating the full grounds of appeal, within seven days of the date on which the decision was sent or given.

An appeal meeting will be held, normally within five days of receipt of the written appeal. This will be dealt with impartially by a Manager who has not previously been involved in the case (although they may ask anyone previously involved to be present).

Confirmation of the final decision will be given in writing, usually within five days of the appeal hearing. This is the end of the procedure and there is no further right of appeal.

If it is not possible to comply with any of the time limits set out above, then the colleague will be informed about the delay and the reasons for it.

Grievance Procedure – Retail

62. This policy was admitted on 26 April 2023 (see above). This policy did not apply to the claimant as he worked in Distribution. This policy applied to all retail, home office and salaried workers. Under the heading "Ex colleague grievance", this was described as an issue of concern raised by a former colleague. It went on to say that they should normally only be heard if received within three months of the colleagues end date. Grievances after three months may be heard, depending on the seriousness of the grievance, at the business partners discretion. The outcome was final and there was no right of appeal.

Capability Policy – Distribution

63. This provided a definition of capability as *" capability is when the colleague takes reasonable care but events outside of his / her control affect their performance. Under these circumstances it would not be appropriate to invoke the disciplinary procedure".*

64. It further provided that if a colleague was identified as having a health or medical issue then this is referred (sic) to in the Long term Sickness and Ill Health Capability section of the Absence policy. This is reinforced in the section headed "Providing Support" which states that issues with achieving performance levels that are related to a return to work following long-term sickness absence where a colleague has an existing health condition, should be managed under the Long-Term Sickness and Ill-Health Capability section of the Absence policy.

65. The capability policy provides that an informal resolution was always the preferred option to support and reach agreement on performance. If that

was not possible a more formal approach was needed and in those circumstances the policy provided for a series of meetings with the employee and the trade union representative and management. The policy provided there should be three meetings and if no improvement was made, it would proceed to a final review where it would be assessed whether the employee had reached and maintained their performance targets. The final outcome would be a capability meeting/final meeting which had to take place between the employee, trade union steward and official, general manager, people manager and if required a continuous improvement manager. The policy provided that the meeting had to be adjourned to determine the outcome and if the general manager believed the employee was unable to meet the required productivity team targets following all processes outlined above they may consider dismissal on the grounds of capability. There was also a right of appeal.

66. We find at all material times for reasons we set out below, that the claimant was **not** managed under the long-term sickness and ill-health capability section of the absence policy, instead he was managed under the capability policy that we referred to in this section.

Reasonable Adjustments Policy

67. This provided:

What's the purpose of a reasonable adjustment?

The purpose is to remove any substantial disadvantage suffered in the workplace to ensure that disabled colleagues or applicants feel comfortable in the work environment, their health isn't at risk, and they're able to perform to the best of their ability.

What is reasonable?

An adjustment is likely to be considered "reasonable" if it's effective in reducing disadvantage arising from the disability, if it's practical and feasible, if it doesn't cause excessive difficulties to the organisation (costs or other impact), and if it doesn't breach the health and safety of the individual or others. Cost alone should not be deemed a justifiable reason for failing to make a reasonable adjustment.

Absence and Sickness Policy

68. Within the Absence and Sickness Policy was a section titled "Long Term Sickness Absence and Ill health Capability". The purpose of the policy was described as:

a procedure appropriate to colleagues who are defined as long term sick, which is a period lasting three weeks or longer.

Under "Dismissal" it provided that if the colleagues' sickness absence is likely to continue for a period of time without a return to work date or the colleague is unable to complete their duties and it is not possible to make sufficient adjustment to the colleagues role that would enable their return, dismissal on the grounds of ill health capability may be considered.

69. The relevant section according to Ms Price's amended witness statement was the following section:

Dismissal – Ill Health Capability

If the colleague sickness absence is likely to continue for a period of time, without a return to work date or the colleague is unable to complete their duties and it is not possible to make adjustments to the colleagues role that would enable their return, dismissal on the grounds of ill-health capability may be considered.

70. The focus of this policy appears to be on long term sickness absence which did not apply to the claimant as he was not on long term absence.

71. In appendix 3, there is a section headed "managing colleagues with disabilities". Under the heading "reasonable adjustments" it provides that the adjustment process must be discussed with the colleague, in addition to any medical evidence from occupational health assessment or GP's. The respondent should consider any changes to the working environment which may facilitate colleagues return to work. Any adjustment should be confirmed in writing with the review date agreed. There is nothing in this policy that indicates adjustments may only be short term and that any long term adjustments would result in summary dismissal.

Driver Planning

72. We turn now to what we have heard about the procedures in place at the distribution centre for planning the drivers' deliveries. The respondent has in the region of 140 drivers and on a typical day there may be between 50 and 80 drivers in work. Until January 2022 the planning of the runs (the deliveries) took place on site conducted by two planners who were experienced and had been in the role for some time. The respondent had led no evidence on how the planning arrangements worked within their operation, other than to refer to the system used, but they had not explained to the Tribunal in their statements any of the facts in the paragraph below. This evidence was elicited from questions put to the witnesses by the claimant, Counsel or the Tribunal.

73. The planners had an Excel spreadsheet of drivers on restricted duties. As of January 2022 there were approximately 22 drivers on restricted duties. A plan would be produced by the planners. This would then go to the shift manager to check and the drivers could also check it as it was produced the day before. The plan often (sometimes daily) had to be what was called "rolled over". This would be due to traffic conditions or conditions at the store resulting in the drivers being delayed, so plans would be frequently changed. The planners also planned the trailers that would be attached to the units driven by the drivers. The shifts started at 12.30am. Drivers could do up to two runs per shift. The claimant was a nine hour driver and he could be planned to go to ten hours if necessary.

74. Out of 59 stores there were 11 which the claimant could not deliver to because they were cage stores, and there were a number of other stores where the restrictions needed to be considered, such as he would need to

either deliver onto a bay, he would not be able to undertake curtains, and he would also require electric PPT.

75. We now turn to the events complained of regarding the deliveries the claimant said the respondent either allocated him to do (and he had to do) or allocated him to do and he had to effectively argue not to do. These are relied on both in respect of the section 15, S20/21 and S26 claims.

76. We accepted the claimant's evidence about these deliveries. His account was not challenged by the respondent and the claimant gave a plausible account about what had happened.

77. It was put to the claimant that he was unreasonably offended at having to disclose his disability to colleagues on the premise that if it had been a bowel or shoulder problem, the embarrassment could be understood, but what was embarrassing about a shoulder condition? (Counsel persistently refereed to the claimant's disability as a shoulder injury / condition throughout the hearing). The claimant told the Tribunal to all his colleagues he was a normal delivery driver. He had been proud of his physical capabilities and strength before he developed his disability. He should not have to disclose this personal information to anyone around him at work when agreed adjustments had not been made.

78. On 2 July 2018 he was planned to deliver to Paignton which is a cage store. As recorded above it had been agreed the claimant should not be sent to a cage store. The claimant had to disclose his disability to the clerk and explain why he could not deliver. When he did so, the delivery was changed. This was supported by a diary entry in the claimant's diary.

79. On 25 July 2018 the claimant was sent to Pershore. This is a very difficult store for the claimant as the loading bay is approximately six inches higher than the trailer necessitating the trailer having to be raised which meant the cages had to be pushed uphill. The claimant was told he could not refuse the delivery and arrangements would be in place for staff to do the duties when he arrived. No such agreement was in place and he had to explain to people at the store about his impairment, which caused him embarrassment, humiliation and distress. This occurred again on 11 November 2018 at Pershore.

80. On 11 December 2018 the claimant felt forced to deliver to Pershore. On this occasion the cage lift was inoperative and the depot had been pre notified. To find a workaround the claimant had to explain in detail his disability to multiple staff. The claimant experienced immense discomfort and embarrassment and felt demeaned as he had to stand by and watch colleagues pushing the cages whilst he was unable to assist.

81. The next incident after that was on 11 October 2019 (so some ten months later) at the Coryton store in Cardiff. This matter was also relied upon by the claimant as an act of direct discrimination.

82. The claimant had been planned to deliver to Frome, but it was changed to Coryton. He asked if a telephone call could be made to ensure that the electric PPT was available. On his arrival the forklift truck driver had an

electric PPT ready for the claimant but a warehouse colleague (whose identity we do not know) intervened and said that the claimant could not use the electric PPT and had to use the manual. The claimant had to explain why he could not use the manual truck to the extent the claimant felt he had to disclose his disability. This individual then telephoned someone called Mr Seal at the respondent's depot and said he had a driver *"claiming to be disabled"* and said *"don't send disabled drivers here again as I need the PPT. This driver is causing problems".* The claimant was left feeling shaken, tearful, completely worthless and unvalued as a member of staff and on his return he reported it in writing. This was supported by a witness statement by Mr Seal, who corroborated the claimant's account.

83. The only evidence that the respondent had led on this incident was in Mr King's statement in which he said that he was aware that disciplinary proceedings had followed, the colleague had been dismissed but the claimant had not been told about the decision due to "GDPR". Mr King told the Tribunal when asked supplementary questions that he was aware that Mr Cullen informed the claimant about an ongoing process regarding the other colleague but he was not allowed to tell details other than it was being dealt with. This is the first time this evidence had been raised. There were limited documents in the bundle mainly emails between some of the managers at the Chepstow store. Mr Gilmour, the general Manager had sent the claimant's and Mr Seal's witness statement by email on 17 October 2019. It was unclear to whom it had been sent.

