EMPLOYMENT TRIBUNALS

Claimant: Mr A Woodley

Respondent: B & M Retail Limited

Heard at: **Liverpool** **On:** 15,16,17,18 April 2024

Before: Employment Judge Aspinall

Representation
Claimant: in person
Respondent: Mr Proffitt, Counsel

JUDGMENT having been sent to the parties on 2 May 2024 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following Reasons are provided:

REASONS

Background

1. By a Claim Form dated 29 November 2022 the claimant brought complaints of unfair dismissal and disability discrimination. The claimant has schizophrenia. He had worked for the respondent since February 2013 in one of its stores but was dismissed on 2 September 2022, following a long period of sickness absence, for incapability. The claimant says problems began when a new manager Mr James came in and made derogatory remarks about his condition and changed his working patterns. He says he experienced direct discrimination, harassment a failure to reasonably adjust and that this caused a mental breakdown and his long-term absence. He says his dismissal was unfair and arose out of his disability related absence. The respondent says that it dismissed him because there was no prospect of a return to work in a reasonable time frame and that his complaints of discrimination factually did not occur, were ill founded as they related not to disability but to his requests to change his working pattern for commuting costs reasons and that his complaints prior to his dismissal were out of time.

2. There was a case management hearing before EJ Batten and then a second hearing before EJ Ficklin at which a List of Issues was prepared.

3. The matter came to final hearing in person at Liverpool to deal with liability only. The List was amended by consent to include points relating to knowledge of disability and to remove content that related to conduct dismissals and the ACAS Code and replace it with the relevant test on incapability dismissals.

The List of Issues

4. The issues to be determined are as follows:

1. Jurisdiction (s123 Equality Act 2010 ("EqA"))
   1.1. Were any of C's claims for discrimination brought outside the 3-month time limit prescribed by s123(1)(a) EqA 2010?

   1.2. If so, is it just and equitable to extend time? (s123(1)(b) EqA 2010)

   1.3. Did any such claims form part of conduct extending over a period such as to be treated as being done at the end of the period? (s123(3) EqA 2010).

2. Disability

   1.1. R accepts that C was a disabled person by reason of schizophrenia at the material times of between 15 August 2021 and 10 October 2022.

   1.2. At what point did R have actual or constructive knowledge of disability?

3. Harassment

   3.1. Did R subject C to the following unwanted conduct?

      3.1.1. On 3 September 2021 Richard James referring to him as a "fucking skitzo";

      3.1.2. On 3 September 2021 Richard James telling him to drop his hours or leave the company;

      3.1.3. On 22-26 September 2021 Richard James scheduling his shifts across 5 consecutive days Wednesday-Sunday;

3.1.4. Between 15 August 2021 and 18 October 2021 Richard James timing him when unloading with the forklift truck (when both were on shift);

3.1.5. Between 15 August and 18 October 2021 Richard James chopping and changes his shifts without giving notice;

3.1.6. On 9 October 2021 Richard James rotating him for a shift, knowing that he had counselling/therapy on the day;

3.1.7. On 12 October 2021 Richard James "writing him up" for a warning.

3.2. Was any such conduct related to C's disability?

3.3. If so, did that conduct have the purpose or effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

4. Direct discrimination (s13 EqA 2010)

4.1. Did R subject C to the following treatment?

4.1.1. On 3 September 2021 Richard James referring to him as a "fucking skitzo";

4.1.2. On 3 September 2021 Richard James telling him to drop his hours or leave the company;

4.1.3. On 22-26 September 2021 Richard James scheduling his shifts across 5 consecutive days Wednesday-Sunday;

4.1.4. Between 15 August 2021 and 18 October 2021 Richard James timing him when unloading with the forklift truck (when both were on shift);

4.1.5. Between 15 August and 18 October 2021 Richard James chopping and changes his shifts without giving notice;

4.1.6. On 9 October 2021 Richard James rotaing him for a shift, knowing that he had counselling/therapy on the day;

4.1.7. On 12 October 2021 Richard James "writing him up" for a warning.

4.2. Was any such treatment less favourable than R did, or would, have accorded to someone in materially similar circumstances who did not share C's disability? C relies on a hypothetical comparator.

4.3. If so, was any such less favourable treatment because of C's disability?

5. Discrimination arising from disability (s15 EqA 2010)

5.1. Did R subject C to the following unfavourable treatment:

5.1.1. On 12 October 2021 Richard James "writing him up" for a warning; and

5.1.2. On 15 September 2022 Mr Dennett dismissing him.

5.2. Was the reason for any such unfavourable treatment something arising from C's disability?

C says the "somethings" arising are:

5.2.1. Having a nervous breakdown (October 2021); and

5.2.2. Taking sickness absence from 18 October 2021 to 15 September 2022.

5.3. Was any such treatment a proportionate means of achieving a legitimate aim, namely effectively managing the sickness absence of its workforce?

6. Failure to make reasonable adjustments (s20-22 EqA 2010)

6.1. Did R apply the following provision, criterion, or practice ("PCP"):

6.1.1. Requiring employees contracted over 20 hours to attend work 5 days per week?

6.1.2. Requiring employees to maintain acceptable levels of attendance or be subject to sickness absence management?

6.2. Did any such PCP place C at a particular disadvantage when compared with people who do not share his disability in that he was more likely to suffer sickness absence, be subject to sickness absence management, and be at risk of dismissal?

6.3. Did R know, or should it reasonably ought to have known, that any such PCP would place C at any such disadvantage(s)? R does not dispute knowledge of particular disadvantage.

6.4. If so, did R fail to take such steps as was reasonable to avoid the particular disadvantage, namely by:

6.4.1. Allowing him to work across 4 days (not including Saturdays) in September-October 2021;

6.4.2. Not dismissing him in September 2022?

7. Unfair dismissal (s98 Employment Rights Act 1996)

7.1. Did R have a potentially fair reason for dismissing C? R relies on capability.

7.2. Was there a prospect of C returning to work within a reasonable time frame?

7.3 How long could the respondent have reasonably been expected to wait?

7.4. Was dismissal within the band of reasonable responses?

Adjustments for the hearing

5. The claimant's schizophrenia means that he has auditory hallucinations. He hears voices making negative comments about him, telling him that he is no good, that he was a bad worker and a bad father. This voice comes from outside, it appears to him that it can be coming through the walls or through the air conditioning vents. This voice talks over conversations that he is trying to have. It makes it very difficult for him to focus on what is being said to him because he has to discern which voice is the person talking to him and which is the negative commentary, then discount the negative commentary and try and focus on hearing what the person has said. He can discern which is an auditory hallucination and which a comment from a person because he can see a person speaking to him, the mouth moving, so he knows the words are coming from a person. He then has to answer the person but the negative commentary interjects and criticizes his proposed answer causing him to have to reevaluate what he wants to say. This means he has to have a high level of concentration and discipline in ordering his

thoughts and responses. That is very tiring. He can appear to others as though he is not listening or that his facial responses don't match what they are saying to him when he is processing the voices he hears and his responses. He can appear to others as though he is ignoring them or taking too long to answer.

6. We discussed what he does in day to day life to cope. He takes medication, goes for walks, listens to music and rests. Everyone agreed in tribunal it will help him if:

a. We give him more time to respond.

b. We don't draw any conclusions based on his facial reactions, body language or speed of response

c. We repeat things when he needs them repeating

d. We allow rest breaks if he is becoming tired and struggling to concentrate.

e. We are responsive as we go through this week and keep adjustments under review.

Documents

7. The parties had prepared a bundle of 185 pages to which further pages were added. Further documents arrived from the respondent during the hearing and were added by consent to a total bundle at close of evidence of 208 pages. Another document arrived during deliberation and was added but no weight was attached to it. A further email was received conceding corporate knowledge of disability throughout.

8. The Tribunal had concerns about the absence from the bundle of the following document which would have expected to see

a. shift rotas for the relevant period showing the work

b. Clocking in and out records showing that shifts actually worked by the claimant

c. fit notes showing dates and reasons for absence

d. GP and other medical records

e. No notes of the discussion on 8 September 2021

f. Detailed notes of a hearing that ended in termination of employment

The Tribunal was also concerned about the reliability of some of the documents that it saw. For example there were entries in some documents produced by the respondent that were inconsistent with entries in other respondent documents. Entries that caused us particular concern were welfare meeting note entries made by Mr James which cited the reason for request for a working pattern over four

days as time and travel cost, which reason was replicated exactly at a document produced later by Jenny Rooney. The Tribunal preferred the claimant's evidence that his disability was the reason for his request.

Oral Evidence

9. The Tribunal heard oral evidence from the claimant and found him to be a sincere and wholly credible witness. When there was something he was not sure about he readily admitted that. He made an important concession in cross-examination that Mr James would have written up anyone who walked off shift on a disciplinary charge. He made that without realizing that parts of his complaint would fail on that point. When that was explained to him he stood by what he had said. The Tribunal observed him to be open to sensible suggestion. In places his own evidence did evolve and that was partly because he is a litigant in person and did not know all of the things that might come up, and his witness statement was only half a page long and he was responding to content in the respondent's witness statements and their oral evidence that was new to him.

10. The Tribunal had read the written statement of Ms Carol Mason. She did not attend, had not signed or dated a statement and there were no ancillary documents to speak to any contact with Mrs Mason. No weight at all was attached to this statement.

11. The Tribunal heard from Mr James who appeared by witness order. He had left the employment of the respondent and required the Order so as to explain his attendance at tribunal to his new employer. He was a willing and co-operative witness for the respondent. The Tribunal found his account of the 8 September meeting unreliable and noted the clear contradictions and inconsistencies in his position at the investigatory interview in the grievance on 4 November 2021 and his position in his witness statement and further change in position in oral evidence. We have found that Mr James was not wholly truthful about his dealings with the claimant. On one point, whether or not he said that the claimant was "always pulling this shit", ie walking off shift, on 9 October 2021, it is his own record dated 11 October that corroborates the claimant's position. In oral evidence he was very keen to answer questions with content about how he *would have* sat down with claimant, had a welfare meeting and discussed how he could make adjustments, if only the claimant had not gone off sick. In this way he sought to blame the claimant for his own failings. The tribunal pressed him to answer as best he could as to what he had actually done at the time. The tribunal is also critical in its reasoning below of his account of his meeting with Mr Carr.

12. Mr Dennet gave his evidence in a straightforward way and was keen to distance himself from events of 2021. He decided to dismiss the claimant and held to his position that there was no foreseeable date of return as justification for that.

13. **The Facts**

14. In 1999 the claimant, a former Royal Navy service man was diagnosed with schizophrenia. Since that date he has had a travel pass entitling him to free train and bus travel. His condition means that he experiences audio and sometimes visual hallucinations. His hallucinations are more frequent and persistent if he is

tired or stressed. He has weekly counselling sessions on Saturdays to manage his mental health and he walks his dog and listens to music both of which are vital therapeutic practices which enable him to maintain a working life. He is on medication and overall for more than ten years prior to the events in this case his condition was well managed so that he was not under any specialist psychiatric service supervision.

