



EMPLOYMENT TRIBUNALS

Claimant

Mr Thomas Richardson

v

Respondent

JD Wetherspoon Plc.

Heard at: Norwich

On: 17 – 20 October 2023

In Chambers: 23 October 2023

Before: Employment Judge M Warren

Members: Mrs A Buck and Mr K Lannaman

Appearances

For the Claimants: Mr D Frame, Solicitor

For the Respondent: Mr N Bidnel-Edwards, Counsel

RESERVED JUDGMENT

1. The Claimant's complaints of discrimination on the grounds of religion or philosophical belief are dismissed upon having been withdrawn.
2. The Claimant's claims of disability discrimination and in breach of contract for notice pay, fail and are dismissed.

REASONS

Background

1. Mr Richardson, an Autistic person, was employed by the Respondent as a Bar Associate between 15 May 2021 and 30 August 2022. After Early Conciliation between 25 September and 1 November 2022, he issued these proceedings on 24 November 2022 claiming discrimination on the grounds of disability and on the grounds of religion or belief. There is also a claim for notice pay. He has had the benefit of legal advice throughout.
2. The matter came before Employment Judge Michell on 9 June 2023, when this hearing was listed and Case Management Orders made. A List of

Issues was produced at the Preliminary Hearing, upon which Employment Judge Michelle made some comments and following the Preliminary Hearing, a Final Agreed List of Issues was sent to the Tribunal on 21 July 2023.

The Issues

3. The Tribunal was presented with a further Agreed List of Issues at the outset of the hearing. The only amendment from that which had previously been filed, was to add appropriate wording to set out the so called, "Grainger Test" from Grainger Plc v Nicholson 2010, ICR360. As it happens, at the end of the Claimant's evidence and before the Respondent's evidence began, Mr Richardson withdrew his claims of discrimination on the grounds of religion or philosophical belief.
4. The Agreed List of Issues as amended appears below, cut and pasted in. Those aspects of Mr Richardson's claim which were withdrawn are in a reduced font size.

Discrimination contrary to section 13 EqA 2010

1. The Claimant relies on the protected characteristic of disability, namely autism. The Respondent accepts the Claimant is disabled and that it was aware of the Claimant's disability.
2. The Claimant relies on the following less favourable treatment:
 - a) Jay Hilton Dismissing the Claimant on 31 August 2022.
3. The Respondent admits that the Claimant was dismissed with effect on 31 August 2022.
4. Did the Respondent treat the Claimant less favourably than it would have treated a hypothetical comparator because of the Claimant's disability?

5. The Claimant relies on a hypothetical comparator, who was a Bar Associate with materially the same circumstances who did not have autism.
6. Specifically, has the Claimant proved facts from which an inference may be drawn in the absence of any explanation that he was dismissed because of his autism?
7. If so, can the Respondent prove that Mr Hilton's decision was, in no sense whatsoever, because of the Claimant's autism?

Direct Discrimination on the ground of religious, or philosophical belief under s13 EA 2010

8. The Claimant relies on the following alleged religious, or philosophical beliefs:
 - a) man should take a woman;
 - b) that all men and women are equal;
 - c) that we should live in a democratic society where people can speak and make choices freely; and
 - d) all people, [of any] race and/or nationality should be equal.
9. Do the above amount to religious, or philosophical beliefs?
10. To the extent that any belief is alleged to amount to a philosophical belief, do they pass the *Grainger* test (*Grainger PLC v. Nicholson* [2010] ICR 360):
 - (i) The belief must be genuinely held;
 - (ii) It must be a belief and not ... an opinion or viewpoint based on the present state of information available;
 - (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
 - (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
 - (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others".
11. The Claimant relies on the following less favourable treatment:
 - a) Jay Hilton Dismissing the Claimant on 31 August 2022.

12. Was the Claimant dismissed because of a religious or philosophical belief, or because he made statements regarded as gross misconduct under the Respondent's policies?

Indirect Discrimination contrary to section 19 EA 2010

13. Did the Respondents apply a provision, criterion or practice (PCP) which is applied or would be applied to persons with whom the Claimant does not share the protected characteristics for the purposes of section 19 of the Equality Act 2010 (EqA)? The Claimant relies on the following PCP:

- a) The Respondent's application of its Equal Opportunities Policy; and
- b) The Respondent's application of its social media policy.

14. The Respondent accepts that it had in force at the material time a policy with the full title "Equal opportunities – Equality, diversity and inclusion (EDI) policy, including antiharassment".

15. Does the above PCP relied on amount to PCP?

16. The Respondent accepts that their policies do amount to PCPs.

17. If so, does the PCP(s) put, or would it put persons who share the same disability of autism as the Claimant at a particular disadvantage?

18. The disadvantage relied on by the Claimant is:

- a) Employees who share the Claimant's disability of autism are less likely than non-disabled applicants to be able to meet the requirements because they will simply tell it as it is.

b) Employees who share the Claimant's religious and/or philosophical beliefs would be placed at a disadvantage because they cannot share their beliefs either verbally or on line, the latter perhaps a breach of free speech.

19. Do the above amount to disadvantages?

20. If so, was the Claimant put at that disadvantage?

21. If so, was the relevant PCP a proportionate means of achieving a legitimate aim?

22. The Respondent relies on the following legitimate aim(s)

23. The aims of i) ensuring a work environment for staff at which they will not be offended, discriminated against, or harassed in respect of any of their protected characteristics; ii) ensuring that breaches of the Equality Act 2010 are subjected to disciplinary proceedings; and iii) that all staff have confidence the Respondent will provide a workplace at which discriminatory, or offensive conduct is prohibited, and that conduct in breach of the Equality Act 2010 will be the subject of disciplinary proceedings.

Failure to make reasonable adjustments contrary to sections 20 and 21 EqA 2010

24. Did the Respondents apply a provision, criterion or practice (PCP) which is applied or would be applied to persons with whom the Claimant does not share the protected characteristics for the purposes of section 19 of the Equality Act 2010 (EqA)? The Claimant relies on the following PCP:

- a) The Respondent's application of its Equal Opportunities Policy; and
- b) The Respondent's application of its social media policy

25. Does the above PCP relied on amount to PCP?

26. If so, did the Respondent's application of the PCP put the Claimant at a substantial disadvantage in comparison to people without the Claimant's disability of autism?

27. The substantial disadvantage being:

- a) Because of the Claimant's autism he speaks more candidly and will say things as they are and without a filter.
- b) Because of this the Claimant is not likely to be able to comply with the Respondent's PCP.

28. When did the Respondent know, or ought to reasonably be expected to know, that the PCP put the Claimant at a substantial disadvantage in comparison to people who are not disabled?