84. It had been put to the claimant under cross examination by counsel that Mr Cullen (who was a manager at the depot) had informed the claimant that "it had been dealt with". (This was one of a number of occasions where the respondent sought to advance new evidence to the claimant for the first time in cross examination. See paragraphs 24-27 above). The claimant denied that he had ever been so informed by Mr Cullen.

85. Mr King was unable to say either when he had had that conversation with Mr Cullen or when Mr Cullen had allegedly told the claimant, and he also told the Tribunal that there had been correspondence between Mr Gilmour (who was the senior manager) and the manager at Coryton about this event. None of this had been disclosed to the claimant. We have not made any further enquiries about that, but that correspondence was not before the Tribunal.

86. The claimant accepted he had not raised a formal grievance or followed up the lack of response by the respondent to this incident. He concluded it was not followed up or dealt with as the respondent did not care about the incident and that any other disability issues he raised would not be considered or dealt with. He told the Tribunal he expected that the written statement he submitted would have been followed up but it never was and this was why he did not raise matters that happened after in writing as nothing had been done on this occasion.

87. We find that the respondent did not act upon this incident. Had they done so, given it had been pleaded as an act of direct discrimination, there would have been corroborating documents in the bundle to show what action had been taken. They could have been redacted to protect the individual

allegedly dismissed identity. Other than some emails showing the claimant and Mr Seal's statements were sent by email to a person unknown, there was nothing to show this very serious matter had been properly dealt with. We find that Mr Cullen did not inform the claimant that the matter had been dealt with. Mr King's evidence was hearsay evidence, Mr Cullen had not been called to deal with this matter himself neither had any documents been disclosed to support this account. It was raised for the first time at the Tribunal, it had not been included in his witness statement. The claimant had been consistent in his contention about this incident. He had pleaded it in the claim and he had thought it sufficiently serious to put it in writing. We also accepted that his experience in regards to this incident led him to reasonably conclude that even if he put complaints in writing they would not be actioned or investigated.

88. We turn now to the Tiger Bay delivery on 4 March 2021. The claimant was planned to do this run which was an error as it had been agreed to be a reasonable adjustment not to send him to stores where he was required to use a manual pump truck. When the claimant raised this with the clerk he was made to feel like it was an inconvenience to allocate him to an alternative delivery and had to "fight for a different delivery run". This was refused initially as the clerk said the only limitation he was aware of was "no cages". This required the claimant to go into details about his physical limitations. Eventually he was given a different delivery.

89. On 7 October 2021 the claimant was forced to complete a double run to two stores resulting in a 14 hour shift. The claimant was told in an abrasive that it had been kept for the claimant due to him being on light duties and he was made to feel guilty and that his disability was being accommodated and he should be grateful. It was put to the claimant that he was down to do overtime on that date (no evidence had been led by the respondent's witnesses on this complaint or that the claimant had been down to do overtime). The claimant disputed this and his working hours were corroborated by Ms Price (see above). Therefore the double run was outside of his working time. The claimant verbally complained to a manager about the incident. He was told by the clerk that the run had been kept for him even though other drivers could have done it, as he was on light duties. We accepted the claimant's evidence that he was not being overly sensitive because of the way in which he was told this information by the person in question, in that the manner was abrasive.

90. On 2 December 2021 the claimant was planned to deliver to Lutterworth, which was within his adjusted stores but this was changed to Paignton which was outside of his agreed adjustments. The claimant had to raise the matter with the clerk and was offered Gillingham, also outside of his agreed adjustments. The clerk called the claimant's run out whilst stood at the top of the stairs and the claimant was required again to disclose his physical limitations in front of about seven drivers. The claimant experienced immense feelings of humiliation and degradation. After a hostile attitude the run was changed.

91. On 18 January 2022, the claimant was originally planned to deliver to Lutterworth but it was changed to Gloucester and Wincanton with no explanation. He was informed by the clerk that he had telephoned and

checked with Wincanton and the load will be on a bay irrespective of the trailer being a curtain sider. When the claimant arrived at Wincanton staff told the claimant no such telephone call had been received and this required the claimant to disclose his physical restrictions to multiple other staff to complete the delivery. This was an extremely stressful experience for the claimant both embarrassing and demeaning. He raised the issue directly with the clerk who appeared unconcerned and gave no apology or explanation.

92. On 1 March 2022, the claimant was planned to deliver to a caged store (Caldicot) outside of his restricted duties.

93. In some cases the above incidents were supported by diary entries. The claimant told the Tribunal he had lost some of his diaries. It was put to the claimant in cross examination that the fact that some of them were not recorded in the diaries undermined or made less credible the entries that he did record. We found the claimant to be a consistent and credible witness with a good recollection of events, and it was plausible (given the detail that he described and the fact that some of the events were clearly distressing) that he would have been able to remember and recount those events to us.

94. It was put to the claimant that when these things happened he could have simply refused to complete the delivery and returned to depot. This was another occasion where Counsel sought to cross examine the claimant on a position which was unsupported by any evidence from the respondent to support that such a practice would have been acceptable. The claimant disputed he could have turned around back to depot. He explained that on arrival to a depot the keys to the vehicle are surrendered to security. We found the suggestion that the claimant, having driven a HGV lorry with a trailer either full of goods or to collect goods, in some cases distances of hundreds of miles could have turned around and driven back to be a wholly implausible suggestion to make particularly in the absence of any evidence from the respondent to this effect.

95. The respondent's witness statement did not deal with these events at all. They did not dispute that they had happened. Ms Price explained that in her original statement that the planning team was responsible for sorting plans for over 80 drivers per day, and on occasions errors would occur. Managers had always told the drivers if they were planned to do job and they could not do it they should tell the manager and they would change it.

96. On occasions when the claimant raised these events with the managers changes were made.

97. In relation to the claimant's case that there was a deliberate campaign to allocate him to runs outside his restricted duties, we do not find there was any such campaign. There was no evidence before the Tribunal that there was an orchestrated campaign to deliberately allocate the claimant runs he was unable to do. The claimant accepted that when he asked a manager for runs to be changed, they were changed.

<u>Events in 2022</u>

98. We are going to turn now to events in 2022.

99. The claimant had a review meeting with Mr Samuels on 29 January 2022. This was the first review meeting since 30 January 2021.

100. No evidence was led by the respondent as to why, but Ms Price told the Tribunal (not in her witness statement but under questions) that she had been tasked as part of her KRAs (key responsibility areas) in early 2022 to review all drivers under restrictions by Mr Cullen and Mr King. Ms Price had received training in 2012 when she was appointed. We do not know what that training was. She referred to annual online update training, again we do not know what the training consisted of. Ms Price told the Tribunal that policies had not changed much since 2012. She was not familiar at all with the respondent's reasonable adjustments policy.

101. In February 2022 the claimant had been informed by Mr Samuels that he was going to be having an Occupational Health assessment. He had planned leave in February, authorised by Ms Price herself. On 4 February 2022, the claimant informed the Occupational Health provider he would be unable to attend an appointment on 21 February 2022, and he sent a copies of the February and March rotas. On 7 February 2022, Occupational Health informed the claimant that they were unable to make changes and that he had to go via his line manager.

102. There appears to have been a further appointment arranged on 23 February 2023 whilst the claimant would still be on leave. On this occasion Occupational Health actually phoned the claimant. The claimant answered but informed them he would not be able to engage in the appointment as he was on leave with his family.

103. The respondent's occupational health services were run by a provider called PAM. The claimant told the Tribunal that he understood that management made contact with PAM and they would then make the appointments. This is corroborated by the referral forms to occupational health we saw in the bundle.

104. The claimant then emailed the People Team after this (this must have been after 25 February 2022) to raise a concern that he was repeatedly being made appointments while he was on annual leave. He told them that he was feeling harassed by this behaviour. All three appointments so far had been made, including a future appointment on 18 March 2022, either when the claimant was on holiday or on rest days, despite having provided his rotas not just to the Occupational Health providers but to Ms Price on 25 February 2022. No reply was sent to that email by the People Team (HR team). We also note that there was no reference in the emails by the claimant to an upcoming stage one capability meeting, and we have taken this into account when assessment our findings of fact in respect of the next matter that we turn to deal with.

105. One of the claimant's S15 complaints was regarding the manner in which he was informed he would be required to attend a capability meeting. Ms Price's original witness statement said that on 14 February 2022, whilst in the transport office she informed the claimant of an upcoming stage one

capability meeting and there was no-one in earshot. In her amended witness statement, Ms Price added evidence not in the exchanged statement. this stated that the week before the 14 February 2022, she had told the claimant in a private office she would be holding a stage one capability meeting with him on 14 February 2022. Ms Price said the claimant asked *"why have got to go through this, I've been through it all before"* and she explained the depot had to review colleagues and restrictions and make sure it was up-to-date with processes in terms of capability. Ms Price then says that on 14 February 2022 whilst in the transport office with the claimant she called him to her desk and *"quietly informed him that the meeting planned for that day had been cancelled due to his union representative being called away on urgent business"*. She went on to say that as he was going on holiday she would rearrange the meeting for his first day back. The claimant asked, *"what meeting"* and Ms Price said, *"the one I informed you about last week"* to which the claimant said, "*which meeting*" and Ms Price "*said quietly the capability meeting"* and the claimant said *"oh that meeting."*

106. The claimant was categoric in disputing this account and said the first time he had been told about the capability meeting was on 14 February 2022 in the Transport office in ear shot of colleagues. We saw a text message the claimant had sent his union representative on 14 February 2022. It stated:

"*came in this morning and Nicola informed me that on the 24 February having stage one capability meeting, which will probably be postponed to later as I haven't had occupational health meeting yet, not sure what they're hoping to gain from it, Nicola did say I can't stay on light duties indefinitely, but my condition is indefinite, the only thing I don't do now is cages and pulling curtains, which we don't do massive amount of anyway I did say if I could do cages I'd be working for Tesco. Can they actually force me out if I can't do cages or curtains?*

The union official replied:

"hi mate technically yes they could, but see what O/H have to say. I'm fairly sure they should make exceptions for you and that is something we will challenge".