15. The claimant started working for the respondent at the Bromborough Store in October 2016. Prior to that he had worked at Wallasey since February 2013 where he had become friends with Ms Mason who had moved to be the manager at Bromborough. He worked 30 hours per week over 5 days. He usually worked Monday, Tuesday, Thursday, Friday 8am to 2pm and Sunday 9am to 3pm. Although he showed some flexibility coming in if necessary to cover for other colleagues his regular pattern was one of not working more than two consecutive days. He was one of only three employees at that store with a fork lift truck driving qualification. A fork lift truck driver was needed on site every day. He was hard working and reliable and there were no issues with his performance.

16. Mr James was brought in to improve the performance of the store. He was concerned to see that people were doing their job fully and quickly. He sometimes watched the claimant at work to see that content of pallets being unloaded from deliveries. He did not time the claimant's work and generally believed the claimant to be one of the better performing colleagues.

17. Work rotas were generated on an automated system known as WFM. Unless the system was told days in which a colleague was unavailable to work it would rota the contracted hours across any five of the seven days in the week. WFM was in operation from March 2021. Between March 2021 and Mr James' arrival at the Bromborough store the claimant had never been required to work on Saturday. The Tribunal cannot know if that was because the previous managers had told WFM that Saturday was a non working day or if rotas were generated showing him working on a Saturday and then manually adjusted by a manager to change the days (in effect adjusting for him) or it was just a function of WFM that the claimant had not been put on rota for a Saturday, perhaps because WFM had been told that other FLT drivers could not work Sundays so that the system allocated them to Saturdays first. However and for whatever reason it came about, the claimant had not worked Saturdays.

18. The claimant had told Carol Mason, area manager Simon Smith, manager called Zoe, a manager called John Chunkshaw about his mental health condition. He had told previous store manager Carol Mason that he had schizophrenia. Peter came to be the store manager after Carol and never required the claimant to work on a Saturday. The claimant had told previous managers that on Saturdays he had counselling and other therapies including a walking group that benefited his mental health.

19. There was an online rota system which staff could access through an app on their phones. The app would notify users when a new rota went up. A rota usually went up on a Sunday two weeks in advance of the first date to be worked on that rota and it showed three weeks worth of rota.

20. In August 2021 the claimant had some time off around the 11th to 13th August, two of those three days, and although the real reason for his absence was his mental health he reported back ache as the reason for absence. On 20 August the claimant went to work and realized he had forgotten to take his medication that morning. He explained this and left store and went home to take it. He reported 20 August 2021 as a mental disorder sick day. That same day 20 August 2021 the claimant received a letter underlining concerns about his attendance. It cited absences on 20.8.21 (mental disorder), 13.08.21 (back ache) and 11.08.21 (reason unclear). On 28 August 2021 Mr Richard James became the claimant's store manager.

21. On 6 September 2021 the claimant was absent from work and reported the reason as a twisted knee.

22. In late August or early September 2021 the respondent displayed posters around its stores offering messages of support to those with mental health problems and encouraging them to speak to their managers about any issues they were experiencing. The claimant, who had been noticing a deterioration in his health since receiving the letter about his attendance, decided to speak to his manager about condensing his 30 hours into 4 days to give himself an extra rest day.

23. On 8 September the claimant who had not been due to work that day went into Bromborough store, having got up his courage to have the conversation about mental health, and told Mr James that he was struggling with his mental health. He said that he was schizophrenic and he asked if he could work his hours over 4 days not 5 so as to give him an extra rest day. He told Mr James that previous managers including the area manager were aware of his condition and that he could not work Saturdays as that was the day he had his counselling. Mr James made a remark that included referring to the claimant as "fucking schizo", saying that he did not want / need a fucking schizo working for him.

24. Mr James explained that the claimant's contract was for 30 hours and that anyone who worked more than 20 hours had to work it over five days. If the claimant wanted to reduce to 4 days he would have to do 16 hours and that would mean that the claimant could drop 56 paid hours a month. The claimant explained that he couldn't lose that much pay Mr James said that the options were to drop his hours or leave.

25. The claimant was distressed by what had been said and embarrassed at having been called schizo. He told Mr James he was going off sick and went home. He didn't make contact with work whilst he was off sick. The claimant was then absent from 8th to 13 September 2021 and HR wrote to him on 13 September 2021 saying that as they had not heard from him and he had not responded to their attempts to contact him they were concluding he was absent without authorization. The letter said that unless he responded by 18 September 2021 disciplinary action would be taken.

<u>The first grievance</u>

26. On 16 September 2021 the claimant wrote a letter lodging a formal

grievance. He sent it to the respondent's head office in Speke it said

I asked for help with my mental well-being and was told lose 56 hours or leave. It felt like I was being bullied and pushed out of my job at Bromborough.

Flexible working request

26. On 16 September 2021 the claimant also completed a form called flexible working application form. He ticked a box on the form to say that he would like to have a meeting with the manager to discuss the change to his working arrangements and that he would like to have a chosen companion with him at that meeting. No such meeting ever took place prior to his dismissal a year later.

He set out his current working pattern of Monday, Tuesday, Thursday, Friday, (eight till two) and Sunday (nine till three) and indicated that the working days could change week by week, and said that instead he would like to work Monday Tuesday Friday (eight till four) and Sunday nine till three. He said in the form that the current working pattern *makes me depressed, makes me have audio hallucinations, makes me unable to sleep,* and said that accommodating the new working pattern,*will calm me down, enable me to function properly and most importantly the audio hallucinations will dramatically decrease hopefully with three days off.*

27. He did not refer to the "fucking schizo" remark or an allegation that he subsequently made (that he was being timed at work by Mr James) in the grievance because he was embarrassed about the comment, did not want to have it repeated and was not fully well at this time.

28. The claimant remained off sick (though the respondent's sickness record wrongly showed him as absent from 8 September to 8 October 2021 by reason of mental disorder because he subsequently submitted a sick note from his doctor covering that whole period) missing seven days in which he would ordinarily have worked.

29. Whilst he was off sick he saw a rota on which he was scheduled to work five consecutive days 22 September 2021 Wednesday through till Sunday. He had never before been required to work five consecutive days and never before required to work a Saturday. He was not aware of any colleague being required to work both Saturdays and Sundays. The rota had a working pattern for him that would have required him to come to work on Saturday 2 October and Saturday, 9 October 2021.

30. This caused the claimant deep distress. He knew that his Saturday counselling and other therapies had kept him well for a long time and this rota would mean he could not do them for three consecutive weeks. He was already struggling and now found that he was thinking about his working pattern all the time and that his health was deteriorating further.

Return to work and the 5 consecutive days

31. The claimant returned to work on 22 September 2021. There was no return

to work meeting with Mr James. The claimant worked the five consecutive days that he had been scheduled. At some point during that week he went to Mr James and said that he needed some time off around his 50th birthday which was 9 October 2021. Mr James blocked out annual leave for the claimant on the WFM system. Mr James granted him the leave. They both understood that the claimant would not work the Thursday, Friday, Saturday or Sunday of that weekend and that he then had another week of pre booked leave. The claimant hoped that this 10 day break would help him regain mental wellbeing. The claimant said that he could not work Saturdays because of his counselling and therapies. He subsequently saw a rota that had removed Saturday 2 October as the date upon which he was scheduled to work.

Disciplinary investigatory interview

32. On 24 September 2021 the claimant had a meeting with deputy store manager Mr Jamie Dennett and the company witness Jenny Rooney who took some notes. The meeting was an investigation meeting under the company's disciplinary policy to investigate the amount of time the claimant had had off in the past three months and unauthorised absences on 10 September and 12 September 2021. The claimant was asked why he didn't contact the store when he was absent. He said *I was having an episode of depression and audio hallucination.*

33. Mr Dennett then said that he wanted to discuss the claimant's other absences and said that the claimant had phoned in sick with depression and stress on 8 September. That was inaccurate. The claimant had not phoned in sick. He had told Mr James when he left on 8 September after their meeting that he would be self certifying as sick. Mr Dennett asked what was the reason for his stress and depression. The claimant replied *not being able to work my hours over the four days giving me that day's rest.* Mr Dennett replied *anything over 20 hours should be spread over five days so there is nothing I can do about that at the moment as you signed your contract for that agreement.* Mr Dennett then went through absences on 6th and 9th of September which the claimant had reported as a twisted knee and then 11th (or 12th) and 13th September. Mr Dennett concluded the meeting saying the claimant was already on a Letter of Concern and that this would now progress under Disciplinary Policy to a hearing. The form Mr Dennett completed asked were there any mitigating factors that the claimant would like to be taken into account. The claimant said *depression, audio hallucinations.* The claimant then worked 28 29,30 September and 1 October 2021. He had a rest day on Saturday 2 October and worked Sunday, 3 October 2021 and Monday, 4 October 2021. He worked Tuesday, 5 October 2021 and then had some days annual leave.

9 October disciplinary meeting

34. The claimant received a letter inviting him to a disciplinary hearing, initially scheduled to take place on 4 October 2021. That meeting was postponed at the claimant's request and rescheduled to take place on Saturday, 9 October 2021. This was his 50th birthday and a date upon which it had been agreed he would not work. The claimant thought that he had to go into work to have a disciplinary hearing about his August absences. He went to work even though he did not work

Saturdays and this was his birthday weekend when he had been granted leave. The claimant clocked in at 09 57. This is three minutes before the time notified in the letter for the disciplinary hearing to begin at 10 AM. None of the claimant's other shifts began at 10 AM. He would always attend just before 8 AM or just before 9 AM to start work. The attendance just before 10 AM showed that the claimant was attending the Bromborough site that day to attend a disciplinary meeting and not for normal work shift.

35. When the meeting did not begin at 10am the claimant started working whilst waiting for it to start. Throughout the morning neither Mr Dennett nor Mr James came to the claimant to tell him to come to the meeting. Neither of them asked him why he hadn't attended at a shift start time of 8am or 9am. Just before 1pm the claimant went to Mr Dennett and said that as he hadn't been called to the meeting he was going home. Mr Dennett said that the claimant would need to speak to Mr James. The claimant went and found Mr James in a part of the site that they called the cowshed and asked why he hadn't been called to the meeting. Mr James said that the meeting was not going ahead because the claimant had said he wanted a union representative with him and no one had attended. The claimant said that if the meeting wasn't happening then he would go. Mr James said that the claimant was down to work a shift that day and Mr James was angry that the claimant had left it to 1pm to tell him that he wouldn't be there to complete his shift. The claimant said he had only come in as a courtesy to the respondent and worked the three hours whilst he was waiting for the disciplinary meeting, that he didn't work Saturdays, that he had leave for this day because it was his 50th birthday and he was having a party later that evening. The claimant said he was going home.

36. Mr James said words to the effect that the claimant *was always pulling this kind of shit, going off shift*, Mr James said that if he went home he would be leaving the store with no fork lift truck driver cover and going off shift without authorization and that it would be added to the disciplinary charges. The claimant, who felt he had been messed around, made a remark to the effect that Mr James could do what he wanted. The claimant left. Mr James went to find Mr Dennett and they discussed this matter. Mr Dennett told Mr James that the claimant had already been to him to ask why the disciplinary wasn't going ahead and Mr Dennett said that he had told the claimant to go to Mr James.