29. Did the Respondent take such steps as were reasonable to avoid the substantial disadvantage?

30. The Claimant alleges the following amount to reasonable adjustments:

- a) Allowing the Claimant to express his philosophical beliefs and/or religious beliefs on Facebook but instructing him to provide a disclaimer that the opinions are his own;
- b) Ignoring the Claimant's historical posts given his autism and philosophical beliefs;
- c) Discounting the Claimant's comments when asked for them as he has autism and will speak candidly and tell it as it is;
- d) The Respondent not supporting gay pride week which would be a neutral act and would not then create the Claimant's comments due to his autism.

31. In light of the Claimant's autism, taking a more relaxed approach as to its published policies.
32. Would the step(s) at 21.1 – 21.6 above have avoided the substantial disadvantage?
33. If so, when is the Respondent to be treated as having failed to take that step(s)?

Harassment contrary to s 26 EqA 2010

34. The Claimant relies on the protected characteristic of his religious and/or philosophical beliefs that:
35. Did the following occur?
 - a) On 13 August 2022, Michela Chapman said "why do I have to apologise for being gay?";
 - b) On 30 July 2022, Emma Ireland saying "Thomas is homophobic";
 - c) On 30 July 2022, Emma Ireland saying "he [Claimant] didn't want things shoved down his throat, in terms of homophobia";
 - d) On 30 July 2022, Edmundas Baiciunas saying "I think I asked him [the Claimant] as [allegedly] a joke what he thought of gay people";
 - e) On 30 July 2022, Edmundas Baiciunas saying "yes I think he's somewhat homophobic";
 - f) On 17 August 2022, Edmundas Baiciunas saying – "I would have if I knew their political status but all the other staff in that day did not have any bad political opinions"; and
 - g) On 29 August 2022, Jay Hilton subjecting the Claimant to a hostile disciplinary meeting.
36. If so, were any or all of the acts unwanted conduct?
37. Do the above amount to conduct related to the Claimant's listed religious and/or philosophical beliefs?
38. If so, did it have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

AND/OR

39. The Claimant alleges that he was subjected to harassment in respect of his disability of autism.

40. Did the following occur:

- a) On 29 August 2022, Mr Jay Hilton subjecting the Claimant to a hostile disciplinary meeting;
- b) Not allowing the Claimant's father to attend with the Claimant making the Claimant more anxious and nervous;
- c) The questions posed were of an interrogation not an open questioning; (NOTE: no minutes of the meeting were or have been provided to the Claimant)
- d) Not allowing the Claimant time to process the question being asked;
- e) Not explain in what context questions were being asked of the Claimant, thereby confusing the Claimant;
- f) On or around 13 August 2022, Emily Davies saying "yeah, well I am a bitch"
- g) On 30 July 2022 Michela Chapman saying "I am not going to apologise for liking boobies"; and
- h) On 22 August 2022 and/or 30 August 2022, Edmundas Baiciunas saying "I mean it wasn't nice but he's obviously going to give an honest answer because he's autistic"?

41. Were the acts above carried out?

42. If so, were any or all of the acts unwanted conduct?

43. Do the above amount to conduct related to the Claimant's autism?

44. If so, did any act have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Uplift for failure to follow the Acas code of practice

45. Does the Acas Code of Practice apply to the Claimant's grievance/dismissal?

46. If so, did the Respondent fail to deal with the Claimant's appeal sent by an email from his mother's email account, Julie Richardson, on 6 September 2022 timed at 11:47?
Or, did the Claimant fail to submit an appeal?

47. If so, is it just and equitable for there to be any adjustment to compensation, and if so by what percentage increase or reduction should be applied?

Remedy

48. What financial losses has the Claimant suffered as a result of any conduct found to amount to unlawful discrimination?

49. What amount of compensation is just and equitable?

50. Is the Claimant entitled to an injury to feelings award, and if so what amount?

51. If the Respondent or Claimant has failed to comply with the ACAS Code, is it just and equitable in all the circumstances to increase or reduce any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992?

5. The Tribunal itself identified potential adjustments before the commencement of the Respondent's evidence as follows:-

- 5.1. Issuing Mr Richardson with a Final Written Warning rather than dismissal;
 - 5.2. Giving Mr Richardson an explanation and clear guidance as to why his postings on Facebook were unacceptable and requiring him to take the offensive postings down, (and not just those which were open to the public) and an emphatic explanation that any further offensive postings on Facebook or any other social media would result in dismissal;
 - 5.3. An explanation and clear guidance to Mr Richardson that what he said to his colleagues was offensive and unacceptable and that any further repetition of such conduct would result in dismissal;
 - 5.4. The appointment of a mentor to coach and support Mr Richardson;
 - 5.5. An explanation, (with Mr Richardson's consent) to his work colleagues that he is an Autistic person and what this may mean in terms of his behaviour;
 - 5.6. Training for Managers and / or work colleagues in relation to Autism;
 - 5.7. Putting in place a Neurodiversity Plan, which is apparently, on the Respondent's case, standard practice for the Respondent; and
 - 5.8. Allowing and / or arranging for Mr Richardson to be accompanied and supported at his Disciplinary Hearing by somebody who understands his Autism, for example but not necessarily limited to, a parent.
6. We adjourned in order to allow Mr Bidnel-Edwards to take instructions before proceeding with the Respondent's case. We also recalled Mr Richardson to give evidence so that the Respondent had an opportunity to ask him questions in relation to the foregoing.

Evidence

7. We heard evidence from Mr Richardson and from his Mother, Mrs Julie Richardson.
8. For the Respondent we heard from:-
 - 8.1. Mr E Balciunas, work colleague;
 - 8.2. Ms E Davies, work colleague;
 - 8.3. Ms M Chapman, Shift Leader;
 - 8.4. Mr J Hilton, Pub Manager and Disciplinary Officer; and

8.5. Mr A Bye, Pub Manager, Respondent's Witness at Disciplinary Hearing.

9. Each of the witnesses produced written witness statements. During an adjournment at the outset of the hearing, we read all of the witness statements and in our discretion, read or looked at, the documents referred to. We emphasised to the parties as is usual, that the representatives should make sure that they take us to those passages in the documents which they consider to be relevant and that we will only consider those documents in the Bundle to which we are referred.