107. We accepted the claimant's evidence about this event. If the claimant had been told about a capability meeting a week earlier, in a private office, we think it is plausible he would have referenced this in his messages about the Occupational Health appointments given the significance of the meeting (see above). Moreover, the claimant's account as to where he had been told about the meeting was corroborated by one of the respondent's witnesses. Mr Vickery's witness statement stated *"I spoke to Nicola as part of the grievance investigation. She explained that she did inform the claimant about the initial meeting in the office, but that she was aware that there was no one else in earshot of the conversation."* We noted that Mr Vickery said in the office not a private office. If the meeting had taken place in private office as later claimed by Ms Price why would Mr Vickery say that

she was aware there was no one else in earshot of the conversation. Further, the text message the claimant sent to his union representative around that time makes no mention of an earlier discussion about a capability meeting. We find he would have been highly likely to have mentioned this to his union representative had he been made aware the week before.

108. Ms Price's evidence about this incident was not reliable. Her evidence had to be changed during the proceedings and there was no reasonable or plausible reason why this was necessary. If the solicitor's had exchanged an incorrect statement we would have expected to have seen evidence as to how this state of affairs had come about and why. Her amended account was not corroborated by the other evidence least of all Mr Vickery's.

109. With regard to the circumstances in which the claimant was informed about having to attend the stage one capability meeting, we find that the claimant was told about that in the open office and there was a potential that that could have been overheard by colleagues that were present at the time.

110. No letter was sent to the claimant in advance of the stage one capability meeting. We note that this was not set out as a necessary step in the policy but it had happened on other occasions. Ms Price told the Tribunal that the reason no letter was sent either before or after the stage one capability meeting was that she had checked with someone called Jodie Lloyd (who was the HR Business Partner) and she was informed she did not need to do this.

111. We turn now to our findings about policies applied by the respondent in this process. Until the hearing, it had been the respondent's case, as set out in Mr Vickery's statement, that the capability policy was followed, and indeed Mr Vickery upheld in his grievance outcome that this the right procedure (the policy on page 127 of the bundle). The claimant's objections throughout that process and the history of this claim was that the wrong policy had been followed. In his witness statement he set out why this was the wrong policy and that the respondent bypassed the Absence and Sickness Policy instead treating him as a worker that "can do but is consistently underachieving" or "the colleague identified as won't do"[2]. His medical problem had clearly been identified but in breach of the policy he was treated as "won't do" rather than can't do".

112. The respondent then sought to advance a claim, halfway through the hearing and in contradiction of their own witness statements and the contemporaneous documents that they had intended to follow the Absence and Sickness Policy (see paragraphs 69-71). The respondent's case to date had been based on them correctly following the capability policy.

113. Other than what Ms Price said above about being tasked to review all drivers on restrictions, we heard no evidence as to why it was decided to proceed to the formal stage of the capability policy. This was not in accordance with the policy that provided for an informal resolution.

[2] This was incorrect as a colleague whose performance was "won't do" was to be managed under the disciplinary policy

114. The claimant proceeded to attend what was called a stage one capability meeting on 25 February 2022, as provided in the Capability Policy. We had regard to the handwritten notes as well as some typed notes the claimant had prepared. This went ahead without an Occupational Health report. We set out the relevant sections of the notice follows;

115. Ms Price informed the claimant of the '*capabilities process, stage I which is held to determine what we can do to support you to get you back to full duties and to agree a date when you can return to full duties. If this can't be agreed at stage I, you will go to stage II capability meeting, you will look at possible dates to return to full duties and alternative duties if you can't return to full duties, if you can't agree during this process it may result in summary dismissal due to ill-health.'*

116. This reference to summarily dismissing the claimant at the stage 2 capability meeting was not in accordance with the procedure set out under the policy itself (see above). The policy envisaged four meetings before a dismissal meeting and there is no suggestion in the policy that a colleague could be summarily dismissed.

117. Ms Price then outlined the claimant's restrictions and asked him to explain his shoulder injury. The claimant corrected her that it was not an injury but a disability. He told her he had been diagnosed with Parsonage Turner Syndrome to which he had recovered to a certain degree but some muscles had not recovered and would unlikely to ever recover.

118. Ms Price twice asked the claimant if he was "*registered as having a disability*" and the claimant was offended by those comments. He interpreted that as Ms Price implying there was some sort of government register of disabled persons which he knew plainly was not the case. Ms Price explained under cross examination that she was asking the question to enquire if was registered on the respondent's system as disabled. She had reviewed all of his documents before the meeting. She had told the Tribunal there was some sort of marker on the personnel files of the respondent if someone has a disability, and this was not present on the claimant's records. None of this had been disclosed (despite a request from the claimant) nor was it in the bundle.

119. Ms Price put to the claimant that *"long term you won't return to full duties?"*. The claimant replied that "*as this doesn't affect my life at the moment, my driving and carry out 90% of my duties with no cost to the company"* he did not see [returning to full duties] as a risk worth talking and doubted that occupational health would support such a return.

120. Ms Price adjourned the meeting and upon her return told the claimant:

"the purpose of restrictions is to support you back to full duties, it is not intended as a long-term restriction, as a driver you're expected to do full duties, as I explained, the purpose of the stage I capability meeting is to agree a date for you to return to full duties, you'll remain on current restrictions during this process, as you were not able to agree a date, I'm referring you to a S2C [Stage 2 Capability) meeting, which will be held with Mike King, operations manager,

MK will agree a time and date with you probably after your occy health appointment"

121. The claimant told the Tribunal that he knew he would never be able to give a date when he would be able to return to full duties as this in effect would require him to give a date he would no longer be disabled

122. We find that the claimant reasonably believed that as he could never return to full duties that he was going to be dismissed at the stage two capability meeting. He was told as much by Ms Price. It was suggested that Ms Price's reference to alternative duties at the beginning of the meeting and the words "as a driver" suggested that it would have been reasonable for the claimant to have understood that alternative duties might be considered before dismissal. We have no hesitation in rejecting this as a finding given what Ms Price told the claimant set out above.

123. There was no follow-up letter of the stage one hearing confirming discussions and actions agreed contrary to policy, again because apparently Ms Lloyd told Ms Price she did not need to do that. This was contrary to the respondent's capability policy.

124. The Tribunal saw notes of other capability meetings conducted by Ms Price with other colleagues around this time. We accept that she was reviewing all other drivers on restricted duties at that time.

Claimant's grievance

125. The claimant submitted a grievance on 3 March 2022. The first sentence stated the letter should be accepted as a formal grievance. In summary the grievance complained about the following matters:

On or around 16/02/22 I was verbally informed by Nicola Price that providing I had received an Occupational Health telephone call prior, I would be having a capability meeting on 24/02/22. The Occupational Health call was planned for a day I was on annual leave, so was not completed. (I was on leave from work 17/02/22 - 23/02/22). When I returned to work on 24/02/22, I was given verbal notice (by Nicola Price) that the Capability meeting would take place on the following day (25/02/22), even though the Occupational Health call had not been completed - my Union representative was not available for an interview on 24/02/22.

On 25/02/22 I attended a Capability Stage 1 meeting - minutes were taken of the proceedings. I will refer to these minutes within this grievance letter. Prior to the capability meeting being raised with me, I believed that I was working within agreed reasonable adjustments that were set in place because of my shoulder impairment. These have been in place for almost four years - since I was diagnosed with Parsonage Turner Syndrome. During this time I have increased the duties I am able to carry out, volunteering my progress to my line manager. It is my view that duties I cannot and have been agreed that I do not undertake, fall under the definition of Reasonable Adjustment, as per the Equality Act of 2010.

I was shocked when during the capability meeting there was a definite focus on my provision of a date when I could return to "full duties". I have a physical

disability which means that I may never be able to return to "full duties". My condition was referred to as "ill health", and NOT as a long-term impairment. I am NOT in ill health.

Multiple times reference was made as to whether I was "registered as having a disability" - There is NO such register of people who have a disability - I found this line of questioning, language and terminology to be derogatory and outdated. This made me feel belittled and as if ASDA viewed me as less than, and did not believe my condition was genuine, despite the medical evidence previously supplied. I tried to inform Nicola that under the Equality Act 2010, and as recognised and stated on company website Walmart One, a disability is a mental or physical impairment likely to last more than 12 months. It was again stated by Nicola that the purpose of the meeting was to agree a date for me to return to full duties. I explained that the parts of the job that my disability prevents me from doing is the opening and closing of curtains (only applicable on a minority of backhauls) and the movement of heavy cages (arises in only 9 stores covered by Chepstow depot). I have no issues with reverse logistics. I have also progressed from bay work only, to being able to deliver to all pallet stores, providing PPT is available. The actual driving of the vehicles poses no issues at all for me (Microlise data can confirm that I am an efficient and diligent driver).

126. The respondent's grievance policy says that within five days a grievance meeting should be arranged. On 7 March 2022 Mr King asked the claimant to come to the office and they had a discussion about the grievance. Mr King made a note dated 7 March 2022. He asked the claimant if it could be dealt with informally, and the claimant told him no. He asked if the grievance was about the ill health capability process or about the manager and how it was conducted. The note states "I informed him that the process is the guidelines we follow and not a grievance but a different matter if it is about the manager". Mr King told the Tribunal he had thought that it had been agreed that the claimant would go away and talk to his union representative and that he was waiting to hear back from the union.