37. On Monday, 11 October 2021 Mr James came to work and created a witness statement of the events on the Saturday. In his witness statement he recorded that the claimant had said that he was not on the rota for 9 October 2021, that it was his birthday, that he had only come in for the disciplinary and had worked a few hours as a courtesy to the respondent. The witness statement recorded Mr James's response to the claimant saying he was going home in the following language

I remarked that this is the type of behaviour that he has constantly been exhibiting where he tries to pick and choose shifts and that is not acceptable

38. That same day Monday, 11 October 2021 HR wrote to the claimant inviting him to attend a meeting on 25 October 2021 with Mr James to discuss his flexible working hours. The letter said

we will endeavour to grant your flexible working if at all possible but as I'm sure you will appreciate Richard will also need to consider the effect of your proposals on the company, the work of your department and your colleagues. As you and Richard discuss these it may become apparent that some compromise would offer the best solution. Therefore it would be helpful if you could consider any alternatives to the changes you requested and be prepared to discuss them at the meeting.

Please don't assume from this suggestion that any decision to reject your proposal, as it stands, has been already made. I just want to make sure that we have the most constructive meeting possible. I also note that you have raised concerns separately that appear to be related to your flexible working request…. as such it may be appropriate for you to address these concerns within your flexible working meeting itself rather than via any grievance process. If you do still desire grievance hearing please confirm this in a separate hearing can be scheduled accordingly for any matters that do not relate to your flexible working request

38. This letter showed the respondent inviting the claimant to a meeting to discuss the flexible working request (i) with a manager against whom the claimant had already made an allegation of bullying following a discussion about his hours and (ii) a manager who had already turned down the flexible working request on 8 September 2021.

39. On 12 October 2021 the respondent again wrote to the claimant this time rescheduling his disciplinary hearing for Tuesday 19th October and adding to the disciplinary allegations related to unauthorised absences the allegation that

on Saturday, 9 October 2021 you failed to follow the time recording and reporting procedure… Left your shift before your scheduled time of 6pm without authorisation from your manager

40. The letter enclosed Mr James's witness statement. The claimant was warned that potential outcomes could include a written warning or final written warning and the claimant was told that he was entitled to be accompanied by a fellow employee or an official employed by a trade union. The claimant was told that as the previous hearing had been unable to go ahead should the claimant failed to attend a decision would be made in his absence. He was also told that any further non-attendance would be treated as a separate issue of misconduct.

41. The claimant was very unwell at this time. His mental health deteriorated rapidly. His auditory hallucinations increased and he found it increasingly difficult to manage. He was afraid about being dismissed. He does not recall receiving the letter inviting him to the 19 October disciplinary hearing.

Grievance 2 16 October 2021

42. On 16 October 2021 the claimant sent a handwritten letter to HR. He said that his mental health took a turn for the worse because he had been put in on a rota to work five consecutive days after he had lodged a grievance about Mr James. He said that he had planned two days off around his birthday which when added to a previous week that had been booked as annual leave would have given

10 days to improve his mental health. The letter said that he went in on 9 October to attend a disciplinary but worked a couple of hours as goodwill. The letter said that Mr James swore at the claimant saying that he was always pulling this shit and that it would be added to his disciplinary

43. The claimant said that the events had led to him having a total mental breakdown. The claimant had then gone to his doctor and explained the situation and had been given a sick note from 8 September to 8th October. The claimant also raised an issue about Mr James using CCTV to observe employees working. The claimant said he wanted these three separate grievance matters looking into.

Disciplinary hearing in claimant's absence

44. On 19 October 2021 the disciplinary hearing went ahead in his absence. On 22 October 2021 the respondent's Mr Stephen Calvert who had heard the disciplinary matter in the claimant's absence sent the claimant an outcome letter. Mr Calvert said that he had taken into account

1. The claimant's non-attendance at the hearing

2. The letter of concern that had been issued about the claimant's absence level and

3. That the claimant had left shift without authorisation on Saturday 9 October

and had decided a written warning was the appropriate sanction. Mr Calvert issued a written warning to remain on the claimant's file for 12 months. The claimant was told that he must familiarise himself with the colleague handbook, make immediate improvement with his attendance, follow correct absence reporting procedures and ensure that if he needed to leave store prior to a scheduled finish time he communicated that with his line manager and sought authorization. The letter informed of his right to appeal.

45. On 27 October 2021 HR again wrote to the claimant this time to acknowledge his grievance of 16 October 2021 and invite him to a grievance hearing at 11am on Monday 8 November. The respondent appointed Graham Carr manager from the Edge Lane store to investigate the grievance. The letter summarised the grievance as follows

- That after the claimant had complained about Richard James, Mr James had put him on a rota for five consecutive days

- after the claimant had booked annual leave for his 50th birthday, Richard James put him on a rota to work his 50th birthday and to attend a disciplinary hearing that day, that Mr James had then disciplined him for leaving shift that day

- that Mr James was using CCTV footage to monitor staff

the claimant was again told of his right to be accompanied by a trade union representative. The letter concluded saying that the claimant had failed to attend his flexible working meeting with Mr James on 25 October and that they would the

therefore put the flexible working request on hold and address the claimant's grievances first.

46. The claimant's mental health was deteriorating further. He was stressed and tired, unable to sleep and experiencing increased audio hallucinations and visual hallucinations. The claimant who had been well managed for over ten years was experiencing psychosis. On 28 October 2021 the claimant telephoned HR to say that he was not well enough to attend the meeting scheduled for 8 November. Emma Glover at HR asked if it could go ahead in his absence and he confirmed that it would have to.

47. The claimant wrote to HR, in response to a letter the tribunal did not see asking for any written evidence in his grievance, the claimant provided more detail about the CCTV allegation. The claimant said that in relation to his other grievances

you only have to look at the rotas to see what he has been doing to me

48. On 28 October 2021 Richard James drove to Edge Lane Store to attend a grievance hearing meeting with Graham Carr. Mr James told the Tribunal that he had not been aware prior to attending this meeting that the complaint had been made by the claimant and that it related to him having put the claimant on a rota for five consecutive days and then to Saturdays.

49. Mr James said that he went on to WFM before the meeting and took screenshots of the system on his phone. He attended the meeting and told Mr Carr that the claimant had asked to work his 30 hours over four days not five but Mr James told Mr Carr that the reason for that request was because the claimant had to travel for two hours each day to get to work and it was the time and cost of the travel that was the reason for the request.

50. Mr James told Mr Carr that he'd offered to put the claimant in 30 hours over four days temporarily. This was not something that Mr James had ever said to the claimant. Mr James also told Mr Carr that he'd offered the claimant alternatives such as transferring to a store closest to his home or even going to work in the Speke distribution centre where he would be able to choose his own working hours. Mr James had never put those proposals to the claimant not on 8 September 2021 nor at any other time. Mr James also told Mr Carr that the claimant had said that if he couldn't get the 30 hours over four days that he wanted at Bromborough he would get himself signed off for eight weeks. This was not something that the claimant had said.

51. The claimant had in fact been off only seven working days after the 8 September discussion. Mr James told Mr Carr that he asked the claimant on his return to work if there was a fit note. The Tribunal finds that there was no return to work meeting after the claimant's absence in September 2021.

52. Mr Carr asked Mr James about the claimant having been put on the rota for five consecutive days. Mr James said that he only became aware of the claimant having any issues with that shift when he approached him at 1pm on 9 October. Mr James said the claimant had not expressed any dissatisfaction with that working

pattern prior to that date. This was untrue. Mr James said that the claimant had said that the Saturday shift had been put in after he had seen the rota. Mr James said that he had checked the rota and could see that there had been no amendment deletion or editing to that rota. Mr James also said that he had checked the claimant's availability on WFM which showed that he was totally available to work all seven days. Mr James also said that the claimant had worked Saturdays for Mr James in the past. On the records available to the tribunal for August 2021 of September 2021 this was not true, Mr James had only been in store since 28 August 2021. The Tribunal prefers the evidence of the claimant who says that he had never worked a Saturday. Mr James said that generally speaking he left it to WFM to auto generate the claimant's rota and that the claimant ought to have protested when he saw that had been scheduled to work five consecutive days which included a Saturday. (The claimant had protested in his request and grievance dated 16 September). Mr Carr asked Mr James about 9 October. Mr James said that the disciplinary was set to take place that day but had to be rearranged under company policy because there was no union representative available for the claimant that day. Mr James suggested that he been told by the claimant that Friday or Saturday would be better days for the representative to attend a disciplinary hearing and that was why he had scheduled the disciplinary for a Saturday. This was untrue. The claimant had not been consulted about which day was better and if he had then the Tribunal finds he would not have said Saturday 9 th October because he did not work Saturdays and because it was his 50th birthday.

53. Mr Carr asked Mr James had he sworn at the claimant (*you're always pulling this shit*) on 9 October and Mr James said that he did not swear at any point during that conversation on 9 October. Mr Carr asked Mr James if the claimant had ever mentioned his 50th birthday party prior to the conversation on 9 October. Mr James said that he had not. This was untrue. Mr James and the claimant had spoken about the claimant's annual leave and Mr James had booked annual leave on the system for the claimant.

54. Mr James accepted in the meeting with Mr Carr that he had wrongly assumed that the two days on a date prior to the Saturday were when his party was. In this way Mr James contradicted himself in the meeting with Mr Carr, both accepting that he had known about the birthday party and denying that he had known the Saturday was the claimant's birthday. Mr Carr asked about the CCTV issue Mr James said that he never used CCTV to monitor staff and work rate. Mr James volunteered that he thought he knew where the claimant had got this allegation from because there had been an incident in which a colleague had reported underperformance of another colleague and Mr James had checked CCTV.

55. A letter was sent to the claimant on 24 November 2021, though he does not recall receiving it because of how unwell he was at that time, telling him his grievance had been denied. Mr Carr did not give evidence to the Tribunal and does not appear to have checked any of the WFM rota issue for himself. He does not attach extracts from WFM or recite anything other than what Mr James told him.

56. The outcome letter said that in relation to the allegation of being put on the

rota for five consecutive days, Mr Carr found that WFM generated the rota and that as the claimant had not raised any concerns when it had been generated he considered Mr James's responses to be reasonable. He said

it is evident from WFM that no changes were made to the rota after it was generated

Mr Carr did not say that he had checked WFM himself and appears to have relied on Mr James assertion that WFM had been checked. On that basis the claimant's grievance was not upheld.

57. On the second point about 9 October and working Saturdays Mr Carr accepted Mr James statement that the claimant had not raised concerns about working on Saturdays. Mr Carr again accepted Mr James evidence that WFM would show that no changes had been made to the rota and that the claimant had not protested about the rota when he'd seen it. Mr Carr also said

it is also evident that you have in fact worked Saturdays previous within store

58. The working pattern that the Tribunal saw said that the claimant had never worked a Saturday during August or September prior to the five consecutive days pattern on Saturday, 25 September 2021. It is not clear to the tribunal how Mr Carr could reach that conclusion other than to rely, without checking, on what Mr James said.

59. Mr Carr rejected the claimant's grievance on this point and found that the claimant was rota'd to work that day and had walked off shift. Mr Carr noted that this had already been dealt with as a disciplinary matter and did not uphold the claimant's grievance. Again it is not clear to the Tribunal how Mr Carr could know what the rota showed for the claimant without checking it, other than by accepting what Mr James said. This seemed a startling thing to accept in the face of the claimant's written grievances and evidence about his birthday that day, his leave and his party. It showed us that Mr Carr blindly accepted what was told to him by Mr James.