Reasonable Adjustments during the Hearing

10. Employment Judge Michell identified at the Preliminary Hearing on 9 June 2023, that there may be a need for reasonable adjustments at this Final Hearing and suggested that they ought to be articulated by Mr Frame as soon as possible. Nothing was raised in advance of the hearing, other than the potential need for regular breaks.
11. Mr Richardson identified the following adjustments he would find helpful, at the outset of the case:-
- 11.1. That people please speak slowly;
 - 11.2. That he be given time to respond;
 - 11.3. That care be taken to ask questions clearly, without ambiguity and to avoid hypothetical questions;
 - 11.4. That he be permitted to be allowed to indicate when he might need a break; and
 - 11.5. That he be provided with assistance in finding the right page in the Bundle while he was giving his evidence.
12. The Tribunal for its own benefit broke for 15 minutes each morning at 11.15am and for 10 minutes in the afternoon, mid-session. Mr Richardson understood that he could call for a break at any time, although in fact he never did so.
13. Participants in the hearing tried to accommodate Mr Richardson's requests in terms of speaking slowly, giving him time to respond and in the way the questions were worded.
14. On Day 1, Mr Richardson's Mother sat with him while he was giving evidence to help him find pages and on Day 2, his Father sat with him for the same purpose. Neither gave him any further assistance in terms of answering questions.

The Law

Direct Discrimination

15. Mr Richardson says that he was directly discriminated against because of his disability. Direct discrimination is defined at s.13(1):

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

16. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The claimant must show that he has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.
17. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).
18. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

Indirect Discrimination

19. Section 19 defines indirect discrimination as follows:

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

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

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

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

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

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

(3) *The relevant protected characteristics are—*

...

disability;

20. The effect of s.136 and the shifting burden of proof, (see below) is that it is for the claimant to show the existence of a provision, criterion or practice, (PCP) and that such PCP placed the *claimant's* group sharing his protected characteristic at a disadvantage as compared to another group that does not share his protected characteristic and that the PCP was applied to the claimant which resulted in him being subjected to that disadvantage. These are primary facts which the tribunal has to find before the burden of proof shifts to the respondent, see Project Management Institute v Latif [2007] IRLR 579 and Bethnal Green and Shoreditch Education Trust v Jeanne Dippenaar UKEAT/0064/15/JOJ.

21. The obligation is on the employer to show that the PCP complained of is a proportionate means of achieving a legitimate aim, ("objective justification"). The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary (Hardys & Hansons Plc v Lax [2005] EWCA Civ 846).

22. The key elements are set out in what is known as the, "Hampson Test" derived from Hampson v Department of Education and Science [1990] ICR 511 HL. The employer must show that the means adopted to achieve the objective:

- 22.1. Correspond to a real need on the part of the undertaking;
- 22.2. Are appropriate with a view to achieving the objective in question, and
- 22.3. Are necessary to that end.
23. In considering the defence of Justification, the tribunal has to objectively balance the discriminatory effect of the PCP and the reasonable needs of the employer.
24. The tribunal must weigh the quantitative and qualitative assessment of the discriminatory effect of the PCP, (University of Manchester v Jones [1993] ICR 474).
25. The tribunal should scrutinise the justification put forward by the Respondent , (per Sedley LJ in Allonby v Accrington & Rosedale College [2001] ICR 189).
26. Proportionality requires the Tribunal to make its own judgment on a fair and detailed analysis of the working practices and business considerations involved, as to whether the discriminatory measure is really necessary, (per Pill LJ in Hardys & Hansons Plc v Lax).

Harassment

27. Harassment is defined at s.26:

“(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.

(5) The relevant protected characteristics are—

...

disability;

...”

28. We will refer to that henceforth as the proscribed environment. There are three factors to take into account:

28.1. The perception of the Claimant;

28.2. The other circumstances of the case, and

28.3. Whether it is reasonable for the conduct to have that effect.

29. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred.

30. HHJ Richardson observed in Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15/LA at paragraph 23:

“The question posed by section 26(1) is whether A’s conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round — recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic. In some cases the burden of proof provisions may be important, though they have not played any part in submissions on this appeal. The Equality Code says (paragraph 7.9):

‘7.9. 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.’ ...”

31. The motivation and thought processes of those accused of harassment may be relevant to the question of whether their conduct amounted to harassment, see Unite the Union v Nailard [2018] IRLR 730 at paragraphs 108 -109.

32. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but the comments, (by Underhill P, as he then was) apply to cases of harassment in respect of any of the proscribed grounds.

“We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture

of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

33. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769. Of the words, “intimidating, hostile, degrading, humiliating or offensive” he said that Employment Tribunals, “*should not cheapen*” the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

Reasonable Adjustments

34. Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which might apply in this case set out at subsection (3) as follows:-

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

35. Section 21 provides that a failure to comply with such requirements is a failure to make a reasonable adjustment, which amounts to discrimination.
36. There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:
- 36.1. The relevant provision criterion or practice applied by or on behalf of the employer;
 - 36.2. The identity of non-disabled comparators, (where appropriate);
 - 36.3. The nature and extent of the substantial disadvantage suffered by the disabled employee;
 - 36.4. The steps the employer is said to have failed to take, and
 - 36.5. Whether it was reasonable to take that step.
37. It is important for the claimant to identify the PCP relied upon and for the Tribunal to make its decision on the PCP advanced by the claimant, see Secretary of State for Justice v Prospero UKEAT/0412/14.
38. The obligation to make reasonable adjustments is on the employer. That means that it must consider for itself what adjustments can be made, thus for example in Cosgrove v Caesar and Howie [2001] IRLR 653 the duty

was not discharged simply because the Claimant and her GP had not come up with what adjustments could be made. An employer that does not make enquiries as to what might be done to ameliorate the disabled persons disadvantage, runs the risk that it fails to make a reasonable adjustment. That is not the same as saying that there is an obligation to consult, just that the failure to do so, or to inform oneself of the relevant facts and reflect on them, runs the risk of placing oneself in the position where a breach of the obligation to make reasonable adjustment occurs, out of ignorance, (see Tarback v Sainsbury's Supermarkets Ltd [2006] IRLR 664).