127. We had sight of a diary entry made by the claimant on that date. This stated that Mr King had told the claimant it was not a grievance as it was procedure.

128. We also saw text messages from the claimant to his union representative on 7 March 2022. After telling the representative he had been called up to see Mr King, he sent a further text stating Mr King had asked for an informal chat about the grievance and that if the grievance was " *aimed Nicola that's fine but if it's aimed at the process then it's not a grievance as that is the process. "*

129. We find, because of text messages that the claimant sent after that meeting and also his diary entry, that Mr King was not waiting to hear anything from the claimant. The claimant had stood by his grievance and was expecting to hear from the respondent. He had told the Mr King he did not want the grievance to be informal.

130. On 15 March 2022 the claimant resigned. He sent a resignation letter dated 15 March 2023 which was brief, it gave no reason, but advised he was giving the two weeks notice required, with his last day being 3 April 2022.

131. The claimant's evidence for the reasons he resigned was as follows. After receiving no further response to his formal grievance and considering all of the occasions of discrimination, humiliation and inaction by the respondent, the claimant finally felt he could not cope with unfair and discriminatory behaviour and decided to resign. It is also relevant to note that he had secured employment with another employer following an interview on 14 March 2022.

132. We accepted the claimant's evidence about the reasons he resigned. We do not consider the reason he resigned to be related to the fact that he had secured employment. Whilst it may have played a part regarding the timing, all of the evidence corroborates that it was the respondent's conduct to the claimant, culminating in advising the claimant he could not bring his grievance, failing to adhere to the grievance procedure and address his grievance in a timely manner that was the last straw for the claimant.

133. Nothing had happened in terms of progressing the grievance until 16 March 2022.

134. The respondent had disclosed a file note purported to be written by Mr King on 14 March 2022. This recorded that he had caught up with the claimant following the conversation on 7 March 2022 and asked if he had made a decision about going ahead with the grievance or discussed it with his union representative. It recorded that the claimant told Mr King that his union representative was supposed to have told Mr King that the claimant wants to go ahead with the grievance as it was not happy he would be dismissed. [3] The note records that Mr King asked if the claimant was ok with the grievance being heard as an ex employee as was due to leave the company on 3 April 2022 and he said yes.

135. The problem with this note is that it is purported to be dated 14 March 2022 however the claimant did not submit his resignation until 15 March 2022. The references to the claimant being an ex employee must mean the note was written after he had resigned. For these reasons upon disclosure the claimant asserted that this note was a false note and an attempt to mislead the Tribunal. Mr King's explanation was that he had mis dated the note and the conversation actually took place on 16 March 2022.

136. On 16 March 2022 the claimant had sent a text message to a friend at 12:31 PM. He expressed incredulity about Mr King suggesting he had been waiting for the claimant to get back to him about the grievance and only approaching him after they had evidently received his resignation letter. He had also text his wife at 12.44pm in a similar vein.

137. We find that the conversation between Mr King and the claimant about his grievance took place on 16 March 2022 as corroborated by the

[3] This corroborates our finding that the claimant understood he was going to be dismissed at the Stage 2 capability meeting

claimant's text messages sent that afternoon and Mr King's admission the note was incorrectly dated. We also find that the only reason there was progress in respect of the grievance at that time was because the claimant had resigned and not because Mr King was waiting for the claimant or his union representative to get back to him. The claimant had told Mr King on 7 March 2022 that he did not wish for the grievance to be dealt with informally. He had submitted a formal written grievance. It is implausible that in these circumstances Mr King would understand that the claimant had to reconfirm his intentions and then wait a further 9 days to raise the matter again. He only did so, prompted by the resignation and realisation nothing had been done to progress the grievance.

138. There was a further document in the bundle which the claimant suggested had dubious provenance. This was a letter from Mr Vickery to the claimant inviting him to a grievance hearing. In the index to the bundle, although the letter was undated, it was described as dated 4 March 2022. The letter stated it was by hand and arranged the grievance hearing for 21 March at 11:30 AM. It stated for guidance on the grievance policy to refer to his colleague handbook. There was no reference in this letter to the grievance being managed under the ex-colleague grievance procedure which is unsurprising given that the grievance policy applicable to the claimant contained no such process.

139. The claimant's evidence was that he was not informed until 17 March 2022 that the grievance meeting would take place on 21 March 2022. This was corroborated by diary entry of the claimant of that date where he noted verbal notice of grievance hearing. Mr Vickery accepted under cross examination that the date of the letter of inviting the claimant to a grievance hearing was not 4 March 2022. Mr Vickery was unable to explain why the letter had erroneously been labelled as dated 4 March 2022 in disclosure, followed through in the index to bundle. He was also unable to explain the delay in between the receipt of the former grievance on 3 March 2022 and his acknowledging the grievance on 17 March 2022. He told the tribunal he been asked to hear the grievance as he was the appropriate line manager to do so.

140. The hearing took place on 21 March 2022. The claimant was accompanied by his trade union representative.

141. The claimant asked why he was being subjected to the capability process. Mr Vickery explained that all colleagues who were currently "*not fulfilling their contract*" as an LGV driver had been asked to attend the meeting. This was a reference to all drivers on restricted duties. He went on to say that once everything is exhausted with help and support through the mechanism we use i.e. occupational health and their reports this may lead to dismissal on ill-health grounds. Mr Vickery asked the claimant if he been told at the meeting with Ms Price whether he would be dismissed through ill-health capability. In reply, the claimant referenced the minutes of that meeting and said yes.

142. After the grievance hearing, Mr Vickery subsequently interviewed Ms Price. Mr Vickery's witness statement confirmed that Ms Price had explained that she did inform the Claimant about the initial meeting in the

office, but that she was aware that there was no one else in earshot of their conversation. He told the Tribunal that Ms Price had told him she was sure that no one could have overheard what she said to the claimant as she had asked Mr Samuel if he had heard anything. It was not explained why, if there was purported to be no one in earshot, why Ms Price would have needed to ask Mr Samuels if he had heard anything. Plainly he must have been in the vicinity if she felt she had to check with him. Ms Price recalled the meeting with Mr Vickery and there had been a note taker. These notes were not disclosed to the claimant nor were they in the bundle. Ms Price told the Tribunal she was never sent any notes to check of that meeting.

143. Mr Vickery was asked how he evaluated Ms Price's version of events in respect of where and how she informed the claimant he would be required to attend a stage 1 capability meeting, which contradicted the claimant's complaint it had been in earshot of colleagues. Mr Vickery told the Tribunal that he accepted Ms Price's version of events as *"he believes people are telling the truth."* If so, this did not explain therefore why he did not accept the claimant's version of events as the truth.

144. Mr Vickery was on annual leave for ten days. On 6 April 2022 he sent his decision letter to the claimant. The letter incorrectly stated that the grievance was upheld. Further, the claimant was told that as he was an ex colleague there was no right of appeal.

145. Mr Vickery's witness statement confirmed that as the claimant had resigned on 15 March 2022 his grievance had to be heard as an ex colleague grievance.

146. When Mr Vickery came to give his evidence he was asked by Counsel for the respondent which policy he had applied when hearing the claimant's grievance. He told the Tribunal he had applied to Retail Colleague grievance which provided for the ex colleague grievance procedure. He accepted this was an error on his part. He also told the Tribunal that despite what was in his exchanged witness statement (that he had concluded the depot had correctly followed its capability procedure quoting the capability policy set out at paragraphs 63-66 above), that he now wished to tell the Tribunal he meant to say the depot had correctly followed the Absence and Ill health policy, admitted on the first day of the hearing. We find that Mr Vickery at all material times considered that the respondent had correctly followed the capability policy, despite it being the wrong policy to apply to the claimant. He specifically quoted the capability policy in his outcome letter and witness statement and the about turn lacked any credibility.

147. Mr Vickery told the Tribunal he had concluded that no decisions had been made about the Claimant's continuing employment and the business was "merely looking to obtain up to date advice from Occupational Health (OH) at this stage, to establish whether this advice may have changed, as it was doing with all other HGV Drivers who were unable to carry out their full duties at that time. " We find that this was not a conclusion that any reasonable person could have reached for the reasons we have set out at paragraphs 115, 119, 120-122 above and it was an erroneous conclusion.

148. We find that Mr Vickery conducted an inadequate investigation into the grievance. Notes were taken but they were not checked with Ms Price and they appear to have been lost. There was no proper evaluation of the differing version of events in order to reach conclusions. Mr Vickery did not interview anyone else, even though Ms Price had told him that she had asked Mr Samuels if he had heard what had been said on 14 February, so evidently there were other people within earshot. He did not check CCTV evidence despite the claimant asking for it to verify that other people had been in earshot, he explained he did not need to as Ms Price was telling the truth. He did not deal with a number of the claimant's complaints. He concluded the correct capability policy had been followed when it had not and then changed his evidence during the hearing. He used the wrong grievance procedure. Whilst it had not been Mr Vickery's decision, Mr Vickery could not have completed the grievance in a timely manner as he was going on holiday. The letter contained important errors, the most significant one of which was he told the claimant his grievance had been upheld whereas it had not, and it erroneously said there was no right of appeal.