60. On the third point, CCTV, Mr Carr said he had investigated this with Mr James at store level and that as Mr James denied the allegation Mr Carr found no evidence to demonstrate that Mr James was using CCTV footage to monitor staff without reasonable cause. This point of the grievance was not upheld. Mr Carr does not appear to have spoken to colleague Maz or Elaine or asked to look at records of when cctv was accessed and by whom. He does not appear to have taken into account the high degree of similarity between the claimant's account and Mr James' account as to the viewing of cctv. The claimant was told of his right to appeal against the grievance

61. The claimant remained off sick and was very unwell. His request to adjust his hours to 30 over 4 days remained outstanding.

<u>Welfare meeting by telephone</u>

62. On 10 December 2021 Mr James telephoned the claimant at home for a telephone welfare meeting. There was a document in the bundle which recorded Mr James' notes of that meeting. He recorded the claimant as having said that he had had a nervous breakdown caused by the refusal of those flexible working request. He recorded that the claimant said that he cannot work five days. When Mr James had asked what reasonable adjustments could be made to aid his return the claimant had said that this was *too little too late*, that he was now on the maximum dose of antidepressants. When asked when he might return the claimant said that he had no intention of returning at that time. The Tribunal notes that at the bottom of that form where it's open to the manager to make a comment Mr James recorded

originally stated reason for change from five days to 4 was cost and time travel that causes more stress

63. The claimant does not recall any discussion about the time and cost of travel during the welfare meeting. It appears to the tribunal that Mr James is recording this in his own defence and not as a record of what was said at that meeting. The claimant must then have been referred to OH but the tribunal did not see the referral.

Welfare meeting 13 Janaury 2022

64. There was a telephone welfare meeting between Gemma Read and the claimant on 13 January 2022. The notes record that the claimant said he had suffered a nervous breakdown because he wasn't allowed to work four days instead of five. The claimant again referred to his counselling weekly on Saturdays and said that he was now seeing a psychiatrist monthly and was next due to have a doctors appointment on 31st January. Claimant said he would not be able to return to work until he was feeling better and when asked about reasonable adjustments again said that it was too little too late. He gave details of his medication and said that he was not able to return to work at that time and was expecting to get another sick note after the current note expired on 31st January.

65. During sickness absence the claimant received notifications via the work app on his phone when rotas were being posted. With his brother's help he was able to look at those rotas and because they were published two weeks ahead of the first shift date, they often overran the currency of the claimant's fit note, so that he appeared on the rotas. It continued to distress him that he saw himself on the rota to work five consecutive days and to work on Saturdays.

66. Mr Dennett attempted to call the claimant on 1 February 2022 to conduct another welfare meeting but got no response. Jenny Rooney spoke to the claimant on 2 February 2022. The claimant said he was hearing voices, feeling suicidal and that this was because of stress at work. The claimant said he was unsure as to when he could return to work because management were saying he had to work five days and it was not possible for him to work his 30 hours over five days. He said that he had asked to work 30 hours over four days because he got too tired after working five days and started hearing voices. He repeated that he could not work Saturdays. He said that he was now prescribed a maximum dose of his medication and that he had no idea at that point when he would be able to return

to work. He said his current note expired on 28 February 2022. Jenny Rooney made a note of that telephone call on a pro forma document. The Tribunal found that document suspicious because at the bottom of the form where there was space from manager to make comments Jenny Rooney recorded

originally his reasons for wanting four days was due to travel time and cost.

67. The Tribunal finds that the reason for the request was not discussed during the welfare telephone call at all. There was no reason for the reason for request to appear at all on that document. The Tribunal concludes that this information must have come to Ms Rooney from Mr James either verbally or as a direct transposition from the previous welfare meeting note written by Mr James.

68. An occupational health appointment was arranged for the 22nd February 2022. The occupational health report dated 22 February 2022 was sent to Emma Glover in HR. It said

Andrew was referred due to long-term sickness absence in relation to his mental health and stress at work. Andrew tells me he felt his mental health was declining and that he asked his manager for support in the way of condensing his hours to 4 days which would allow him an additional day of rest each week …. he was declined this by his manager and he was told he could reduce his hours or leave the business. He tells me this led to him taking time off sick. He also mentions that he attends regular counselling sessions each Saturday and he kept been rostered to work which meant he missed the sessions….. he had a breakdown in October 2021 where his mental health declined and he is under the care of his GP and mental health support team and taking prescribed medications.

The report commented that the claimant was struggling with his activities of daily living at present due to reduced well-being. It provided the following management advice

I do not consider Andrew to be currently fit for work in any capacity

I return to work date is difficult to realistically predict

when Andrew is able to return to work I recommend his manager considers allowing him to condense his hours to 4 days to allow the additional rest day which would support his well-being

it is also advised he does not work on Saturday to allow him to attend counselling sessions

I recommend his manager completes her HSE stress risk assessment

Andrew may also benefit from completing a wellness recovery action plan to open up a dialogue between him and his manager to support his well-being at work

due to the nature of Andrew's condition it requires long-term management and flareups and recurrence of symptoms may happen in the future I'm unable to predict the frequency or duration of any future flareups absences in relation to these

69. The report does not use the word schizophrenia. The Tribunal accepts the claimant's oral evidence that he told the OH practitioner of his history and diagnosis of schizophrenia and the support he had had from previous managers.

70. On 4 March 2022 the respondent wrote to the claimant inviting him to attend a medical capability meeting. The letter warned him that the outcome of the meeting might be termination of his employment on grounds of ill-health. That meeting was rescheduled to take place on Thursday, 17 March 2022.

71. In March 2022 the claimant was extremely unwell. He was unable to manage his own text, email and correspondences. He had intermittent help from his brother in accessing communications. He continued to experience audio and visual hallucination, psychosis, depression and lack of sleep. He was very worried about his work. He was in receipt of statutory sick pay and struggling financially. He had a friend who helped him with emails and it was his friend who composed the following email for him which was sent to HR on 16 March 2022

… My mental health is suffering badly at the moment and therefore I am not fit to speak to you. I feel also that giving me a 4pm deadline to reply and pushing me for an interview putting so much pressure on me which I will discuss next week with my doctor again……. I'm in the process of getting a note from my doctor to explain I'm not mentally ready for an interview…. When I am fit enough for an interview I will have union representation present…. Can you please not put any more pressure on me as I'm already in a really bad place and please go through Joe at the union future…...

72. The respondent then held of any further action against the claimant. His health continued to deteriorate. In July 2022 the claimant, who had concluded that he would not be able to return to work because the respondent was not going to allowing to work over four days and to have Saturdays for his therapy, attempted to take his own life by overdose. He was admitted to hospital and remained there for three days. Following his discharge from hospital he had face-to-face meeting with Dr Janapati who produced a full report of that consultation. The claimant told Dr Janapati that he had been called *a fucking schizo* by his manager and that his shift patterns had been changed and he had been required to work Saturdays. The doctor reported having been told the following

Andrew reports the circumstances around his work, which led to the breakdown, started when he started seeing posters at work advising employees to seek help for anxiety depression and stress. Andrew stated he worked at B&M Bromborough …. his previous manager was very accommodating….. On Saturdays he goes to therapy and drop-in sessions in Birkenhead and he also has a therapeutic walk….. upon seeing the posters… he gathered up the courage and approached his manager as to what help could be offered him…. He explained he was suffering from a mental health disorder schizophrenia and severe anxiety. To his shock the manager used swear words saying I'm not having a fucking schizo work for me. The manager then went on to say that Andrew could either quit and leave the company or reduce hours to 56 hours per month….. Andrew also mentioned that he had told his manager he would not be able to work Saturdays,,,,… He started to miss (his therapy on) Saturdays and reports that the manager used to time his breaks and use bad language.

73. The doctor reported that for the past 10 years the claimant had been stable on his medication and not under the supervision of psychiatric services. The doctor reported that the claimant had realised that his life is more precious than things that have happened at work. The report recorded that the claimant plans to take the respondent to a tribunal…because it was only after he saw the posters and had the courage to ask for help this manager started giving him problems.

74. The report concluded

Andrew has been discriminated against because of his mental health and has been called names by his manager. He is a vulnerable adult and all the circumstances leading to have a mental breakdown and eventually overdose.

75. In August 2022 the respondent, who had not seen the clinic report referred the claimant to occupational health. It obtains an occupational health report dated 17 August which said

Andrew is experiencing severe levels of both depression and anxiety

there does not appear to be any remarkable improvement in his symptoms in comparison to the last OH assessment

Andrew's current mental well-being is not consistent with a return to work at this time as this treatment is not currently acting in a therapeutic manner

Following today's consultation with reference to the specific question you have asked your referral ID mandrel unfit to work in any capacity at present and timescales recovery are unclear

please refer to your sickness absence policy. Andrew is aware that a meeting is to be scheduled at the organisation to discuss his employment stop the anticipation of this meeting appears to be impacting upon Andrew's mood and as such I would recommend that you schedule this meeting as soon as reasonably possible. And states that he is happy to attend this meeting.

76. A medical capability hearing was then arranged for Friday, 2 September 2022 at 11 AM. The claimant was informed of the meeting in writing and warned that the outcome might be termination of employment. He was advised that he was entitled to be accompanied by a fellow employee or trade union representative. He was told the agenda for the meeting was to discuss

- absence from work due to ill health
- likelihood of you returning to your job work in the near future
- whether there are any reasonable adjustments that can be made that would facilitate a return to work
- whether there is any alternative employment suitable for you

77. The claimant attended a meeting at Bromborough store with Mr Dennett, who was now the manager there, on 2 September 2022. He was not represented

at the meeting. He updated Mr Dennett with his ongoing mental health issues including stress depression and suicidal thoughts and his audio hallucinations. He informed Mr Dennett that he had an appointment to see a specialist mental health psychiatrist on 21 September 2022. The claimant gave details of his medication and the side-effects of them including dizziness, forgetfulness, inability to use machinery such as the forklift truck and would feel uncomfortable being around other people. On the point of return to work the claimant said he could not say when he would be returning and that it could take up to 4 years to be fit to return to work.

78. Mr Dennett's notes of that meeting wrongly recorded the claimant as having been absent since 21 August 2021. Following the meeting Mr Dennett decided to terminate the claimant's employment on the grounds of medical incapability. He sent a letter detailing the outcome dated Thursday, 15 September 2022 which the claimant saw that day. The letter also wrongly recorded the start date of the claimant's absence from work.

79. The claimant's employment ended on 15 September 2022 and he was paid outstanding holiday pay and pay in lieu of notice on 18 October 2022 the claimant contacted ACAS, achieved a certificate on 29 November 2022 and commenced his employment tribunal proceedings.

Relevant Law

Unfair dismissal

80. Where the employer does show a potentially fair reason for dismissing the claimant the question of fairness is determined by section 98(4).