39. The duty is to make “reasonable” adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective. Our focus should be not on the process followed by the employer to reach its decision but on practical outcomes and whether there is an adjustment that should be considered reasonable. It is for the tribunal to determine, objectively, what is reasonable. It is not a matter of what the employer reasonably believed. Unusually, the tribunal may substitute its view for that of the employer and it is permissible for the tribunal to conclude that different adjustments would have been reasonable from those contended for by the Claimant: see Smith v Churchills Stairlifts Plc [2006] ICR 524 CA; Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Garrett v LIDL Ltd UKEAT 0541/08; Southampton City College v Randal IRLR 2006 18; Project Management Institute v Latiff [2007] IRLR 579.
40. The employer’s reasoning or other processes that lead to the failure to make reasonable adjustments are irrelevant, Owen v Amec Foster Wheeler Energy Ltd 2019 ICR 1593, CA.
41. The tribunal should adopt a holistic approach, where a number of adjustments taken together might ameliorate the substantial disadvantage, see Burke v The College of Law [2012] EWCA Civ 37 and Home Office (UK Visas and Immigration) v Kuranchie EAT 0202/16.
42. The EHRC Code at paragraph 6.28 sets out examples of matters we might take into account in evaluating whether proposed steps are reasonable as follows:
 - 42.1. The effectiveness in preventing the substantial disadvantage;
 - 42.2. Its practicability;
 - 42.3. The financial and other costs and the extent of any disruptions that may be caused;
 - 42.4. The employer’s financial or other resources;
 - 42.5. The availability of financial or other assistance, (eg through Access to Work), and

- 42.6. The type and size of the employer.
43. The effectiveness of a proposed adjustments is one of the factors to be evaluated by the tribunal; it is sufficient the Claimant to raise the issue for there to be a chance that the step would avoid the disadvantage: South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley (UKEAT/0341/15/DM) at [17]-[18].
44. The effectiveness of a proposed adjustment should be assessed on the basis of the evidence available at the time.
45. In Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 Elias LJ said:
- “So far as efficacy is concerned, it may be that it is not clear whether the step proposal will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.”*
46. The more practical an adjustment is to implement, the more likely it is to be reasonable. A step that is recommended or contemplated in an employer’s own policies is likely to be practical. An adjustment which is recommended in an employer’s own policy is one that is likely, at least as a starting point, to be a reasonable adjustment to make: see Linsley v Commissioners for Her Majesty’s Revenue and Customs (UKEAT/0150/18/JOJ) (7 December 2018) at [24]. One should expect a good reason for departing from such a policy; ignorance by the relevant managers is not a good reason: see Linsley at [24]-[25].
47. In Cordell v Foreign and Commonwealth Office 2012 ICR 280 EAT the EAT gave useful guidance on the significance of the cost of a proposed adjustment. That might include the size of any budget allocated to reasonable adjustments, how much has been spent in similar situations, what other employers are prepared to spend in similar situations, and any policies set out in collective agreements. The tribunal makes a judgment on what it considers right, as an industrial jury. The significance of cost might also depend on what the Respondent might otherwise have to spend, for example in retraining or recruiting others.
48. The resources, financial and otherwise, available to the employer are relevant as is its size. For example redeployment is more likely to be reasonable for a large employer.
49. The effect of an adjustment on others is relevant. But one should not forget that employers are under a statutory obligation to take positive action.
50. On the question of comparators, the Code states at 6.16 that the purpose of comparison with people who are not disabled is to establish whether it is a PCP, physical feature or lack of auxiliary aid that places the disabled

person at a disadvantage and therefore there is no need to identify a comparator whose circumstances are the same as the Claimants, (in contrast to such a requirement in claims of direct and indirect discrimination). Simler P observed in Sheikhholeslami v University of Edinburgh [2018] IRLR 1090 at [48]-[49] that it is a question of whether the PCP bites harder on the Claimant, she said:

“Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.”

Burden of Proof

51. Section 136 deals with the burden of proof:

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

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

52. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005] IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

53. This does not mean that we should only consider the Claimant’s evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

Credibility

54. A brief word first of all about reliability of evidence. We could not regard Mr Richardson as a reliable witness, in that the evidence which he gave was inconsistent and contradictory, much as his evidence was before Mr Hilton in the Disciplinary Hearing.

55. Mr Hilton could not be described as a reliable witness either. He confirmed under Oath that the contents of his Witness Statement were

true, but it was not. Mr Hilton's evidence in his statement was that he did not know about Mr Richardson's disability until he started the Disciplinary Hearing. Yet reference had been made to Mr Richardson's Autism in the notes of the investigatory meetings, which Mr Hilton said he had read carefully before starting the Disciplinary Hearing. In oral evidence, he acknowledged that he knew of Mr Richardson's disability from having read the investigatory interviews and indeed, he asserted for the first time that before starting the Disciplinary Hearing, he had spoken to the Investigating Officer, Ms Moore, about Mr Richardson's Autism. He further asserted for the first time in oral evidence, that at the end of the Disciplinary Hearing, before the Outcome Hearing, he consulted with Human Resources for advice and the advice he was given was that he should carry on.

Findings of Facts

56. The Respondent has something in the region of 900 pubs in the United Kingdom and employs in the region 40,000 people.
57. Mr Richardson was aged 21 at the time in question. He is an Autistic person. We noted the following from the Education Health and Care Plan prepared in respect of Mr Richardson within the Bundle, noted as last having been reviewed in May 2021, which is the month in which his employment with the Respondent began:-

"Thomas has a literal understanding and interpretation of both verbal and written language used around him.

Thomas has significantly restricted comprehension skills in comparison to his peer group...

Thomas tends to talk about his own interests and can make odd comments from time to time.

Thomas has difficulties interpreting and using facial expressions, body language and tone of voice.

...

Thomas has limited understanding of social rules and needs guidance and support in this area".

58. There are a number of policies to which we were referred.
59. The Equality, Diversity and Inclusion Policy, (EDI), is relied upon as a PCP in respect of the indirect discrimination and reasonable adjustments claims. It states that those who do not adhere to the policy will be subject to disciplinary action, which may include summary dismissal. It states that the Respondent is committed to making reasonable adjustments to assist all who require them. It states that the Respondent does not tolerate actions such as sexist comments, inuendo, jokes of an offensive nature

and that such actions will be dealt with under the Disciplinary Policy. Listed under 'Management Guidance' is an expectation that managers will support employees with a disability and take all reasonable steps to ensure that any provision, criterion or practice ("PCP") does not put a disabled person at a substantial disadvantage. In respect of harassment, it states:-

"Differences of attitude, background / culture and the misinterpretation of social signals can sometimes mean that actions are perceived as harassment, even though the purpose of the behaviour was not to offend others.

Wetherspoon is committed to supporting an environment where everyone is treated fairly, with dignity and respect, and is entitled to work in an environment free from harassment..."

60. The Social Media Use Policy states that it covers all forms of social media including of course, Facebook. It makes clear that employees must not publish anything which could directly or indirectly damage or compromise the Respondent's reputation in any way. Employees are expressly warned that if they can be identified as working for the Respondent, they must ensure that their content complies with the Social Media Policy and is in line with how employees are expected to present to customers and colleagues whilst at work. Employees are reminded that they should be respectful when making statements on social media and that they are personally responsible for all communications which will be published on the internet for anyone to see. It states that:

"You must remain aware of the public nature of social media at all times. Even content posted on a private page, or closed page, can be shared quickly across other social media platforms, so you must assume that anything published on your page will reach the public domain."