Exit interview

149. The claimant's last day at work was 1 April 2022. The claimant had understood that as there was an hour delay between the start of his shift and his first run that the exit interview would be taking place at that point. The claimant asserted that all managers ignored him for that hour when he was sitting in the open plan office waiting for what he thought was going to be his exit interview. He became very upset about this when giving his evidence. The interview eventually took place at the end of the 10 hour shift by another manager which unnecessarily extended the claimant's working day. The claimant maintained that the above matters works of bullying and victimisation by the respondent in retaliation for having raised the grievance. Ms Price told the Tribunal that the exit interview normally takes part at the end of the shift in order to ensure that keys and uniform etc. are handed back, and that the fact of the exit interview would not be written on the board. She also denied intentionally ignoring the claimant on that occasion.

150. We can understand why the claimant concluded his exit interview was going to be at the beginning of the shift. We also accepted how upsetting the claimant found this incident, but we do not find that this was a deliberate play on the part of any of the managers of the respondent. It was plainly an unfortunate and upsetting experience, but we have concluded it was due to a misunderstanding rather than any deliberate act on the part of the respondent in retaliation for the claimant submitting a grievance.

151. The claimant also asserted that other colleagues have received thank you letters for their service upon leaving the respondent. It was accepted by the respondent that no letter was sent to the claimant providing either thanks or a link to enable him to access his payslips and P60s. He did not receipt any proper leaver letter and as such he was unable to access the usual documents he should have been able to access. The respondent's witness evidence was effectively that the claimant should have been sent a leaver's letter but if he had not, it was an administrative error. The letter is usually sent by a team in Leeds directly to the ex

colleague. Evidently none of the respondent's witnesses had actually checked as to whether one was ever sent and if not why not.

152. The claimant relied upon a leaver's letter to a colleague as evidence he was treated victimised for having raised a grievance. We accepted Ms Price's evidence about the letter the claimant relied upon sent by her to a colleague. This was a letter to a colleague who had left the business and was thanked for his service by Ms Price. She explained that it had been sent to the depot in error instead of directly to the colleague and she had been asked to send it on to him. It is the only letter she has sent personally in 11 years and was only due to the internal mix up meaning it was sent to the depot by the hub team at Leeds.

The Law

Unfair (constructive) dismissal

153. The relevant law is contained in Section 95 (1) c) ERA 1996 which sets out circumstances in which the Claimant will be dismissed if the employee terminates the contract.

Following **Western Excavating (ECC) v Sharp [1978] IRLR 27,** the employee must establish:

- that there was a fundamental breach of contract by the employer;
- that the employer's breach caused the Claimant to resign;
- the employee must not delay too long before resigning or he will have affirmed the breach and lose the right to be discharged from the contract.

In **Malik & Mahmud v Bank of Credit & Commerce International SA [1997] 3 W.L.R 95** the implied term of mutual trust and confidence was held to be as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Disability

154. The issues before the Tribunal were to determine whether the Claimant was a disabled person for the purposes of the Equality Act 2010 as defined in Section 6. The burden of proof lies with the Claimant.

155. The steps that the Tribunal are required to examine in such matters are whether the Claimant has a physical or mental impairment that has a substantial adverse effect and a long-term adverse effect on the Claimant's ability to carry out day to day activities.

156. The substantial adverse effect is one that is more than minor or trivial and a long-term effect is one that has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person. If an impairment ceases to have a substantial adverse effect on a

person's ability to carry out normal day to day activities it is treated as having continued to have that effect if the effect is likely to recur.

157. Section 6 of the Equality Act provides:

Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

158. In determining whether a Claimant is disabled the Tribunal must take into account of the statutory guidance on the meaning of disability as it thinks relevant (2011 Guidance on Meaning of Disability).

Direct Discrimination

159. Section 13(1) of the Equality Act 2010 ("EQA 2010") provides that direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

160. Under s136 EQA 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof. The Tribunal must approach the question of burden of proof in two stages.

161. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act if the complaint is not to be upheld. To discharge the burden of proof "it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex," (per Gibson LJ).

162. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

163. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

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

164. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

S15 EQA 2010– Disability Arising from Discrimination

165. Section 15 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. 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.

166. Unfavourable treatment is not defined in EQA. The EHRC Employment Code states that the disabled person must have been put at a disadvantage. In **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor ICR 230 SC**, it was held that little was likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in s.15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions in the Act, or between an objective and a subjective/objective approach. Although the Equality and Human Rights Commission's Code of Practice (2011) could not replace the statutory words, it provided helpful advice as to the relatively low threshold of disadvantage which was sufficient to trigger the requirement to justify under s.15(1)(b).

167. **Basildon & Thurrock NHS Foundation Trust v Weerassinghe UKEAT/0397/14** provides the Tribunal should identify two separate causative steps in Section 15 claims (per Langstaff J, then the President of the EAT):

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

168. **Pnaiser v NHS England & anor [2016] IRLR 170** sets out the approach to be followed in Section 15 claims (paragraph 31):

I. A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

II. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

III. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

IV. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links.

V. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

VI. The statutory language of section-on 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

VII. It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

169. In respect of S15 (1) (b), the Tribunal must objectively balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. In **Birtenshaw v Oldfield**

[2019] IRLR 946, the EAT held that the Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly.

S20/21 – Failure to make reasonable adjustments

170. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. In this case, it is the duty arising under S20 (3) EQA 2010. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT).** The question whether the proposed steps were reasonable is a matter for the ET and has to be determined objectively.

171. The EHRC Employment Code provides that the meaning of “PCP” should be widely construed so as to include and formal or informal policies, rules, practices, arrangements, criteria, conditions. Prerequisites, qualifications or provisions.

172. In **United First Partners Research v Carreras 2018 EWCA Civ 323, CA**, the Court of Appeal held that tribunals should not adopt an overly technical approach to what constitutes a ‘practice’ for the purpose of showing that a PCP has been applied.

173. **Ishola v Transport for London [2020 IRLR 368** provides guidance on what can amount to a PCP (per Lady Justice Simler) from paragraphs 35:

35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an

employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010 , all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

Section 26 EQA 2010 – Harassment

174. This provides:

175. Section 26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

……

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

176. Part 7 of the EHRC Code provides that unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.

177. It is a question of fact for the Tribunal as to whether the conduct complained of occurred. If so, the Tribunal must determine if it had the purpose or effect as set out in S26 (1) (b). The test has subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser has on the Claimant. The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

178. **In Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495** the EAT held that the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the only necessary or possible route to the conclusion that the conduct in question is related to the particular characteristic. Nevertheless there must still be some feature or features of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct is related to the protected characteristic. The Tribunal must articulate what these features are.

179. **General Municipal and Boilermakers Union v Henderson 2015 IRLR 451** provides that a single comment could not constitute harassment because it had not reached the necessary degree of seriousness.

180. In **Reverend Canon Pemberton (appellant) v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham (Respondent) - [2018] IRLR 542,** Underhill LJ held: S 26 of the 2010 Act [entitled "Harassment"] … is not in identical terms to s 3A of the Race Relations Act 1976, with which I was concerned in Dhaliwal … the precise language of the guidance at para 13 of [that] judgment … needs to be re-visited. I would now formulate it as follows. In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the

conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

Victimisation

181. Section 27 EQA 2010 provides:

27 Victimisation

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

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

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

(a) bringing proceedings under this Act;

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

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

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

182. The treatment must be by reason of the protected act. The Tribunal must consider the employer's motivation (conscious or unconscious); it is not enough merely to consider whether the treatment would not have happened 'but for' the protected act. See also **Martin v Devonshires Solicitors [2011] ICR 352, Panayiotou v Kernaghan [2014] IRLR 500) approved in Page (appellant) v Lord Chancellor and another (respondents) - [2021] IRLR 377.**

Time limits – EQA 2010

159. S123 EQA 2010 provides:

(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

160. The key date as to when time starts to run is the date of the act **(Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24)**.

161. In **British Coal Corporation v Keeble and others [1997] IRLR 336** the EAT suggested the following should assist Tribunals when considering the exercise of discretion. The relevance will depend on the facts of the case. The Tribunal should consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

162. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite

the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule (per Lord Justice Auld in **Bexley Community Centre (Trading as Leisure Link) v Francis Robertson [2003] EWCA Civ 576.**

163. **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530,** provides that when deciding whether there is a continuing act, the focus should be on the substance of the complaints that the Respondent is responsible for an ongoing situation or state of affairs. The question is whether that 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.

164. Where an alleged act is found not to be discriminatory it cannot be said to be part of conduct extending over a period **(South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168).**

Conclusions

183. Was the claimant a disabled person at the relevant time?

184. Our findings of fact are at paragraphs 37-58 above.

185. The respondent disputed disability on two grounds in their email dated 21 December 2022. Firstly that the impairment was not long term. Secondly that the effect of the impairment on his day to day activities was not substantial. There was a further line of challenge during cross examination. It was put to the claimant that he had not been diagnosed with Parsonage Turner Syndrome. The basis of this was that the claimant had not produced evidence of a formal diagnosis from Mr Kulkarni from February 2018 when he had returned to see the consultant.

186. Firstly, we address that latter contention. We have concluded that there is overwhelming evidence, also confirmed by the letter from Mr Chambler is that the claimant has, since August 2017, the physical impairment of Parsonage Turner Syndrome. We consider that this was an unreasonable position of the respondent to have maintained given the amount of evidence confirming the diagnosis. Prior to these proceedings the respondent has never doubted the validity of the diagnosis and it was referenced constantly in the occupational health records. It is unfortunate, that upon receipt of the letter from Mr Chambler that the respondent has continued to dispute that the claimant was disabled.

187. We further conclude that this impairment had a substantial adverse effect on the claimant's ability to carry out day to day activities. Whilst we agree that the effects have improved since they were at their worst in Autumn 2017 and spring 2018, we reject the contention that the effects abated (to the extent they were no longer substantial) by 2 July 2018, the start of the relevant period.