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and**
>
> **b. shall be determined in accordance with equity and the substantial merits of the case."**

81. In applying the test of reasonableness, the Tribunal must not substitute its own view for that of the employer. It is only where the employer's decision falls outside the range of reasonable responses that the dismissal should be held to be unfair. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

82. In Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 a sickness absence case, Phillips J said:

> **"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all circumstances, the employer can be expected to wait any longer and, if so, how much longer?"**

83. Relevant circumstances include the nature of the illness, the likely length of the continuing absence and the need of the employers to have done the work which the employee was engaged to do.

84. In Lynock v Cereal Packaging [1988] IRLR510 the EAT considered the range of factors which may be taken into account including; the nature of the illness, the likelihood of reoccurring or some other illness arising, the length of the various absences in the space of good health between them, the need of the employer for the work done by the particular employee, the impact of the absences on others who work with the employee and the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching.

85. The EAT in Lynock emphasised that the appropriate approach for the employer to take is one of understanding and not a disciplinary approach.

86. In O Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 the claimant was a senior teacher at the school who had been absent on sick leave for a year. She was dismissed for capability reasons, the respondent stating that there was unsatisfactory evidence as to a likely return to work date. At internal appeal the claimant adduced new evidence in the form of a fit note that she was fit to return to work. The respondent rejected that evidence and dismissed the claimant. The claimant brought claims for unfair dismissal and disability discrimination together with other claims. The Employment Tribunal rejected some of her claims but found that she had been unfairly dismissed and that her dismissal was an act of discrimination arising out of her disability. The respondent appealed the Tribunal's decision and, on the unfair dismissal and discrimination arising out of a disability arguments, it was reversed by the EAT.

87. The Court of Appeal allowed the claimant's appeal and reinstated the Tribunal's finding. The majority decision was that the Tribunal had not erred in law in its findings on the reasonableness of waiting a little longer. The Tribunal had found that it would be reasonable for the school to have obtained its own evidence to confirm the claimant's argument at appeal that she was fit to return to work, but that need only occasion a short delay and there was no real evidence that serious further damage would be done during that time. In a dissenting judgment Davis LJ considered that the issue was "how much longer did this employer have to wait".

88. The question of how long it is reasonable for an employer to wait in an unfair dismissal claim may overlap with the consideration of a proportionality defence where a claimant also brings a claim under section 15 Equality Act 2010.

89. The O'Brien case also addressed the issue of the consideration of the reasonableness (and proportionality for the Section 15 claim) of the employer's response as at the date of dismissal or the date of appeal. The Court of Appeal, by majority decision, said "as a matter of substance her dismissal was the product of the combination of the original decision and the failure of her appeal, and it is

that composite decision that requires to be justified" and cited its own earlier decision in Taylor v OCS Group Ltd [2006] EWCA Civ 702.

Time limits in discrimination complaints

90. The Equality Act 2010 provides that a complaint of discrimination must be brought within (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. Conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when he does an act inconsistent with doing it, or if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it.

91. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> **"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "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."**

Early Conciliation Provisions

92. Section 18A of the Employment Tribunals Act 1996 contains a requirement that before a person (the prospective claimant) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter.

93. The prescribed period means prescribed in Employment Tribunal procedure regulations. In relation to claims for disability discrimination the prescribed period is three months.

94. The case law on the application of the "just and equitable" extension provides that it is the task of the tribunal to take account of all relevant factors, and leave out of account any which are not releva**.** Leggatt LJ said this at paragraphs 18-19:

> **"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a**

> **tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para 75.**
>
> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."**

95. In Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434] the Court of Appeal considered the extent of the discretion to extend time on a just and equitable basis under the discrimination legislation. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

> **"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. 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 a 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."**

Burden of proof

96. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

97. In Igen v. Wong [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> **(1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination.**
>
> **(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**

> **(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.**
>
> **(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.**
>
> **(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].**
>
> **(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.**
>
> **(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.**
>
> **(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**
>
> **(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic**
>
> **(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.**

98. The initial burden of proof is on the claimant: Ayodele v. Citylink Ltd [2017] EWCA 1913

99. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in Igen v. Wong, but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage.

100. Lord Hope of Craighead in the Supreme Court in Hewage v. Grampian Health Board [2012] UKSC 37 reminded tribunals not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

101. In the Employment Appeal Tribunal in Mrs A Field v Steve Pye and Co Ltd [2022] EAT 68 EAT 2022 HHJ Tayler cited Lord Hope and went on to say:

> **"41. It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive Judgment approved by the court for handing down findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason**

for the treatment. To do so ignores the prior sentence in Hewage that the burden of proof requires careful consideration if there is room for doubt.

42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an Igen analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one Igen threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the Igen guidelines."

Harassment

102. Section 26 Equality Act 2020 provides:

(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.

103. In a harassment complaint the unwanted conduct must be related to the protected characteristic. The EHRC Code at paragraph 7.9 states that 'related to' should be given a broad meaning 'a connection with the protected characteristic'. Context will be relevant and mere reference to a protected characteristic may not be sufficient to establish that the conduct was "related to" the characteristic. It must be shown that the characteristic was the ground or reason for the treatment to which objection is taken. In the EAT case of **Warby v Wunda Group PLC** UKEAT/0434/11 Langstaff J stated:

"We accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context; the context

> **here was that the dispute and discussion was about lying. The conduct complained of, as the Tribunal saw it, was a complaint emphatically made about lying; it was not made to the Claimant because of her sex, it was not made to the Claimant because she was pregnant, and it was not made to the Claimant because she had had a miscarriage. In the words of Ahmed at paragraph 37, as earlier quoted:**
>
> **"The fact that a Claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of a sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."**

104. The conduct complained of must be unwanted. It will normally suffice that the claimant genuinely did not welcome the conduct. The conduct must have the required purpose or effect. Conduct with purpose requires an examination of the alleged harasser's intentions. It may be necessary for the tribunal to draw inferences from the surrounding circumstances. Effect must be assessed from the victim's point of view subject to the important qualification that the conduct must reasonably be considered to have violated the victim's dignity or to have created an unpleasant environment for him or her. The tribunal will be required to assess whether the victim actually took offence and if it was reasonable for him to do so. It is important to note that if the tribunal finds that the alleged harasser behaved deliberately and that his purpose was to violate his victim's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for his victim, the test is met even if the conduct did not have this effect. The claim may be successful, but there may be no injury to feelings in such circumstances.

Direct discrimination

105. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(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".**

106. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

107. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31-37 and the authorities there discussed.

108. Section 212 Equality Act 2010 contains an interpretation section which provides that "detriment" does not include conduct which amounts to harassment. Claimants often plead factual allegations and bring claims under both heads, section 13 and section 26 in respect of the same factual allegations. On a strict reading of Section 212, that the same factual allegations cannot be considered under both heads, it is arguably conceivable that a claimant who has mislabelled an allegation could be deprived of a remedy. The authors of IDS commentary

discourage such a reading of section 212

> **The purpose of section 212 presumably is to prevent double recovery, to prevent a claimant being compensated twice under two different causes of action for the same conduct. Where conduct could feasibly fall under both detriment and harassment then just because a tribunal finds that the conduct is more readily defined by one label should not mean that a claim brought under the other label should be rejected. Rather, the claimant should have a choice between the two causes of action. Furthermore, there would seem to be no reason why the claimant should be prevented from bringing both claims in the alternative on the understanding that both cannot succeed. The claimant bringing a complaint of harassment should be able to argue less favourable treatment or where appropriate victimisation in the alternative giving the claimant a second bite at the cherry if the harassment claim fails, and vice versa.**

Duty to make adjustments

109. Section 20 and Section 21 Equality Act 2010 provide for the duty to make reasonable adjustment for disabled people.

> **(1) The duty comprises the following three requirements.**
>
> **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.**
>
> **The second requirement is a requirement, where a physical feature 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.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.**
>
> **……..**
>
> **In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to —**
>
> **(a) removing the physical feature in question,**
>
> **(b) altering it, or**
>
> **(c) providing a reasonable means of avoiding it**

Discrimination arising from disability

110. Section 15 Equality Act 2010 provides:

> **"(1) a person (A) discriminates against a disabled person (B) if –**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**

> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".**

111. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

112. In McQueen v General Optical Council [2023] EAT 36 the Employment Appeal Tribunal upheld the first instance decision that the claimant's disabilities (dyslexia, Asperger's, neurodiversity and hearing loss) had no effect on the aggressive behaviours for which he was disciplined. The tribunal found that the Claimant's conduct arose not out of his disabilities, but from a short temper and resenting being told what to do. Mr Justice Kerr said at para 52, commenting on the written judgment in that case:

> **52. It would have been better if the tribunal had structured its decision by asking itself the questions (i) what are the disabilities (ii) what are their effects (iii) what unfavourable treatment is alleged in time and proved and (iv) was that unfavourable treatment "because of" an effect or effects of the disabilities. Or, the tribunal could have reversed the order of questions and asked instead (i) what unfavourable treatment is alleged in time and proved (ii) what was the reason for that unfavourable treatment (iii) what were the effects of the disabilities and (iv) was the reason for the unfavourable treatment and effect or effects of the disabilities.**
>
> **53. Whichever way the tribunal decides to approach the issues, it should structure its decision so that a reader can understand clearly what is being asked and answered at each stage of the analysis.**
>
> **…**
>
> **58. …once the tribunal had determined that the disabilities did not have any effect on the claimant's conduct on the occasions in question the further question whether any unfavourable treatment was "because of" that conduct did not arise.**
>
> **…**
>
> **59 …. The tribunal found that those effects did not play any part in the conduct that led to the unfavourable treatment complained of. It was not the tribunal's finding that those effects played a significant but less than predominant role in causing that conduct. This is therefore not a case where dual or multifactor causation had to be analysed.**

113. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

> **"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:**

> **31. ……the proper approach to determining section 15 claims …. can be summarised as follows:**
>
> **(a) 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.**
>
> **(b) 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 section15 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.**
>
> **(c) 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: see Nagarajan v London Regional Transport [1999] IRLR 572. ..**
>
> **(d) 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. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**
>
> **I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."**

114. The Court of Appeal in Robinson v Department for Work and Pensions [2020] EWCA Civ 859 considered causation in a section 15 complaint. Bean LJ at paragraphs 55 and 56 of the judgment rejected a "but for" test in establishing whether the treatment (unfavourable treatment for a section 15 complaint and less favourable treatment for a section 13 complaint) was *because of* the claimant's disability or something arising in consequence of it. Bean LJ affirmed Underhill LJ in Dunn v Secretary of State for Justice [2018] EWCA Civ 1998 who stated that a prima facie case under section 15 is not established solely by the claimant showing that she would not be in the situation…if she were not disabled. The Tribunal must look at the thought processes of the decision maker concerned to ascertain "the reason why they treated the claimant as they did. Was it wholly partly because of something that arose in consequence of the claimant's disability?"

Applying the Law to the Facts

Knowledge of disability

115. The respondent accepted that at all material times it had knowledge of the claimant's disability. Further, the tribunal finds that Mr James knew that the claimant was schizophrenic from 8 September 2021 when the claimant told him. Mr James ought reasonably to have known from that date that the claimant would be disabled and afforded the protection of the Equality Act 2010. Mr James denied any knowledge of disability. The Tribunal prefers the evidence of the claimant that he told Mr James of his schizophrenia because of (a) the claimant's evidence about his having gone in on a non work day, having plucked up courage, to talk about his mental health after he saw the posters and (b) of his reaction that day after the conversation when he went off sick and missed 7 days of work and (c) his grievance dated 16 September 2021 and (d) because of the corroboration of that position in his meeting with Mr Dennett on 24 September 2021 and (e) because of the content of his grievance dated 16 October 2021.