61. The Disciplinary Policy states that employees who have a disability may be accompanied by,

"a reasonable choice of companion (e.g. a Support Worker or someone with knowledge of their disability and its effects)"

It includes amongst its examples of gross misconduct that may lead to summary dismissal, a failure to comply with the EDI or the Anti-Harassment Policy.

62. The Disciplinary Policy also states that a choice of companion will not be unreasonably refused.

63. The Anti-Harassment Policy explains harassment in terms of the legal definition, (see above). It is made clear that harassment may include conduct, (inside or outside of the workplace) which,

“denigrates, ridicules, intimidates or is abusive to an individual...”

It is made clear that breach of the policy may result in disciplinary action up to and including summary dismissal.

64. The Welcoming and Supporting Employees with Disabilities Policy refers to a Neurodiversity Policy and a Neurodiversity Support Plan, neither of which were reproduced in the Bundle.
65. Mr Richardson’s employment with the Respondent as a Bar Associate began on 15 May 2021. It was, in the words of his Mother, his first proper job. He was employed at a pub in Norwich belonging to the Respondent known as ‘The Queen of Icen’.
66. Mr Richardson said in answer to a question from me during his oral evidence, that on joining the Respondent he completed a form at his Induction on which he ticked a box to confirm that he was a disabled person. He says that he heard nothing more about that. That was surprising new evidence. It was also surprising that the document had not been disclosed, (or asked for). None of the Respondent’s Witnesses suggested this was not true. The Respondent’s position was that it accepts that it knew Mr Richardson was disabled at all material times. We accept Mr Richardson’s evidence.
67. At the start of his employment, Mr Richardson told his Team Leader Mr A Vincent about his disability and he was assured that his work colleagues had been made aware.
68. Mr Richardson was a good worker and until the events in question, he got on well with everybody. In July 2022, Mr Richardson invited a work colleague, Mr Balciunas, to join him as a friend on Facebook. Mr Balciunas saw Mr Richardson’s postings on Facebook and as a consequence of what he saw, deliberately ignored Mr Richardson’s invitation.
69. The postings which Mr Balciunas would have seen included those which subsequently gave rise to an Investigation and ultimately Mr Richardson’s dismissal. A description of them follows:-
 - 69.1. 10 February 2022 - a posting by Turning Point UK, (which describes itself as a right wing Conservative activist and political organisation that aims to challenge the left leaning bias in our institutions and wider society; expose the far left and end the tyranny of woke ideology). The posting states in writing over a photograph of some young people,
 - *“modern red day flags:*
 - *Karl Marx t-shirt*
 - *blue hair*
 - *pronouns in bio*

- *BLM in bio*
- *vegan*

69.2. 22 May 2022 - a copy of Mr Richardson's Contract of Employment showing that he was employed by the Respondent.

69.3. 7 September 2020 - a posting which states,

"I Support my Black Friends, but not BLM. I Support my White Friends, but not the KKK. I Don't Support Hate Groups. Skin colour doesn't mean shit. You're either a good person or a piece of shit".

69.4. 29 June 2020 - a re-posting with the words, *"There is hope"* of a picture that places adjacent to each other two photographs, one of an apparently 1930s style crowd doing a Nazi salute, but with one person not doing so, his arms folded. He is highlighted, with graphics circling him. The adjacent photograph is of a line of modern day sports women, all of whom are apparently, *"taking the knee"* except one, who is not doing so.

69.5. 12 November 2019 - a photograph of Greta Thunberg with the words written below,

"My generation will start a revolution!"

Below that a photograph of Clint Eastwood and Telly Savalas from the World War II movie 'Kelly's Heroes' with the words,

"My ass. Your generation can't work forty hours in a week, can't decide whether you're a boy, a girl, or "other" or can't eat meat without crying".

69.6. There is a table comparing Communism, Islam and Nazism, indicating with a 'Yes' or a 'No' whether or not those, what are described as, *"totalitarian ideologies"* permit freedoms of speech, equality of women, democracy, the equality of races, the freedom to eat and drink what one wants, sexual freedom, the freedom to wear clothes of one's choice and freedom to marry whom one loves. In respect of each of those, Islam is identified as denying such freedoms. Communism is identified as denying freedom of speech and democracy. Nazism is identified as denying freedom of speech, democracy and the equality of races. The posting identifies Islam as a totalitarian regime. In a re-posting of that posting, Mr Richardson wrote, (on 23 November 2018) his own observations which included:-

"I don't want to piss people off but I know this will trigger some lefties, but the UK is dead, it is not a freedom of democracy, it is more of a authoritarian government that apparently if you're a far left Communist, Muslim woman or black man, then that's fine you can

say hateful speech. But if you are Conservative then you are immediately demonised, you can have your life ruined by the State. ... Communism and Nazism are the same ideology, one is class and the other is nationality, they are both socialist. They are both Anti-Capitalist and anti-freedom of speech, same for Islam and Sharia Law... Islam is worse than Communism or Nazism. Share this post, restore democracy in our nation and MAKE BRITAIN GREAT AGAIN!"

69.7. A re-posting of a Daily Mail article with the heading,

"Doctor Facing Enquiry for Asking Muslim Woman to Lift Her Veil, says he will quit".

With this on 19 May 2019, Mr Richardson wrote,

"Now you hear the bull #hit about the NHS underfunded or not enough Doctors, well. There may be. Stop sacking them for not following progressive left wing ideology. #BANISLAM #EUOUTBRITAINFIRST."

70. On 30 July 2022, there was an annual Gay Pride Parade in Norwich. The Queen of Icenis was busy. There were many Gay Pride flags, slogans and decorations. Mr Balciunas, (openly gay) asked Mr Richardson what he thought of gay people, to which he responded,

"I am fine with them, I just don't want the gay thing shoved down my throat".

71. On 30 August 2022, Ms Davies was working with, amongst others, Mr Richardson. She was stressed and was shouting. A colleague, Ms Ireland, asked her if she was okay. Mr Richardson interjected to inform Ms Davies that she was a 'sinner' for shouting. She retorted,

"Yeah, well I'm a bitch anyway."

As Ms Davies walked away, he said, not heard by Ms Davies but heard by others,

"God will forgive you."

72. In a subsequent exchange between Mr Richardson, Ms Chapman and Ms Ireland, Mr Richardson commented that,

"God would not forgive gay people"

To which Ms Chapman responded,

"I'm not going to apologise for liking boobies"

Mr Richardson replied,

"God has forgiveness for everyone"

Ms Chapman replied,

"Why do I have to apologise for being gay?"