188. In August 2017 the claimant developed significant pain and reduced movement in his right shoulder and arm. By 23 January 2018 he had lost use of the right arm and could not lift the arm or shoulder. By mid February 2018 he was unable to use the right shoulder at all and was struggling with day to day activities. On 19 March 2018 he was diagnosed with Parsonage Turner Syndrome. By 13 April 2018 the function is recorded as having gone from nothing to better. On 2 May 2018 the range of movement in the arm and shoulder was "grossly restricted". He could only move the arm from the elbow down and the deltoid muscle was completely wasted. Since October 2018 he has required a permanent restriction to duty as he is unable to undertake any duties requiring him to raise his right arm above shoulder height, push cages or use a manual PPT truck. He is also unable to draw heavy plastic curtains.

189. As of October 2019 the claimant still had difficulty in performing overhead activities and experiences functional restrictions with his right shoulder and any activities involving rotation. At the time his impact statement was produced, in October 2022 the claimant has no front or rear active deltoid muscle. By 20 January 2023 the claimant can undertake wishful day to day activities but still has difficulty with isolated lifting of certain objects and personal hygiene. At the time of this Tribunal, in 2023, he has adapted his recreational activities such as walking the dog. He is unable to ride a bicycle or kayak. He cannot lift empty pans or a kettle with his right arm or put things in the oven if it requires two hands. He struggles to put on clothing requiring overheard movements.

190. We note that the statutory guidance provides that an impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities. In this case we consider that the claimant has clearly proven that he has had to adapt how he carries out multiple day to day activities including walking the dog, getting dressed, cooking, personal hygiene, in fact any activity that requires him to lift his right arm above shoulder height either had to be adapted or curtailed.

191. We therefore conclude that the impairment is substantial. It has more than a minor or trivial adverse effect on his ability to perform day-to-day activities. It is long term having started in August 2017 and the effects remaining substantial as of the date of this hearing. Mr Chambler confirms his recovery has plateaued and no further treatment will benefit his recovery.

192. For these reasons we find the claimant is a disabled person within the meaning of S6 EQA 2010.

<u>Direct disability discrimination</u>

193. There are two acts of less favourable treatment relied upon for the section 13 claims.

<u>Incident at Coryton Cardiff on 11 October 2019</u>

194. Our findings of fact are at paragraphs 81-87. We have no hesitation in saying the incident at Coryton amounted to less favourable treatment because of the claimant's disability. An employee of the respondent refused to allow the claimant use of an electric PPT he required in order to perform his job, despite it having been arranged. He then made derogatory and demeaning comments about the claimant's disability in earshot of the claimant and told the claimant's depot never to send disabled drivers there again.

<u>On 25 February 2022 the claimant was told he may lose his job if he could not return to full duties</u>

195. Our findings of fact are at paragraphs 114-123.

196. We have concluded that the claimant being informed at the capability meeting that he may lose his job if he could not provide a date to return to full duties amounted to less favourable treatment. He was told that unless he could give a date or show he would no longer require the reasonable adjustments he may (and we find he believed) be summarily dismissed that is dismissed without notice. That act was plainly an act that put the claimant at a disadvantage as he was never going to be able to tell the respondent that he would be able to return to full duties because of his disability and how that restricted his ability to fulfil his role. That meant, in the claimant's mind and reasonably, he believed he would be summarily dismissed at the next meeting.

197. It was not directly clear why the respondent sought to include the evidence about the other drivers' meetings with Ms Price. The claimant was treated the same as those other drivers but we do not know if they did or did not share the same protected characteristic as the claimant namely whether they were disabled. Just because they were on restricted duties does not mean we should make any such assumption; this would be wholly inappropriate to do so. The respondent has proved that an actual or hypothetical comparator received the same treatment as the claimant.

198. The amended response did not address the comparator issue other than to request the claimant be ordered to name a comparator which was superseded by the list of issues not naming specific comparator/ or a hypothetical comparators.

199. The comparator would be an employee subject to the capability process who was not disabled. Such a person is in the same position in all material respects as the claimant save he or she is not disabled. Applying Nagarajan we conclude it is plain as to why the less favourable treatment has occurred. The claimant was told he may lose his job if he could not return to full duties because his disability meant he could not undertake full duties. For these reasons, we find for the claimant in this complaint.

<u>Section 15 – discrimination arising from disability</u>

<u>4.1.1- On multiple occasion planning the claimant to deliver to stores that were outside his restricted duties</u>

200. Our findings of fact are at paragraphs 76-97.

201. On each occasion where the claimant was planned to deliver to stores that were outside his restricted duties and had to challenge that allocation and disclose his disability we find that amounted to unfavourable treatment.

202. On each occasion where arrangements were promised but not delivered requiring the claimant to disclose his disability to external store colleagues that amounted to unfavourable treatment.

203. The respondent had sought occupational health advice about what adjustments were required for the claimant. The claimant's line manager had told the claimant that emails would be sent to the planning team to make them aware of the adjustments. There was an internal record (not disclosed or before this Tribunal) of all drivers on restrictions available to the planning team. The claimant was entitled to have a reasonable expectation that these adjustments would be adhered to. When they were not, despite the claimant informing the planning clerk , changes were refused and as a result, he had to go on and disclose his disability going into detail about why he could not undertake certain tasks to often unsympathetic clerks in front of his colleagues. The claimant experienced embarrassment and humiliation. For these reasons we find that treatment amounted to unfavourable treatment.

204. The 'something' that caused the unfavourable treatment was that the claimant was unable to do certain deliveries due to restrictions in place because of his disability. It follows that plainly the unfavourable treatment was the main or sole reason for the unfavourable treatment.

205. The respondent submitted that the claimant having to disclose his disability should not be seen as unfavourable treatment as it was not as an embarrassing condition as say a bowel problem. We found this to be a particularly unmeritorious and unreasonable position to have taken to suggest that one disability is in some way less embarrassing than another. The claimant explained and we accepted why he found it uncomfortable and humiliating to keep having to disclose his disability to work colleagues when agreed adjustments had either not been made or were promised then not available. We find this was a reasonable position to have taken.

206. For the above reasons, this complaint succeeds.

<u>4.1.2 - Coryton Cardiff incident</u>

207. We have already addressed this above under the direct discrimination claim and find it amounted to unfavourable treatment. The claimant's disability plainly caused the treatment.

<u>4.1.3 - 7 October 2021 where the claimant was allocated a double run, which meant he worked a 14 hour day instead of his normal 10 hour maximum and was made to feel guilty and that he should be grateful for the work</u>

208. See findings of fact at paragraph 89. We find that this also amounted to unfavourable treatment. A disabled person with adjustments should not

be made to feel grateful or guilty or allocated additional work because he has adjustments in place. The claimant was treated this way because of something arising in consequence of his disability namely his adjustments.

4.1.4 Placing the claimant under the capability process (instead of holding well being meetings) and calling the claimant to a stage 1 capability meeting because he could not do caged stores and could not give a date when he could do caged stores;

4.17 At the capability meeting on 25/2/22 telling the claimant he may lose his job if he could not provide a date to return to full duties;

4.1.9 At the capability meeting on 25/2/22 telling the claimant that if he could not give a date when he would return to delivering caged stores he would be progressed to stage 2

209. Our findings of fact are at paragraphs 100, 114-124. It should be noted that the respondent's actions were not limited to a concern about an inability to do caged stores. The claimant understood that unless he could give a date when he could return to full duties he would be summarily dismissed.

210. We find this treatment amounted to unfavourable treatment for the same reasons as we found it to be less favourable treatment for the direct discrimination claim above. Being placed in a capability process and telling the claimant he faced summary dismissal amounted to unfavourable treatment. What was aggravating about this process was that it was also outside of the respondent's own procedures for a multitude of reasons.

211. Firstly, the respondent's capability procedure was not the correct procedure to have followed. The policy says that that if a colleague was identified as having a health or medical issue then this is referred (sic) to in the Long term Sickness and Ill Health Capability section of the Absence policy. This is reinforced in the section headed "Providing Support" which states that issues with achieving performance levels that are related to a return to work following long-term sickness absence where a colleague has an existing health condition, should be managed under the Long-Term Sickness and Ill-Health Capability section of the Absence policy.

212. Secondly, even when following the wrong policy, the respondent did not follow the steps within that policy. They bypassed the informal resolution stage and moved straight to a formal stage 1 capability meeting. They also then bypassed the next three stages (as the policy set out their should be four meetings before a final meeting where dismissal would be considered). There was also no provision within that policy to dismiss an individual without notice for capability whereas the claimant was informed he was facing summary dismissal. There was absolutely no consideration checks or balances as to why, after four years of the adjustments in place, there was a need to review those adjustments. There was no evidence as to why all of a sudden these adjustments were causing any issues for the respondent's operations. The claimant was not in breach of any performance targets; none had been set.

213. Thirdly, even if the procedure had been conducted under the Absence and Sickness Policy the respondent did not follow that procedure in any event. There was no policy that provided that the purpose of reasonable adjustments was to support someone back to full duties which is unsurprising as this would be potentially discriminatory in itself. The policy stated that adjustments were to "facilitate attendance at work".

214. The claimant was unable to undertake full duties and as such on restrictions in consequence of his disability. The 'something' that caused the unfavourable treatment was his disability.