Time limits

116. In relation to the factual allegations of harassment and direct discrimination at paragraphs 3 and 4 of the List of Issues the tribunal finds that the claimant went to ACAS on 18 October 2022 and therefore any alleged act of discrimination prior to 19 July 2022 may be out of time.

3.1.1 and 4.1.1 the Tribunal finds that the *fucking schizo* remark was made on 8 September 2021 and is therefore out of time.

3.1.2 and 4.1.2 the ultimatum that the claimant drop hours or leave was also made on 8 September 2021 and is therefore also out of time.

3.1.3 and 4.1.3 the claimant being rota'd to work five consecutive days also took place in September 2021 and is also out of time

3.1.4 and 4.1.4 the allegations relating to the claimant being timed to unload the forklift truck related to events on 15 August 2021 and 10 October 2021 and also out of time

3.1.5 and 4.1.5 the allegations about the changes to the claimant's shift pattern in August 2021 and late September and early October 2021 are also out of time

3.1.6 and 4.1.6 the dispute about what the claimant was rota'd for on 9 October 2021 and the claimant leaving work on 9 October 2021 were also out of time

3.1.7 and 4.1.7 the claimant being referred to a disciplinary hearing for a written warning on 12 October 2021 was also out of time.

117. In relation to the complaints of discrimination arising from disability

5.1.1 writing him up for a warning on 12 October 2021 was out of time

5.1.2 The claimant's claim for discriminatory dismissal by Mr Dennett on 15 September 2022 was brought in time.

Failure to reasonably adjust

118. The complaint at 6.1.1 and 6.4.1 in relation to the failure to reasonably adjust by not allowing the claimant to work across four days instead of five related to a PCP with an ongoing discriminatory effect from 8 September 2021 all the way up to the date of dismissal. This complaint was brought in time. If the Tribunal is wrong about the ongoing discriminatory effect so that this was a complaint that ought to have been brought within three months of each of the occasions on which the claimant requested flexible working then the last occasion on which the respondent refused to consider allowing the claimant to work across 4 days instead of 5 was when it decided to dismiss him at some point between 2 September 2022 and 15 September 2022 so that there would have been a last act in time which would have brought earlier acts of the same kind into time as part of a course of conduct extending over the period. Further, if the Tribunal is wrong about that then it would have exercised its discretion on the basis that it would be just and equitable to extend time in the circumstances of the claimants ill-health as reasoned below.

119. The complaint for failure to reasonably adjust at paragraph 6.1.2 about sickness absence management and adjusting so as not to dismiss the claimant on 2 September 2022 was brought in time.

Course of conduct and discretion to extend time

120. For those complaints that were not brought in time the Tribunal had regard to relevant statutory provision and relevant case law in Hendericks and Virdi and considered the difference between an act with ongoing discriminatory effect and a one off act with ongoing impact. The tribunal found that the allegations at the following paragraphs in the List of Issues 3.1.1, 3.1.2, 3.1.3, 3.1.5 and 3.1.6 and 3.1.7 (and the corresponding allegations in paragraph 4) and the complaint at 5.1.1 which mirrored the complaints at 3.1.7 and 4.1.7 formed part of a course of conduct extending over a period of time. They were all acts by the same person, Mr James, and were acts of the same nature in that they related to conflict about the claimant's working pattern.

121. The alleged act of discrimination at paragraph 3.1.4 (and 4.1.4) was not part of a course of conduct extending over a period of time. It was a one off allegation that the claimant had been timed unloading the forklift truck on 15 August 2021 and a repeat of that one off allegation on 10 October 2021. This allegation was about performance monitoring, it was not part of the same course of conduct as conflict about shift patterns and rotas and the tribunal has found that this did not happen. Whilst the claimant perceives himself to have been monitored by his managers, the Tribunal accepts the oral evidence of Mr James that he was not timing the claimant unloading the forklift truck and that, in fact, Mr James perceived the claimant to be one of the better and more efficient and higher performing forklift truck drivers. The Tribunal has no jurisdiction to hear this out of time complaint.

122. Accordingly, the factual allegations of discrimination at 3.1.1, 3.1.2, 3.1.3,

3.1.5 and 3.1.6 and 3.1.7 (and the corresponding allegations of at paragraph 4) and 5.1.1 fall within the jurisdiction of the tribunal.

123. If they had not been part of a course of conduct extending over a period of time then the tribunal would have exercised its discretion and found that it would have been just and equitable to allow the claimant to have brought those complaints late. The Tribunal had regard to the claimant's oral evidence as to impact of the decision making about shift patterns and rotas on him in mid September, deterioration in his health following disciplinary allegation after 9 October, the decline in his mental health to such an extent that by spring 2022 he needed support from his brother and friend even to be able to access his communications and respond and the serious and continuing decline in his mental health to his suicide attempt in July 2022. The tribunal had regard to the Impact Statement and the report of Dr Janapati. The tribunal accepts that from October 2021 until early September 2022 the claimant was unfit to attend to his own employment matters. He attended the 2 September 2022 meeting expecting to be dismissed and having already decided that he would never return to work for the respondent because of the way it had let him down. In the circumstances it would have been just and equitable to extend time.

Direct discrimination and harassment

124. LOI 4.1.2: The Tribunal finds that on 8 September 2021 Mr James referred to the claimant as a "fucking schizo". Mr James denied having made the remark but the tribunal prefers the evidence of the claimant on this point because the claimant's absence after that conversation speaks to the tribunal of his distress and embarrassment at having been referred to in that way. The claimant finds Mr James evidence unreliable on this point. This remark amounted to less favourable treatment. It related to the claimant's relevant protected characteristic of disability, schizo being an abbreviation of the word schizophrenic and being prefaced by a swearword. The Tribunal accepts the claimant's evidence that Mr James would not have used this remark to a hypothetical comparator. There would be no reason to call someone who did not have the claimant's disability of schizophrenia, schizo.

125. If this complaint had not succeeded in direct discrimination it would have succeeded in harassment. The remark amounted to unwanted conduct. The Tribunal finds that it was done with the purpose and effect of violating the claimant's dignity and the Tribunal accepts the claimant's evidence that he found this remark degrading, humiliating and offensive. It reduced him to the label sometimes given, pejoratively, to the mental health condition of schizophrenia and in doing so it violated his dignity. The Tribunal finds having regard to all the circumstances case the claimant was reasonable to find that remark degrading, humiliating or offensive.

124. The respondent submitted that the claimant was not credible in relation to the schizo remark because of its absence from his subsequent written complaints. The Tribunal rejects that submission. The Tribunal was not troubled by the absence of a complaint about the fucking schizo remark in the claimant's grievance dated 16 September or in his request for a reasonable adjustment/application for flexible working. The Tribunal accepts the claimant's response that he was embarrassed at having been called schizo and that this was something that he did not like and did not want repeating. His position on this was wholly compelling and

was reinforced later during the hearing, incidentally, when the claimant produced a letter from a doctor describing his condition as non-organic psychotic disorder. The claimant explained that he had asked his doctors not to use the label schizophrenic as he'd always been embarrassed by this label.

125. The Tribunal is also not troubled by the absence of the complaint about the remark in the grievance because whilst it doesn't cite the exact wording of the remark the grievance does complain about being bullied and pushed out of his job at Bromborough. This was something that was deeply upsetting and embarrassing to the claimant and not something he wanted to repeat in the work context. He did tell Dr Janapati about the remark following his suicide attempt in July 2022 and included it in his claim form and witness statement. The claimant was consistent in his evidence about both this remark having been made and its effect on him in cross examination.

126. The claimant's complaint at 4.1.1 of the List of Issues succeeds.

127. LOI 4.1.2: The Tribunal has found as a fact that on 8 September 2021 Mr James told the claimant that he would need to drop his hours if he wished to work over 4 days or leave. Mr James denies having said this. The Tribunal prefers the evidence of the claimant on this point because he told us that he had seen posters telling him to come forward if he needed help with his mental health and that he had summoned up the courage to have that conversation. It's not disputed that he attended on 8 September 2021 and initiated a conversation about his mental health and his working pattern. The Tribunal accepts his evidence that he needed to work across 4 days not 5 to give himself an extra rest day to manage his mental health.

128. The Tribunal finds that Mr James evidence that the claimant had asked to reduce hours to save travel time and cost is unreliable. The Tribunal found the claimant wholly compelling when he said that he has always had free travel and has travelled happily to Bromborough taking two buses to get to work since 2016, that the claimant chose to work at the Bromborough store and had no problem whatsoever with this travel. The Tribunal's conclusion that this was a fabrication is corroborated by Mr James inclusion of this remark in the welfare meeting minutes, and by its repetition of the foot of the welfare meeting minutes conducted by Jenny Rooney. The repetition and striking similarity of the repetition in a different location by a different manager at a different time persuaded the tribunal that this reason had inserted into the respondent's record after the event.

129. Mr James corroborates that there was a conversation about working hours on 8 September 2021 initiated by the claimant. The Tribunal notes that following the conversation claimant immediately left work saying that he would have to get signed off sick. The Tribunal found it credible the claimant has consistently said that he was told to reduce hours and cited the figure of 56. Mr James' evidence, echoed in Mr Dennett's evidence, was that the respondent offers contracts for 20+ hours over five days or 20 minus hours over four days. The Tribunal finds that Mr James said that if the claimant wanted to work 4 days that would mean 16 hours. Dropping from 30 hours a week to 16 hours a week would mean a loss of 14 hours per week, being 56 hours per month.

130. The Tribunal finds that this ultimatum did not amount to less favourable treatment on the grounds of the claimant's disability. The Tribunal finds that Mr

James would have treated a hypothetical comparator, that is someone else who asked to be able to work 30 hours over 4 days but did not have the claimant's disability , in the same way. Mr James was in effect, applying the respondent's practice of requiring anyone dropping to 4 days to reduce their hours. No one was allowed, to Mr James' mind, to work 30 hours over 4 days, with a disabled or not.

131. The complaint at 4.1.2 fails as an act of direct discrimination. The complaint also fails as an act of harassment at 3.1.2. Being denied his request was unwanted conduct but the Tribunal finds that it was not related to the protected characteristic of disability.