And he replied,

"Maybe God will forgive you."

73. Although Mr Richardson denies, (sometimes) that he said that God would not forgive Ms Chapman, his answer to questions about that, both in the Disciplinary Hearing and in cross examination, were contradictory. We note that Ms Chapman's Investigation Notes from her interview on 13 August, do not quote Mr Richardson as saying, *"God would not forgive her"*. The notes of the 19 August meeting with her record that he did. The notes of Ms Davies' meeting record she said he had said God would *not* forgive. We find that he did say God, *"will not forgive"* and did not say that God, *"will forgive"*. We find that Mr Richardson was not lying or being untruthful, but his evidence is unreliable.
74. Ms Chapman discussed at the time what had just occurred with another Shift Manager, Mr Scott Piloni. He undertook an immediate Investigation, interviewing on 13 August 2022 Ms Chapman (page 90), Ms Davies, (page 91), and the next day on 14 August 2022, Ms Ireland, (page 92).
75. Subsequently, a different Shift Manager, Ms Moore, was appointed to investigate. She interviewed Mr Richardson on 15 August 2022 (page 93). He acknowledged saying that shouting was a sin. He described himself as a born again Christian. He acknowledged that somebody had made some reference to their sexuality and claims that he had said he did not have a problem with it. He denied making any reference to God forgiving Ms Chapman for liking women. He denied saying that he did not want Gay Pride shoved down his throat. He then repeated the expression. He spoke about being too scared to say anything and compared his circumstances to totalitarianism during the 1930s in Eastern and Western Europe.
76. Ms Moore interviewed Ms Davies on 16 August 2022, (page 100). She reiterated what she had heard. Ms Moore interviewed Mr Balciunas on 17 August 2022, who confirmed what he had heard on 30 July 2022. He made a remark recorded as,

"He's obviously going to give an honest answer because he is Autistic."

He made a reference to Mr Richardson's Facebook and suggested that Mr Richardson was homophobic.

77. Ms Moore interviewed Ms Chapman on 19 August 2022, she quoted Mr Richardson as saying that *"God would not forgive gay people"*, (page 104).

78. Ms Moore interviewed Ms Ireland on 19 August 2022, (page 106). She said she did not really hear the conversion, but recited what she had been told by Ms Chapman to the effect that Mr Richardson had told her she was going to hell because she was gay. Ms Chapman referred Ms Moore to Mr Richardson's Facebook postings, which she said were, "*quite problematic*".
79. Ms Moore interviewed Mr Richardson on 26 August 2022, (page 107). She talked him through the various postings as we have described above. He referred to the modern day red flags posting as just, "*anti-woke stuff*". He described Black Lives Matter as a Marxist terrorist organisation that supports black supremacy. He compared Black Lives Matter to Nazi Germany and compared taking the knee to the Nazi salute. He denied posting the #BANISLAM posting, saying that had been put on his account by someone else who had gained access.
80. Mr Richardson was subsequently invited to attend a Disciplinary Hearing. The letter is at page 121 and appears to be dated 19 August 2022, but that must be a typographical error, because the letter is stated to include amongst the minutes of all the interviews conducted by Ms Moore, that which she conducted of Mr Richardson on 26 August 2022. All relevant documentation was included, including copies of the Facebook postings, the interview notes and the relevant policies. The letter stated that he may be accompanied by a work colleague or Trade Union Representative.
81. Mr Hilton was appointed to Chair the Disciplinary Hearing. He read the interview notes. He noted the reference to Mr Richardson being Autistic. He spoke to Ms Moore, who confirmed that to be the case. He did not take advice.
82. The Disciplinary Hearing took place on 29 August 2022. Mr Hilton was accompanied by Mr Bye, who at the time was Shift Manager at the Queen of Icen. Mr Richardson was accompanied by his friend and Shift Leader, Mr Vincent.
83. The first three allegations related to what Mr Richardson had said to his colleagues. They were:
- 83.1. That he said to Ms Davies she was a sinner for shouting and that God would forgive her.
- 83.2. That he told Ms Chapman God would not forgive gay people, when she said she was not going to apologise for liking boobies, he replied,
- "That's okay God has forgiven us for everyone"*
- When she responded,

"Why should I apologise for liking women?"

He replied,

"Maybe God will forgive you"

83.3. Lastly, that on 30 July 2022, he said in relation to Gay Pride, he did not want it,

"shoved down my throat".

84. The minutes record that he said in response to those allegations,

"They are all lies because they do not like me".

85. Having said that, when it was pointed out to Mr Richardson that he had previously admitted making some of those remarks, in the meetings with Ms Moore, he then acknowledged he had done so. He acknowledged that he said he did not want Gay Pride shoved down his throat, he acknowledged that he said to Ms Davies she would be forgiven for shouting. He continued to deny he had said that God would forgive gay people.

86. Mr Richardson was taken through the various Facebook postings. He described the Nazi salute and taking the knee posting as anti-woke and fun. He reiterated his description of Black Lives Matter as a black supremacist and Marxist organisation that he said, wants to bring down the West. He described the knee as a symbol of the movement as much as the salute was a symbol of the Nazi Regime. He described Black Lives Matter as a hate group and compared it to the Black Panther organisation of the 1970s. He confirmed that he still held those views.

87. During the Disciplinary Hearing, particularly at the outset, Mr Hilton discussed Mr Richardson's disability with him. He establishes that it is Autism. He asked whether that put him at a disadvantage in the workplace, to which Mr Richardson replied,

"Possibly with some tasks but mainly it would affect me being bullied in the workplace."

88. The meeting lasted between 12:38 and 15:16, so just a little short of three hours. There were two breaks, at 13:16 for about 20 minutes and at 14:40 for about 15 minutes. When the meeting concluded, Mr Hilton explained that he would reach a decision overnight.

89. Mr Hilton contacted Mr Richardson on 30 August 2022, the next day, to come into the pub for the outcome. Mr Richardson texted to say that he would attend at 9.30pm with his Father as his witness, (page 245), Mr Hilton's response was that his companion had to be a member of staff.