<u>14/2/22 Nicola Price telling the claimant in a busy office in front of other without written notification and when the claimant was about to go on holiday that he had an upcoming capability meeting</u>

215. See out findings of fact at paragraph 105-109 above.

216. We found that Ms Price had informed the claimant in the transport office, in earshot of others about an upcoming capability meeting. We went on to consider whether this amounted to unfavourable treatment having regard to the EHRC employment code and **Williams v Trustees of Swansea University etc.**

217. We consider that the claimant was put at a disadvantage by being informed about a formal meeting in this way. He was informed in an open busy office where it is likely to have been overheard by his work colleagues who would be privy to confidential information that the claimant was being placed in the capability process, formally. Further, he was evidently taken by surprise at this step given he had been working since May 2018 on these restrictions with no suggestion that they were causing any issues with the respondent's operation. As far as the claimant was concerned the restrictions had been in place for almost 4 years and he had no idea that after this passage of time he would suddenly placed within capability procedures.

218. The 'something arising' was the restrictions to the claimant's duties, caused by his disability. Therefore, the unfavourable treatment was in consequence of the claimant's disability.

<u>4.1.6 – Through allocation of duties outside of the claimant's restrictions and then through the capability process pressurising the claimant to return to full cage store duties.</u>

219. We did not conclude that the respondent deliberately allocated duties outside of his restrictions to pressurise him to return to work. The evidence before us showed that adjustments were put in place following occupational health advice. The claimant's line manager held regular reviews and ensured the planning team were told about his restrictions. There was an internal record of restrictions. In our judgment, the claimant was allocated duties outside of his restrictions because of a number of reasons namely, incompetence and a busy planning environment when mistakes were made due to operational pressures. There was no evidence this treatment arose

in consequence of his disability in so far as a causative link required for a S15 claim. This complaint does not succeed.

4.18 at the capability meeting on 25/2/22 asking the claimant if he was registered disabled

220. Our findings of fact are at paragraph 118. Ms Price does not dispute that she asked the claimant this question twice. We have to consider whether it amounted to unfavourable treatment. One conclusion might be that the asking of this question did not lead to any discernible detriment or disadvantage to the claimant. The language was certainly clumsy. There is a "relatively low threshold" to trigger the requirement to justify under S15 (1) (b). The claimant was offended by this question. He had to explain twice to Ms Price there was no such register of disabled persons. She did not explain (if this was her motivation) that she was asking the question about the respondent's internal records and even if she was we would question why the respondent keeps an internal register of disabled employees). He was sufficiently concerned to have raised it as part of his grievance describing the impact of the questions as follows:

There is NO such register of people who have a disability - I found this line of questioning, language and terminology to be derogatory and outdated. This made me feel belittled and as if ASDA viewed me as less than, and did not believe my condition was genuine, despite the medical evidence previously supplied. I tried to inform Nicola that under the Equality Act 2010, and as recognised and stated on company website Walmart One, a disability is a mental or physical impairment likely to last more than 12 months.

221. For these reasons we find that this amounted to unfavourable treatment. The question was directly linked to his disability and the treatment arose in consequence of his disability.

Legitimate aims

222. Having made those findings, no legitimate aim had been pleaded by the respondent and the application to amend the response was refused. Even if it had been permitted this would not have assisted the respondent. The amendment was only relevant to some of the unfavourable treatment namely that treatment concerned with the placement of the claimant on the capability procedure (the amendment was "to ensure a formal and consistent process is followed when managing employees on restricted duties"). This was bound to fail as although such an aim would likely to be legitimate the respondent was bound to fail in showing they reached it by proportionate means for the reasons we have set out at paragraph 100,111-113.

223. Whilst it would be proportionate to review restrictions, the respondent went much further than this. The claimant was told that if he could not return to full duties that he would be progressed to a stage 2 capability meeting where summary dismissal may occur. The respondent led no evidence about why Ms Price embarked on the review in 2022 of all drivers on restrictions. The respondent might have had operational issues with the

number of drivers on restrictions for example. But none of this was before the Tribunal. The Tribunal does not make these comments lightly; this reflected a general theme of the respondent's case that was poorly prepared with limited brief witness statements that failed to address many of the issues with these claims. The claimant had been on restrictions since May 2018 and we simply had no evidence at all to enable us to assess and balance the needs of the claimant and the respondent on this issue.

224. As regards the other unfavourable treatment there were no legitimate aims before us either as pleaded or in evidence from the respondent. It is not for the Tribunal to try and guess what that might have been.

225. The claimant's claim for discrimination arising from disability therefore succeeds save for the complaint at 4.1.6 of the list of issues.

Reasonable adjustments claim

226. The PCP relied upon was as follows:

Allocating the claimant to delivery duties that were outside of his restricted duties (were caged stores /involved pushing heavy cages/ to locations where it was known the cage lift was not working/ involved moving heavy pallets/ where there was no bay/ that required use of a manual pump truck/ where there was no electric truck available)

227. The respondent's amended response did not address the issue of the PCP other than a blanket denial as follows:

Without limitation, ASDA denies that any provision, criterion or practice (PCP) applied by it placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled and/or submits that if (which is denied) the Claimant was so disadvantaged:

(a) it took such steps as were reasonable, in all the circumstances of the case, for it to prevent the PCP, or feature, having that effect; or

(b) in the alternative, it did not know, and could not reasonably have been expected to know, that the Claimant was likely to be so affected.

228. In submissions, Ms Stroud conceded that knowledge was not an issue. Ms Stroud submitted that the was "no viable PCP" and cited **Carphone Warehouse Ltd v Martin UKEAT/0371/12/JOJ** as authority for the principle that lack of competence cannot be a practice unless there is a finding of conspiracy. In that case the lack of competence that was held not to amount to a PCP was that the employer failed to take proper care in preparing the employee's pay packet. We consider this authority to be about a very different factual scenario. Although it could be said that the repeated allocations of the claimant to deliveries outside of his restrictions was a situation where the claimant was not "taking care", it was not a one off act.

229. In this claim the PCP cannot be said to have been a "one off" act or decision. As can be seen from the facts, there were at least nine occasions

where the claimant was allocated to duties outside of his restrictions. Further, accepting the evidence of the respondent witnesses, it was a frequent occurrence for deliveries to be reallocated during any one shift due to traffic conditions, situations at stores etc (see paragraphs 72 - 74). Although the PCP had been described in the list of issues as *allocating the claimant to delivery duties that were outside of his restricted duties,* the claimant's case had always been that the allocation of the deliveries caused him the disadvantages. We do not consider we are bound to consider the PCP has put in the list of issues as this was not how the claim was advanced and understood at the hearing. There were no submissions or pleading by the respondent that the PCP was not a viable PCP as it only applied to the claimant. Adopting the approach in **Carreras** we consider the PCP should not be narrowly interpreted in such a way that did not accord with how the claim was evidently advanced and understood. The PCP was in this case "the allocation of deliveries to drivers". That was the base line applied to everyone.

230. Having regard to what was said in **Ishola,** the function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or operation that causes the substantial disadvantage. It is the act of discrimination that must be justified not the disadvantage.

231. The above discussion is however rendered immaterial as in our judgment, the respondent took reasonable steps to avoid the disadvantage and as such the reasonable adjustments claim does not succeed. The respondent did take those steps as suggested by the claimant in the list of issues at 5.5. They sought advice from occupational health about what restrictions were needed and implemented the restrictions. The claimant's line manager discussed them with the claimant at regular review meetings and informed the planners and the managers. An Excel spreadsheet sat alongside the planning system which noted the restrictions. The planners would produce the run. There was then a further safeguard where the managers would check the run, and then there was a further layer where the plan would be produced for drivers to then check and raise issues. There were some occasions where the claimant raised planned deliveries outside his restrictions with the planners and was still allocated the runs, however on these occasions extra steps were taken to ensure the adjustments would be in place. The claimant accepted that when he did raise issues with managers the runs were changed.

232. Looking at the facts, on eight occasions between the period June 2018 – March 2022, the claimant was allocated to runs outside of his restrictions. In some cases, when he raised the issue they were changed. In others, he agreed to do the run as he was promised additional arrangements and they were either not made, or made but did not happen. We have found the changes occurred in a discriminatory way under the S15 claim. However in the context of the reasonable adjustments claim, when we consider this in the context of the respondent operating between 50-80 runs per day for all drivers, and the number of deliveries the claimant would have performed during that period in our judgment this supports a conclusion that the respondent had taken such steps as were reasonable to take to avoid the disadvantage. It is evident that things went wrong on

these occasions but this was not because the respondent had failed to take those steps. We do not seek to downplay the impact of these occasions but it does not follow, for the reasons above that the S20/21 claim can succeed.

Disability related harassment

233. There were three matters relied upon in respect of this complaint.

234. The first occasion was on 7 October 2021 when he was allocated the double run. Our findings of fact are set out above at paragraph 89. The claimant was placed on a run that extended his normal working hours. The claimant was told in an abrasive that it had been kept for the claimant due to him being on light duties and he was made to feel guilty and that his disability was being accommodated and he should be grateful.

235. We find that incident amounted to unwanted conduct related to the claimant's disability as the evidence we had before us lead us to conclude that respondent actively chose to allocate the claimant a run beyond his extended hours because he was on light duties even when other drivers could have undertaken that run. He was on light duties because of his disability. Therefore the conduct in question was related to his disability.

236. As regards the purpose of effect of the conduct. The respondent did not call anyone to give evidence about this incident. We found that there was a deliberate allocation of this run to the claimant for disability related reasons. Further, is it abundantly clear that the effect of the conduct on the claimant violated his dignity and created the proscribed atmosphere required under S26 (1) (b). This was a reasonable perception to have reached in the circumstances.