132. LOI 4.1.3: Mr James scheduling the claimant to work shifts across 5 consecutive days Wednesday-Sunday 22 to 26 September 2021, amounts to less favourable treatment. The Tribunal accepts the claimant's evidence that he had never worked a Saturday and had never been required to work five consecutive days nor to work the whole weekend before. The claimant's position was corroborated by the only documentation produced by the respondent on that point. Those two pages showed the claimant's position to be wholly accurate. His working pattern changed after he had asked to move to 4 days not 5. Mr James knew that he had made that request because of his mental health. The claimant had told Mr James that he had schizophrenia. At that time Mr James was his manager. The Tribunal rejects Mr James evidence that the system, WFM, auto generated a rota that gave the claimant Saturdays to work. Even if it had done, would have been incumbent upon Mr James to check that auto generated rota. The Tribunal finds that Mr James made changes to the rota to schedule the claimant to work five consecutive days from 22nd September 2021 and that this was less favourable treatment that was related to the claimant's protected characteristic of disability. The Tribunal finds that Mr James would not have made changes to the rota of a hypothetical comparator who did not have the claimant's disability. The Tribunal finds that the changes were made to punish the claimant and make his working life difficult for him. It makes that finding because it accepts the oral evidence of the claimant that Mr James had said words to the effect that he did not want/need a fucking schizo working for him. If this complaint had not succeeded in direct discrimination that it would have succeeded as an act of harassment. Changing the shift pattern was unwanted conduct and the tribunal would have found that it was done with the purpose of creating an intimidating hostile degrading humiliating or offensive environment for the claimant.

133. The Tribunal rejects Mr James' attempt in evidence to dissociate any change in pattern (had he made any and he said he did not) from disability and relate it to the fact of a grievance having been brought about a working pattern. Mr James said he could not have altered the shift *because he was unhappy with the claimant for having bought a grievance, when he did not know about the grievance until 4 November 2021.* The Tribunal finds that Mr James was unhappy with the claimant during and following the exchange on 8 September 2021. The Tribunal finds that Mr James was motivated by his knowledge that the claimant had schizophrenia. The remark about not wanting a *fucking schizo* working for him showed the tribunal Mr James's attitude to the claimant's disability. The Tribunal also finds Mr James did know the content of the claimant's grievance and knew that the claimant had brought the grievance prior to attending the meeting with Mr Carr on 4 November 2021. Mr James was not credible on this point because it was his own evidence that he looked at WFM and had taken screenshots of the

claimant's rota to take with him to the meeting on 4 November 2021. If he had not known the claimant had brought a grievance about his shift pattern then how could he have known to screenshot the rota ? This was just one instance in which the tribunal found Mr James to have given oral evidence that was shown by the documentation and his own conduct at the time to be untrue.

135. The complaint at 4.1.4 and 3.1.4 has been found to be out of time . If it had not been then the tribunal has found as a fact that between 15 August 2021 and 18 October 2021 Mr James was not timing the claimant when unloading with the forklift truck (when both were on shift); if the Tribunal is wrong about that then it was not less favourable treatment on the ground of the claimant's protected characteristic of disability. If the tribunal is wrong about that and had to consider the matter and harassment, the tribunal would have found that it was not unwanted conduct from manager to monitor the performance of the staff . Further, if it did amount to unwanted conduct in harassment the tribunal would have found it was not related to the protected characteristic of disability would have been undertaken as part of normal performance management. (The Tribunal notes that it accepted Mr James evidence on this point that he did or anyone else loading and unloading the forklift truck) And if the tribunal is further wrong about that then this part of the complaint would fail because it would be unreasonable for the claimant to perceive this as an act of harassment. It would be legitimate for a manager to observe the performance of his employees.

136. The complaint at 4.1.5. that between 15 August and 18 October 2021 Mr James was chopping and changing the claimant's shifts without giving notice and that this amounted to less favourable treatment on the grounds of disability succeeds. The Tribunal accepts that Mr James did schedule the claimant for five consecutive days, which had never happened to him before, and did schedule the claimant to work on the 2 and 9 October 2021 both of which were Saturdays and that the claimant had never been required to work Saturdays before. The Tribunal finds that because Mr James had said he did not want a fucking schizo working for him and because the claimant shift pattern changes after he's told Mr James that he has schizophrenia, the conduct was related to the protected characteristic of his disability. Mr James would not have treated the hypothetical comparator , someone without the claimant's disability in that way. The limited disclosure of documents by the respondent such as shift patterns, clocking on and off records and any other evidence as to what pattern the claimant had actually worked prior to 8 September 2021, meant that the tribunal had a short chronology of evidence with which to work. The tribunal was persuaded by the claimant's oral evidence corroborated by those limited documents that were disclosed, that his pattern changed after he had the conversation with Mr James on 8 September 2021. The chronology worked against the respondent. If this complaint had failed in direct discrimination law then it would have succeeded in harassment as unwanted conduct related to the protected characteristic because the change in shift pattern had the purpose or effect of creating an intimidating hostile degrading humiliating or offensive environment for the claimant. In the circumstances of the case particularly the chronology, it was reasonable of the claimant to perceive that the changes were related to his disability and for the conduct to have that intimidating and hostile effect.

137. The complaint at 4.1.6; that on 9 October 2021 Mr James put the claimant down for a shift, knowing that he had counselling/therapy on the day succeeds. This amounted to less favourable treatment on the grounds of the claimant's disability. The claimant was scheduled to attend a disciplinary meeting that day despite the respondent knowing that he did not work Saturdays, that Saturdays were important for the management of his mental health, and that that particular Saturday was his 50th birthday. The Tribunal finds that Mr James put the claimant on the rota on this day was done deliberately to make things difficult for the claimant would not have been done to someone without the claimant's disability .

In the alternative, if this complaint is not succeeded in direct discrimination in the tribunal you know would have found that it succeeded in harassment and that they scheduling of the claimant to work on 9 October 2021 was unwanted conduct done with the purpose of violating the claimant's dignity and creating an intimidating hostile degrading humiliating or offensive environment for him. Mr James had been told that the claimant couldn't do Saturdays and the reasons for that. The Tribunal accepts the claimant's oral evidence that Mr James had granted two days leave prior to that date because he knew it was the claimant's 50th birthday. The tribunal would have found that this unwanted conduct was related to the claimant's disability. Again, the fucking schizo remark and the chronology of change to the claimant's shift pattern after Mr James finds out the claimant has schizophrenia persuades the Tribunal that the unwanted conduct is related to the disability.

138. The complaint at 4.1.7. and 3.1.7 that on12 October 2021 Mr James wrote the claimant up for disciplinary warning fails as an act of direct discrimination. Being written up for disciplinary warning is potentially less favourable treatment but the claimant accepted in cross examination Mr James's position that he would have written up anyone who he perceived to have walked off shift. The claimant could not therefore meet the burden of proof in showing that the less favourable treatment was on the grounds of his disability. The Tribunal considered this complaint in the alternative in harassment law. Being written up was undoubtedly unwanted conduct but Mr James gave oral evidence that he would have written up anyone that he believed had walked off shift. Therefore, writing the claimant up for walking off shift was not conduct related to the protected characteristic of disability. This complaint also fails in harassment law.

139. In oral judgement the Employment Judge proceeded through the list of issues in a linear way dealing with harassment at paragraph 3.1.1 – 3.1.7 and then direct discrimination at paragraphs 4.1.1 to 4.1.7. At the end of oral judgment Mr Proffitt sought clarification that the complaints could not succeed under both heads. The Employment Judge confirmed that there would be no double recovery. He was quite right that the complaints cannot succeed as both section 13 and section 26 complaints. The tribunal has set out above which complaints have succeeded and failed under section 13, and where they have failed why they would also have failed under section 26. In this way, the tribunal has supported the claimant litigant in person to bring both claims in the alternative.

<u>Discrimination arising from disability (s15 EqA 2010)</u>

140. Sadly, this claim was not well pleaded. The tribunal offered support to the claimant litigant in person using checking back questions to ensure that this was how he wished to put his complaint and it was. It was not for the tribunal to redraft

the things that the claimant said arose out of disability. The claimant said that one of the things that arose out of his disability was having a nervous breakdown in October 21. The Tribunal has found that the claimant's health deteriorated during this time. The tribunal avoids making further findings about causation of the breakdown in the claimant's health or exacerbation of already deteriorating health, prior to a remedy hearing. However, for the purposes of liability the claimant was unwell and was becoming increasingly unwell in October 2021. The claimant has not established a causal connection between Mr James' unfavourable treatment of him (in adding the claimant leaving B and M on 9 October 2021 to existing disciplinary issues about the claimant's August absences from work when he wrote him up for a disciplinary on 11 October 2021) and his deteriorating health. There only needs to be a loose connection but none is made out in this instance. The claimant accepted in cross-examination that Mr James would have written up anyone who he, Mr James, perceived to have walked off shift, whether that person had mental health or any other health problems.

141. The claimant also said his sickness absence was something that arose out of his disability and that the unfavourable treatment happened to him because he had sickness absence between 18 October and 15 September 2022. The claimant's sickness absence from 18 October to 15 September 22 clearly arose out of his schizophrenia. The Tribunal accepts the oral evidence of Mr James that he made his witness statement on 11 October 2022 and decided that day to add the claimant's, to his mind, having walked off shift on 9 October 2021 to the existing charges about the claimant's absence in August. This "something" the absence that arose out of schizophrenia cannot have been a causal factor in Mr James writing him up because it happened *after* Mr James decided to write him up.

142. The Tribunal finds further that the claimant did not leave B and M on 9 October 2021 because of his health. The Tribunal accepts his evidence because of the clocking in time of 09 57 when ordinarily if clocking in for a shift at the weekend he would have clocked in for 9am that he did not believe himself to be on shift that day. He walked out of work because the meeting he had come in to attend was not taking place. He also walked out of work that day because it was his birthday and he had pre-booked leave to attend his own party later that day. He had needed to book leave because Mr James had put him on the rota to work a Saturday despite the claimant not working Saturdays and despite annual leave having been previously agreed.

143. The claimant brought a complaint at 5.1.2 of the List of Issues that his dismissal was an act of discrimination arising out of disability. The Tribunal heard evidence from Mr Dennett, the dismissing officer. the claimant said that his having a nervous breakdown in October 21 the sickness absence that flowed from that through to September 2022 both arose out of his schizophrenia. The Tribunal accepts that causal link. Both his ill-health and the duration of his absence were factors in Mr Dennett's decision to dismiss. The Tribunal accepts that the lack of a return to work date was the determining factor, that despite the ill-health and absence if the claimant had been able to return to work in say a month from September 2022 Mr Dennett would not have dismissed, but they ill-health and absence was still factors. For the purposes of section 15 that loose connection is sufficient. The Tribunal finds that the decision to dismiss arose out of ill health and disability related absence but that the respondent's defence, that dismissal was a

proportionate means of achieving the legitimate aim of adequate staffing, succeeds.

144. The tribunal finds the respondent had a legitimate aim of seeking to ensure adequate staffing at all times. As at the date of dismissal the claimant had been absent from work for approximately 10 months. The claimant said at the meeting on 2 September 2022 to discuss his ongoing employment that it could be four years before he would be fit to return. The respondent had obtained an occupational health report which said that there was no foreseeable date for return at that point.

145. The defence to section 15 requires the Tribunal to carry out a balancing exercise, to balance the needs of the respondent with the rights of the claimant. The respondent needed to staff its store. The claimant had been absent a long time. The respondent is not required to wait indefinitely for a return to health and a return to work. The tribunal can ask how long was it reasonable for the respondent to have to wait and in the circumstances of no date for return, the tribunal finds that the respondent was not required to wait any longer. In balancing its needs against those of the claimant it was reasonable for it to move to dismissal in September 2022.