90. At the Outcome Meeting on 30 August 2022, Mr Hilton informed Mr Richardson that he was to be summarily dismissed for gross misconduct.
91. The outcome was confirmed by letter dated 31 August 2022, (page 138). Mr Hilton concluded:-
 - 91.1. Mr Richardson admitted telling Ms Davies that God would forgive her for shouting;
 - 91.2. Mr Richardson admitted saying to Mr Balciunas, Ms Ireland and Ms Davies, that he did not want Gay Pride, "*shoved down your throat*";
 - 91.3. Mr Richardson told Ms Chapman that God would not forgive gay people and that maybe God would forgive her;
 - 91.4. Mr Richardson's Facebook postings on 10 February 2022, 26 June 2022, 12 November 2019 and 23 November 2018 breached company Social Media and EDI Policies; and
 - 91.5. That Mr Richardson had been responsible for sharing the post on 19 May 2019 relating to #BANISLAM.
92. Mr Hilton considered as mitigation:-
 - 92.1. Mr Richardson felt that the people who had complained about him did not like him and made up their allegations;
 - 92.2. His comment to Ms Davies had been meant as a joke and had been misinterpreted;
 - 92.3. The comment about not wanting Gay Pride shoved down his throat was taken out of context;
 - 92.4. He was unaware of the Social Media Policy and had not intended to breach it; and
 - 92.5. The post on 19 May 2019 had been posted by a friend and he personally, absolutely disagreed with it.
93. Mr Hilton discounted as inoffensive, the posting of 7 September about supporting black friends but not BLM and supporting white friends but not KKK.
94. He concluded that Mr Richardson was in breach of the EDI Policy, the Anti-Harassment Policy and the Social Media Policy.
95. An email address was provided for appeal in the outcome letter. Mrs Richardson attempted to appeal on her son's behalf in emails on 4 and 6 September 2022. Unfortunately, she sent those emails to the wrong address. They were not received by the Respondent.

Conclusions

96. For the avoidance of doubt, telling somebody that God will forgive them, (or not) for being gay is harassment on the grounds of sexual orientation. It is unwanted conduct that can reasonably be perceived as creating the proscribed environment. The same may be said of the comment to the effect that one does not want Gay Pride rammed down one's throat. Were an employer to fail to take action when employees have complained about being on the receiving end of such comments, they would be likely to find themselves facing sustainable complaints of discrimination on the part of the complaining employees.
97. We note that Mr Richardson's case has not been advanced on the basis of discrimination arising from disability.
98. We also note that it was not put to the Respondent's Witnesses that they had been goading or deliberately provoking Mr Richardson into making the remarks that he did.
99. We turn to the List of Issues in order to reach our conclusions.

Direct Discrimination on the Grounds of Disability

100. Mr Richardson relies upon a hypothetical comparator. That is a Bar Associate in the same circumstances who does not have Autism. It is clear that if a person had made the remarks Mr Richardson made and had put the postings on Facebook Mr Richardson had posted, and that person was not an Autistic person, they would have been summarily dismissed just as Mr Richardson was. There were no facts from which we could properly conclude otherwise, absent explanation. The burden of proof does not shift. Even if it had, we accept the evidence of Mr Hilton that the reason for dismissal was Mr Richardson's gross misconduct and was in no sense whatsoever to do with his Autism.

Failure to Make Reasonable Adjustments

101. We note the Equal Opportunities Policy is mis-described in the List of Issues, its proper title is The Equality Diversity and Inclusion Policy (EDI). The EDI and Social Media Policies plainly meet the definition of a provision, criterion or practice.
102. It is Mr Richardson's case that these PCPs put him at a disadvantage compared to people without Autism, because his Autism causes him to speak more candidly and say things as they are, without a filter. It is said on his behalf that he is therefore less likely to be able to comply with the PCP. There is no categorical direct evidence, but we find that the characteristics quoted above taken from the Norfolk County Council NHS Report, (at pages 157 – 160) are such that Mr Richardson was at a

disadvantage in complying with these policies as compared to a neurotypical person.

103. We find that the Respondent knew, or ought reasonably to have known, that Mr Richardson was at such a disadvantage when he started his employment, having ticked a box to indicate that he was disabled, which one would have thought would have triggered the gathering of further information and the preparation of a Neurodiversity Plan as anticipated by the Welcoming and Supporting Employees With Disabilities Policy. They also knew when Mr Richardson told Mr Vincent and again, when Mr Balciunas spoke to Mrs Moore on 17 August 2022.

104. We must ask ourselves whether the Respondent took such steps as were reasonable to avoid the substantial disadvantage. We consider first of all the adjustments proposed by Mr Richardson:-

104.1. It is suggested that the Respondent should have allowed Mr Richardson to express what he calls his philosophical and religious beliefs on Facebook, providing a disclaimer that the opinions are his own. That would not, in our opinion, be a reasonable adjustment. It is not practical to expect an employer, a nationally well known organisation in the service industry, to be exposed to the danger of adverse publicity flowing from knowingly employing a person who expresses the views articulated in Mr Richardson's postings on Facebook.

104.2. It is suggested the Respondents should ignore Mr Richardson's historical postings. For the reasons set out in the previous subparagraph, that would not in our view be a reasonable adjustment, it would not be practical.

104.3. It is suggested the Respondents should,

"discounting the Claimant's comments when asked for them as he has Autism and will speak candidly and tell it as it is".

This sentence does not entirely make sense, but it seems to be a suggestion that the Respondent and its employees should be prepared to ignore what he says. Put as baldly as that, it is not a practical solution and would not be a reasonable adjustment. One cannot simply ask employees to ignore homophobic insults because the person saying them is Autistic.

104.4. It was suggested that the Respondent should not support Gay Pride week. That absolutely would not be a reasonable adjustment. It is right, appropriate and laudable that the Respondent should support such events.

104.5. There is a numbering error in the List of Issues, there should be a 30(e) which actually appears as paragraph 31. The adjustment

contended for is that the Respondent should take a more relaxed approach to its published Policies. That is what might be described as a vague and general description of the more specific adjustments we raised as possibilities with the parties at the outset of the Respondent's evidence.