237. The second occasion was on 2 December 2021 where the claimant's run was originally planned to Lutterworth then changed to Paignton. When the claimant raised this it was changed to Gillingham, outside his restrictions. See our findings of fact at paragraph 90. The unwanted conduct related to the claimant's disability as the hostility he faced when the claimant had to ask (twice) to be allocated a delivery within his agreed restrictions

238. The planning clerks were aware of the claimant's restrictions. On occasions there were errors. When the claimant raised these errors he should not have had to face a hostile attitude from the clerks but on this occasion he did. He had to disclose his physical limitations. The claimant found this immensely humiliating and degrading particularly as he had to do so in front of other colleagues. We reject the suggestion that the claimant was overly sensitive or was not entitled in some way to feel embarrassed about discussing and explain his disability for reasons we have set out above.

239. The third complaint was concerning the arrangements of occupational health appointments (see paragraphs 101 - 104). It was the claimant's case this was done deliberately knowing he would be on holiday.

240. The evidence showed that PAM arranged the appointments not the line managers. We noted that despite the claimant informing HR that he felt harassed by the dates the appointments were being made HR did not have

the courtesy to reply or follow up that concern. However as the appointments in question fell before this complaint, and the respondent was not responsible for making those arrangements, there was no evidence to support the contention that this was all done deliberately. The administration process displayed a level of incompetence on the part of the people involved but this was not related to the claimant's disability. For these reasons, this complaint does not succeed.

S109 EQA defence

241. The respondent's amended response set out a S109 (4) EQA 2010 defence. It relied upon adoption and publication of a diversity and inclusion policy, providing training of managers on equal opportunities and the prevention of harassment and specifying in the disciplinary policy that harassment is a serious disciplinary offence. Other than the inclusion of the aforementioned policies in the bundle there was no evidence led on this issue. The evidence of Ms Price about her training (see paragraphs x) came from questions during evidence. Ms Price told the Tribunal that she had received training in 2012 when she was appointed but there were no details about the content of that training. There was no evidence about the identity of the manager who behaved in this way to the claimant or whether he had received training. The respondent could have identified this person and called them to give evidence but they chose not to do so. We have no hesitation in rejecting a contention that a S109 EQA 2010 defence has been established particularly given the shortcomings in the application of the respondent's policies by the witnesses and their lack of knowledge about the reasonable adjustments policy.

Victimisation

242. The protected act relied upon was the claimant's grievance which was submitted on 3 March 2022. Given the contents of the grievance (see paragraphs) the claimant was evidently complaining about possible breaches of the Equality Act 2010. This grievance amounted to a protected act under S27 (2) (d) EQA.

Detriments

7/3/22 Mike King told the Claimant he could not raise a grievance against a process, only Nicola Price as an individual. The Claimant considers he was being pressured to withdraw his grievance;

243. Factually, Mr King's note supports the claimant's position that he told the claimant he could not raise a grievance about the procedure (see paragraphs 126-129). We therefore consider first of all if this amounted to a detriment. The claimant puts his case here that as a result of this he felt pressured to withdraw the grievance. We find that telling an employee they could not raise a grievance about a process they maintain is being applied in a discriminatory way and outside of process does amount to a detriment. We are required to go on and consider the motivation, conscious or unconscious of the individual. We do not consider that Mr King acted in this

way because of the protected act that is because the claimant had made allegations that the respondent were breaching the act. Mr King explained why he had acted in this way; it was because the grievance procedure encouraged an informal process initially. With respect to Mr King we do not think there was the necessary awareness on his part that the claimant had done a protected act with the lodging and contents of the grievance. For these reasons this claim does not succeed.

Managers failed to attend the claimant's scheduled exit interview at the start of his shift where he sat for an hour ignored by the managers on the premises. It was completed at the end of a 10 hour shift by a different working day;

244. Our findings of fact are at paragraphs 149-150 above. We find that this was not motivated by the protected act for the reasons set out in paragraph 150.

The Claimant received no correspondence thanking him for his service which he is aware has been given to other leavers;

The Claimant has not been given access to a link to a website where he can obtain pay slips etc, which has been provided to other leavers;

245. Our findings are at paragraphs 151-152. we do not consider that a failure to send a thank you letter shows any discernible detriment or disadvantage. we do find that in failing to send the exit letter the claimant was unable to access his pay slips and other employee documents that should have been available to him and this was a detriment. However we do not find that this was motivated by the protected act for the reasons set out in paragraph 152.

The grievance outcome was presented out of time, and said, that he had no right of appeal as an ex-colleague;

The grievance outcome had no substance other than stating the Respondent had done nothing wrong, and said the questions raised in the grievance had been answered when they had not. It closed down, did not address, and showed no interest in addressing the claimant's grievance.

246. Our findings are at paragraph 126, 134, 137-148. The erroneous refusal of an appeal was one of the shortcomings of the grievance process we have outlined above. Mr Vickery's witness statement gave the explanation that this was the respondent's policy. This position changed during the hearing (see above) and he accepted he was wrong about this. In our judgment this state of affairs reflects the general level of incompetence of the respondent's managers as well as the lack of training rather than any motivation to victimize the claimant for a protected act.

247. We also consider the same can be said of the grievance decision and the way in which it was conducted.

248. The victimisation claims fail and are dismissed.

Time limits

249. We have summarised the complaints that have succeeded in the table in the attached table in Appendix A. The first act of discrimination occurred on 2 July 2018 and the last act occurred on 1 March 2022. ACAS early conciliation commenced on 29 April 2022 and ended on 9 June 2022. The ET1 was presented on 16 June 2022. If we find that there was conduct extending over a period under S123 (3) EQA 2010 the claim is in time.

250. In our judgment there was an ongoing situation or state of affairs where the claimant was treated unfavourably in breach of S15 EQA 2010 by allocating him to deliveries outside of his restricted duties. This happened on nine occasions between 2 July 2018 and 1 March 2022. There were two relatively long periods between occasions between December 2018 – October 2019 and October 2019 to March 2021. We do not consider that the periods of time between these events result in a break in the conduct extending over the period as there was a repeated pattern of connected conduct.

251. We find that the discrimination claims were presented in time.

Unfair Dismissal Claim

252. The claimant relied upon the following matters in respect of his constructive unfair dismissal claim:

a) All matters relied upon for the discrimination and victimisation complaints;

b) Fail to give the Claimant feedback/an outcome on the complaint about the conduct of the Cardiff Coryton manager, which left the Claimant feeling the Respondent had no interest in taking action/ challenging discrimination;

c) The lack of acknowledgment of his grievance was the final straw in a culmination of all the other events (having to continually explain his disability, justify his restrictions, change in attitude towards him, pressure to resume full duties (under threat of a capability process that could result in dismissal), rushing through a process to terminate his employment).

253. In our judgment, the claimant has shown that the respondent fundamentally breached his contract of employment by subjecting him to the various acts of unlawful discrimination set out above such actions amounting to breaches of the implied term of mutual trust and confidence.

254. In regards to the failure to give the claimant feedback or an outcome on his complaint about the Coryton incident, we find that the claimant affirmed this particular breach by continuing to keep the contract alive between October 2019 and March 2022.

255. We find that the lack of acknowledgement of the grievance was the final straw following the discriminatory conduct of the respondent. The respondent failed to adequately deal with the claimant's grievance in accordance with their own procedures (in respect of failures prior to the resignation). We found that the grievance was only progressed as the claimant had resigned. The grievance was not actioned within the specified timeframes of the respondent's procedures. The claimant believed he was facing summary dismissal as he could not return to full duties and when he

raised a formal grievance about this, he was told he could not raise a grievance about that process which was itself wholly flawed and outside of the respondent's own policies.

256. We find that the claimant resigned because of the acts of discrimination and the failure to acknowledge or progress the grievance that sought to complain about those acts.

Employment Judge S Moore

Date: 13 July 2023

REASONS SENT TO THE PARTIES ON 25 July 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

Appendix A – Table of claims that succeeded

Date	Claim	Brief description of issue and relevant paragraph in judgment	
2 July 2018	S15	Allocated delivery outside of restrictions (Paignton) (78)	Succeeded
25 July 2018	S15	Allocated delivery outside of restrictions (Pershore) (79)	Succeeded
11 November 2018	S15	Allocated delivery outside of restrictions (Pershore) (79)	Succeeded
11 December 2018	S15	Allocated delivery outside of restrictions (Pershore) (80)	Succeeded
11 October 2019	S13 S15	Coryton incident (81-87)	Succeeded
4 March 2021	S15	Allocated delivery outside of restrictions (Tiger Bay) (88)	Succeeded
7 October 2021	S15 S26	Double run (89)	Succeeded
2 December 2021	S15 S26	Allocated delivery outside of restrictions (Paignton) (90)	Succeeded
18 January 2022	S15	Allocated delivery outside of restrictions (Wincanton) (91)	Succeeded
14 February 2022	S15	Deciding to place C in capability process (100)[4]	Succeeded

[4] This is when the claimant was informed. We did not have evidence as to when this was actually decided upon except Ms Price told the Tribunal she was asked to review all drivers on restrictions in early 2022.

14 February 2022	**S15**	**Advising C in busy office would be called to a capability meeting(105-109)**	**Succeeded**
25 February 2022	**S13** **S15**	**C told may lose job if unable to return to fill duties (114 -122)**	**Succeeded**
	S15	**Processing C to Stage 2 (114-122)**	**Succeeded**
	S15	**Asking C is he was registered disabled (118)**	**Succeeded**
1 March 2022	**S15**	**Allocated delivery outside of restrictions (Caldicot) (92)**	**Succeeded**