146. The tribunal must also consider whether something less discriminatory could have been done ? Waiting for a further occupational health or specialist psychiatric report, i.e. delaying for a clearer medical picture, would have been less discriminatory. However, in this case, the claimant accepted in oral evidence that he had told Mr Dennett that he might not be well enough to return for as long as a further four years and that he had said that even if he did return he would be unlikely to be able to use machinery, to use the forklift truck to do full shifts. The claimant also accepted that he was feeling so let down by the respondent in September 2022 that he had said words to the effect that there was no role in the company that they could make him return to and that he had used the words *too little too late* at the meeting on 2 September 2022 and Mr Dennett had talked to him about a possible return to work.

147. The respondent could have dealt with the claimant's flexible working request and addressed his request for reasonable adjustment. That would have been a less discriminatory way to proceed. If the respondent had offered him a return to work working his 30 hours over 4 days and with the support of occupational health might have engaged the claimant in a discussion about a phased return when he was well enough to do so to that four-day working pattern. However, the Tribunal finds that the claimant had decided by 2 September 2022 that he no longer trusted or wanted to work for the respondent. There was therefore nothing less discriminatory that they could have done at that time to balance the needs of the claimant and respondent that would have resulted in the claimant returning to work within a reasonable timeframe.

148. The respondent's defence to the section 15 complaint succeeds. It had a legitimate aim of adequate staffing store and in the circumstances in which there was no foreseeable return date the claimant and the claimant was saying that the respondent had done too little too late and that he would not return to work for it and that it could be up to 4 years before he was fit to do any work, dismissing the claimant was a proportionate means of achieving that legitimate staffing aim.

Failure to make reasonable adjustments (s20-22 EqA 2010)

149. At 6.1. Of the List of Issues the tribunal finds that the respondent operated at PCP of

> Requiring employees contracted over 20 hours to attend work any 5 of 7 days per week?

In practice, prior to Mr James arriving at the claimant's store, the claimant had not worked more than two consecutive days on a regular basis without a break and had not had to work Saturdays. This had been, in effect, a local adjustment that had been made to support the claimant with the management of his mental health. When that local adjustment was removed by Mr James the full impact of the PCP operated on the claimant. This PCP put the claimant at a particular disadvantage compared to people who did not have his schizophrenia. Losing his time on a Saturday in which to attend therapy and engage in therapeutic practices that supported his well-being, his walk with a mental health support group of friends, affected his well-being and his mental health began to deteriorate. He was therefore more likely to suffer absence as his mental health deteriorated, to be at risk of being subjected to absence management interventions and to be at risk of dismissal than a person who did not have his schizophrenia.

150. The respondent also had a PCP at 6.1.2. of the List of Issues of

> Requiring employees to maintain acceptable levels of attendance or be subject to sickness absence management?

This PCP also placed the claimant at a particular disadvantage compared with people who did not have his schizophrenia. He was less able to maintain acceptable levels of attendance than someone without schizophrenia.

151. At 6.3 of the List of Issues in relation to knowledge of particular disadvantage the respondent did not dispute that it had knowledge. The Tribunal finds that the respondent failed to take the reasonable step of allowing the claimant to work his 30 hours across four days in September and October 2021. The duty to make a reasonable adjustment for the claimant arose prior to 8 September 2021 conversation with Mr James because the respondent had known about his schizophrenia. His previous manager had made a local arrangement for him which had worked well. The Tribunal finds that there had been no previous problems with the claimant's performance or attendance. It's only after Mr James becomes aware of the claimant schizophrenia on 8 September 2021 that the local arrangement is disrupted and the respondent thereafter failed to take reasonable steps.

152. The claimant made a verbal request for the reasonable adjustment on 8 September 2021. It was not acted on. The claimant made a written request in his flexible working application on 16 September 2021 and this request remained live until termination of his employment, he was never given a meeting to discuss flexible working. Mr Dennett was aware of the claimant's request to work 30 hours over four days on 24 September 2021 and failed to take the reasonable step of allowing him that working pattern and on 16 October 2021 the claimant again

raised the point in his grievance. He had made repeated requests for an adjustment to support him in managing his mental health and they were not acted upon. This resulted in an ongoing discriminatory effect on the claimant, an ongoing failure to reasonably adjust. The Tribunal finds that it was inappropriate to set up a meeting to discuss the working pattern with Mr James when there was an outstanding grievance against Mr James on this very point because of his conduct on 8 September 2021.

153. The Tribunal accepts the claimant's oral evidence, corroborated by the medical report of Dr Janapati and the chronology of events that the failure to reasonably adjust led to significant deterioration in the claimant's mental health and was a significant factor in his suicide attempt in July 2022. The complaint for failure to reasonably adjust at 6.4.1 succeeds.

154. There was a further complaint about failure to reasonably adjust at 6.4.2. of the List of Issues relating to a reasonable step of not dismissing the claimant in September 2022? The Tribunal has found above that the PCP was in operation and did put the claimant at a particular disadvantage the respondent conceded that it knew or ought to have known that the PCP would place the claimant as a person with schizophrenia at that particular disadvantage. There was discussion at the hearing about disregarding disability related absence. The Tribunal accepts Mr Dennett's evidence that his focus was on a return date. He was of course aware of the length of absence the Tribunal accepts his evidence that he would not have dismissed if there had been a return date. The evidence before Mr Dennett was that there was no date from occupational health and that the claimant was saying, somewhat contradictorily, both that the respondent had done too little too late and that he would not return to work for them and that it might take as long as four years for him to be well enough to return to work. In considering the reasonableness of the step the Tribunal must balance the needs of the claimant and respondent. The Tribunal finds that it would not have been a reasonable step to hold off dismissal after 10 months absence and with OH not been clear about return date and the claimant saying he did not want work the respondent and that it could be up to 4 years before it was well enough to work again.

Unfair dismissal (s98 Employment Rights Act 1996)

LOI:7.1. Did R have a potentially fair reason for dismissing C? R relies on capability.
155. The Tribunal finds that the reason for dismissal was the claimant's medical incapability to work in the absence of a return to work date. This amounts to a capability related dismissal within section 98(2) and is a potentially fair reason for dismissal.

LOI:7.2. Was there a prospect of C returning to work within a reasonable time frame?
156. The Tribunal accepts the oral evidence Mr Dennett that he considered the point of whether or not the claimant could return to work within a reasonable timeframe. It accepts is evidence that he asked the claimant about that and the claimant said that he would not return to work, that the respondent had done too little too late and then it could be as long as four years before the claimant was fit

to do any work. The Tribunal accepts Mr Dennis view that OH had not given a return date. In those circumstances the tribunal finds that the respondent was reasonable to conclude that there was no prospect of the claimant returning to work within a reasonable timeframe.

LOI: 7.3 How long could the respondent have reasonably been expected to wait?
157. The answer to this question will be fact specific. The Tribunal accepts the evidence of Mr Dennett that the respondent had already waited a long time. The claimant had been off sick for over 10 months. The respondent had postponed a hearing to deal with medical incapability dismissal from March 2022 because the claimant had said how unwell he was. The respondent had held off moving to dismissal. If, for example there was evidence before the respondent the claimant might recover within say three months sufficiently to be able to return to work then, subject to discussion about his working pattern and any reasonable adjustments that he might need phased return, it might be reasonable for the respondent to have to wait three months. Again, on this point there was little documentary evidence from the respondent to support its position. The Tribunal might have expected to see data about staffing levels and possibly even seasonal trade and the need to have posts that were vacant because of sickness absence filled. In the absence of any such evidence the tribunal relied heavily on the oral evidence of Mr Dennett which was corroborated by the claimant. The claimant accepted that he had said that he was not well enough to return, that the respondent had done too little too late and he would not be returning and that in any event it could be four years before he was fit to do any work. In those circumstances it was reasonable for the respondent not to have to wait any longer and to move immediately to dismissal on notice.

158. The Tribunal is critical of the way the respondent went about the dismissal. The Tribunal was concerned that the dismissal hearing had no one to present management case, no one with the claimant (though he was given the opportunity to be accompanied) and no one to take notes and provide the notes. We heard oral evidence from Mr Dennett that he had thought the claimant would be due not 9 weeks notice pay, one for each year of service, but 7 because 2 years don't count. The Tribunal does not expect Mr Dennett to know the detail of calculations of pay on termination but saw this as emblematic of the way both Mr James and Mr Dennett had made decisions about the claimant without proper regard for the detail. Mr James had not taken care to understand the claimant's working pattern when he came to manage the store in August 2021 and not taken care about the claimant's annual leave on 9 October 2021. The Tribunal has make findings above about the things that he said to Mr Carr. Mr Dennett in considering dismissal did not know if he had seen the OH report or not and had not checked the absence dates before dismissing. Mr Dennett got the dates wrong. He thought the claimant had been absent since 21 August 2021, when in fact the long term absence had begun on 18 October 2021. The Tribunal finds that whilst this was unkind and that a respondent considering medical incapability dismissal ought to take great care to base its decisions on accurate information, in this case it made no difference. Mr Dennett would have dismissed whether the claimant had been absent from August or October 2021. The Tribunal accepts his oral evidence that his focus was not retrospective, not on how long the claimant had been absent, but prospective in that he was focusing on how long it might be before the claimant

could return to work.

159. The Tribunal also notes that when Mr Dennett gave his oral evidence he said he couldn't be sure if he had seen the occupational health report or not. The Tribunal saw an email suggesting it had been sent to him. Again, a respondent considering terminating employment on the grounds of medical incapability ought to take great care to gather relevant medical evidence, to discuss it with the person he is considering dismissing and to take it into account. That is not to say that Mr Dennett did not do that at the time, only that he could not remember whether he had seen the report in September 2022 or not when he was giving evidence in April 2024.

LOI: 7.4. Was dismissal within the band of reasonable responses?
160. Yes. The Tribunal cannot say that no reasonable employer would have dismissed in the circumstances outlined above. The claimant had been off sick for over 10 months was not able to give the dates for a return to work but was saying that the respondent had done too little too late and that it could be as long as four years before he could do any work. It is understandable that the claimant said those things because in his mind the respondent's conduct from to September 2021 had had a catastrophic effect on his previously well-managed mental health such that he had attempted suicide in July 2022. The claimant saw and sees a direct causative link between the respondent's conduct and his inability to return to work in September 22 and to the date of the liability hearing and beyond. The Tribunal accepts that this was his belief in September 2022 and that he voiced it in terms he would not work the respondent again. Mr Dennett was entitled to take the claimant's stating that he would not work for the respondent again at face value. The Tribunal finds that the dismissal was fair in all the circumstances of the case including the size and administrative resources of the respondent and having regard to equity and the substantial merits.

Conclusion

161. The claimant's complaint of unfair dismissal, the discriminatory dismissal under section 15 Equality Act 2010 and his complaints in direct discrimination/harassment at paragraphs 3.1.2/4.1.2 and 3.1.4/4.1.4 and 3.1.7/4.17 and his failure to reasonably adjust complaint at 6.4.2 fail for the reasons set out above.

162. The claimant has succeeded in complaints for direct discrimination at 4.1.1, 4.1.3, 4.1.5, 4.1.6 and and in his failure to reasonably adjust complaint 6.4.1. A remedy hearing has been listed.

_____

Employment Judge Aspinall

Date: 12 September 2024

REASONS SENT TO THE PARTIES ON

13 September 2024

FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/