105. We raised the following as possible adjustments to alleviate Mr Richardson's substantial disadvantage:
 - 105.1. Issuing him with a Final Written Warning rather than dismissal;
 - 105.2. Giving Mr Richardson an explanation and clear guidance as to why his postings on Facebook were unacceptable, requiring him to take the offensive postings down, (and not just those which were open to the public) and an emphatic explanation that any further offensive postings on Facebook or any other social media would result in dismissal;
 - 105.3. An explanation and clear guidance to Mr Richardson that what he had said to his colleagues was offensive and unacceptable and that any further repetition of such conduct would result in dismissal;
 - 105.4. The appointment of a Mentor to coach and support Mr Richardson;
 - 105.5. An explanation, (with Mr Richardson's consent) to his work colleagues that he is an Autistic person and what this may mean in terms of his behaviour;
 - 105.6. Training for Managers and / or work colleagues in relation to Autism;
 - 105.7. Putting in place a Neurodiversity Plan, which is apparently, on the Respondent's case, standard practice for the Respondent; and
 - 105.8. Allowing and / or arranging for Mr Richardson to be accompanied and supported at his Disciplinary Hearing by somebody who understands his Autism, for example but not necessarily limited to, a parent.
106. Ignoring the question of accompaniment to begin with, we consider our proposed adjustments holistically, i.e. consider whether together they might amount to a reasonable adjustment to alleviate the disadvantage. Would these have been effective and practicable?
107. In terms of effectiveness, there does not need to be certainty that they would have achieved the desired outcome, that is ensuring nothing like this ever happened again. We are not evaluating on the balance of probabilities whether we think it would have happened again. There is certainly a chance, a good chance, that if all our proposed adjustments were implemented, such incidents in the future would be avoided. Mr

Richardson had worked for the Respondent for more than a year before these difficulties arose. With the benefit of clear warning and guidance, it seems to us unlikely events such as these would have reoccurred.

108. The difficulty for us was not effectiveness, but practicability. We were clear, having heard evidence from Mr Richardson's colleagues, as Mr Hilton was clear on reading the investigation notes and hearing from Mr Richardson, that there was significant relationship damage in what had happened. Mr Richardson had expressed pronounced and extreme ideological views which he confirmed at the time, he still adhered to, (he disavows them now). It would, in our judgement, have been impracticable for Mr Richardson to have returned to work with Mr Balciunas, Ms Chapman and Ms Davies and expect there to be a sensible working environment in respect of which the Respondent's commercial success depends upon its pubs having a jovial, pleasant social environment for its customers to enjoy. For these reasons, we reject our proposed adjustments as not being reasonable adjustments.
109. We also proposed an adjustment should have been that Mr Richardson be allowed to be accompanied by somebody who understood his Autism, such as a parent. That is an adjustment that after all, is contemplated in the Respondent's own Policies. It is a mistake by Mr Hilton not to have recognised that. However, we are not satisfied that allowing Mr Richardson to have been accompanied would have alleviated the disadvantage upon which he relies, as articulated in the List of Issues, namely that he speaks more candidly and says things as they are without a filter. Being accompanied by a parent or some other person who understands Mr Richardson's Autism, would not overcome the difficulty that what he had said and done had destroyed his relationship with his work colleagues.
110. We observe that one of the difficulties for Mr Richardson is that his case was not advanced on the basis that there was a failure to make reasonable adjustments from the start of his employment, by making enquiries as to his needs and putting in place a Neurodiversity Plan as contemplated by the Respondent's own procedures.
111. For these reasons, the complaint of failure to make reasonable adjustments fails.

Indirect Disability Discrimination

112. We have already established the EDI and Social Media Policies are PCPs.
113. The characteristics of Mr Richardson as an Autistic person as articulated above, (pages 157 – 160 of the Bundle) are typical of an Autistic person and for those reasons, we would accept that the PCP puts a person with Autism at a disadvantage.

114. We have already accepted the disadvantage is such people are unlikely to meet the requirements of the PCPs because they will simply tell it as it is.
115. We have already established such disadvantage applied to Mr Richardson. The question then arises whether the PCPs were a proportionate means of achieving a legitimate aim. The aims relied upon by the Respondent, that is of ensuring a work environment for staff in which they will not be offended, discriminated against, or harassed because of a protected characteristic; ensuring that breaches of the Equality Act 2010 are the subject of disciplinary proceedings and that all staff have confidence the Respondent will provide a work place at which discrimination or offensive conduct is prohibited, are without doubt, legitimate aims. The question is, are the policies a proportionate means of achieving those aims? In our view they are. There is obviously a real need to achieve those aims. They are laudable aims and the Respondent would find itself liable in discrimination claims brought by employees subjected to such prohibited conduct if the policies were not in place.

Harassment Related to Disability

116. We considered the four allegations relating to the conduct of the Disciplinary Hearing first, they are at paragraphs 40(a), (c), (d) and (e) of the List of Issues. We considered the minutes of the meeting in detail and having heard Mr Hilton's evidence, we are satisfied this was not a hostile disciplinary meeting, though it was doubtless perceived as such by Mr Richardson, not reasonably so in our view. It appears to have proceeded at a slow pace, with two reasonable adjournments. Questions appear to have been posed in a reasonable way. Mr Richardson was allowed time to answer the questions and the context of the questions being asked seems to have been clearly set. We note that the List of Issues appears to have been drawn up at a time when Mr Richardson and those advising him did not have sight of the minutes of the meeting, (see the note at paragraph 40(c)) and it is perhaps a shame these allegations were not revisited once the minutes were made available.
117. We remind ourselves of the test set out in section 26(4).
118. It was alleged that not allowing Mr Richardson's Father to attend, making Mr Richardson more anxious and nervous, amounted to harassment. Attend what? It is not explained in the List of Issues. The meeting he was not, "*allowed*" to attend, was the Outcome Meeting. Not allowing Mr Richardson Senior to attend the Outcome Meeting was a breach of Policy. It would have been better if Mr Hilton had allowed him to attend, but his not doing so did not, in our judgement, create the proscribed environment for Mr Richardson.
119. Emily Davies saying on 13 August 2022, "*Yeah, well I am a bitch*" is not related to Mr Richardson's Autism. It is a reaction to an inappropriate comment made by Mr Richardson. It does not create the proscribed environment.

120. Ms Chapman did not on 30 July 2022, say that she was not going to apologise for liking boobies, she made that remark on 13 August 2022. Notwithstanding the mistake as to the date of the comment, for the same reasons as those relating to Ms Davies comment, we find that the remark did not create the proscribed atmosphere.
121. Mr Balciunas' comment on 17 August 2022, (page 102), "*I mean it was not nice but he is obviously going to give an honest answer because he is Autistic*" is related to Mr Richardson's Autism. It seems to us a perfectly fair remark, made in the context of an investigatory meeting not in the presence of Mr Richardson. It was not a remark made in the work place whilst Mr Balciunas and Mr Richardson are working together. It is a fair remark that does not create the proscribed atmosphere.
122. For these reasons, the complaint of failure to make reasonable adjustments fails.

Breach of Contract and Notice Pay

123. The breach of contract claim does not appear in the list of issues. For the avoidance of doubt, Mr Richardson's contract of employment, (page 206) contains provision for termination of employment without notice in the event of the employee being guilty of gross misconduct, (clause 9). Mr Richardson was guilty of gross misconduct and so was not entitled to notice pay.

Employment Judge M Warren

Date: 28 November 2023

Sent to the parties on: 4 December 2023

For the Tribunal Office.