Case No: 2410309/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr A Parhiar

Respondent: Sodexo Limited

Heard at: Manchester Employment Tribunal

On: 14, 15 and 16 August 2024

Before: Employment Judge M Butler
Mrs M Plimley
Mr A Wells

Representation
Claimant: Self-representing
Respondent: Mr S Proffitt (of Counsel)

JUDGMENT

The unanimous decision of the tribunal is that:

1. The claims of direct race discrimination fail and are dismissed.

2. The claims of direct religion or belief discrimination fail and are dismissed.

3. The claim that the respondent failed in its duty to make reasonable adjustments fails and is dismissed, and for substantially the reasons given in the deposit order that applied to this specific allegation.

4. The claims of victimisation fail and are dismissed.

REASONS

INTRODUCTION

5. A decision in this case was handed down orally to the parties on 16 August 2024. The claimant requested written reasons by email dated 20 August 2024. These are those written reasons.

6. The claimant worked for the respondent as a Senior Employee Relations Advisor from 04 May 2022 until 22 November 2022. He presented his claim form on 22 December 2022, alleging that he had been discriminated against on the grounds of age, race, disability, marriage or civil partnership, sex and religion or belief. And also brought claims for notice pay and for other payments.

7. The claimant provided details of his allegations in box 8.2 in the claim form (at p.8 of the hearing bundle).

8. The parties attended a Preliminary Hearing with Employment Judge Shotter on 20 June 2023. EJ Shotter tried to record the claim in full. However, this was not possible at the hearing. EJ Shotter listed the hearing for a further preliminary hearing and put in place various directions to progress the case.

9. Following an application to strike out the claim and/or to apply deposits to the claim by the respondent, a preliminary hearing in public took place on 31 October 2023, before Employment Judge Ross. Although EJ Ross decided that the strike out application was unsuccessful, she applied deposit orders in respect of six of the claimant's allegations (see pp.180-181). The claimant withdrew his unlawful deduction from wages claim in respect overtime pay and wrongful dismissal claim at the hearing before EJ Ross (see pp.192 and 193).

10. The claimant paid a deposit in respect of one of the allegations that were made subject to a deposit, namely allegation 5 on p.180 (see p.196). The others were all struck out accordingly.

11. The list of issues to be determined in this case, which was confirmed at the beginning of this hearing, was contained at pp.238-241 of the bundle.

12. The tribunal was assisted with an evidence bundle that ran to some 394 pages. There was additional disclosure during the hearing, with page numbers 395-402, which were disclosed during the hearing. These documents were the claimant's pre-employment checks. No objections were raised in respect these documents being before the tribunal, and they appeared to be relevant. And therefore they were admitted into evidence.

13. The tribunal heard evidence from the claimant, who gave evidence on his own behalf.

14. The respondent called the following witnesses:

    a. Ms Delaney
    b. Ms Dickinson

15. The claimant produced a document entitled 'Witness Statement as at 14 May 2024'. This document was not a witness statement. It contained no evidence that related to the specific allegations live in this case. It refers to his mental impairments, the affects thi shad on him, before then giving remedy information.

16. In short, the claimant had not produced a witness statement addressing liability issues in advance of this hearing. This is despite him knowing that he needed to produce one. First, he has brought two previous claims to the employment tribunal. And secondly, the claimant attended the preliminary hearing before EJ Ross on 31 October 2023, the record of which makes clear that the claimant himself must produce a witness statement and provides detailed explanation as to what this should include. The tribunal is critical of the claimant for not producing a witness statement in these circumstances.

17. The tribunal, given the above, considered the documents available to it and whether any document or documents would be sufficient to stand as the claimant's witness evidence in this case. The tribunal highlighted three specific documents for the claimant to consider. The claimant considered and informed the tribunal that the narrative he wrote at box 8.2 of his claim form (p.8 of the bundle), his appeal from dismissal (pp.14-17) document and his further and better particulars (at pp.135-138) contained all the evidence that he wanted to give in this case. The tribunal was satisfied that this did not disadvantage the respondent such that a fair hearing was not possible. As an adjustment to the process, the tribunal directed that these two documents combined would stand as the claimant's witness evidence in this case.

POSTPONEMENT APPLICATIONS

18. The claimant made an application to postpone this final hearing on 25 March 2024 by email to the tribunal (see pp.229-230). In short, this application was made with the claimant citing a breakdown of a relationship, his suffering with anxiety and depression, that he needed a volunteer to assist him in the case, and that his was going through other court proceedings as the reasons behind his application.

19. The claimant's application to postpone the final hearing was refused by Employment Judge Howard by letter dated 08 April 2024. She wrote that claim 'relates to matters that took place in 2022 and a postponement will result in a hearing in 2025 and will have a detrimental impact upon the quality of the evidence. It is the best interest of all the parties to have this matter determined as currently listed'.

20. On the morning of the first day of this hearing, the claimant made a further

application to postpone the final hearing. This mirrored the application above. In short, he explained that he is involved in other court proceedings, that he suffers from anxiety and depression and that he has not been able to prepare for this hearing. And that he considered that it would be unfair on him to proceed in those circumstances. On questions from the tribunal, the claimant explained that he had had the final hearing bundle since around 06 July 2024, but had only opened it this morning.

21. The respondent objected to the application. Mr Proffitt explained that the claimant knew he needed to prepare for this hearing. That the claim was presented some 20 months ago, and the evidence needed to be heard. He further explained that the claimant was only going to be cross-examined for around an hour.

22. The tribunal refused the claimant's application for postponement. The claimant had received the bundle on 06 or 07 July 2024, which was accepted by the claimant. He had had ample time to read the documents and prepare his evidence. Him choosing not to do so did not support a postponement. Many of the documents are documents the claimant had already seen much earlier through disclosure, through work and/or being documents that were his own. There was no medical evidence supporting that a postponement was needed.

23. The tribunal expressed sympathy with the claimant, as it does not doubt that he may well have had focusses elsewhere. However, this did not support the postponing of this hearing. The tribunal has experience with adjusting hearings for persons with anxiety and depression, and adjustments were put in place in this hearing. Particularly, this was in the form of adequate and sufficient breaks, and time to prepare where needed.

24. The tribunal carefully observed the claimant throughout the proceedings and are satisfied that he was able to effectively particulate throughout.

25. To assist the claimant, and in agreement with the sensible suggestion made by Mr Proffitt, the tribunal decided that day 1 would be used by the tribunal to read into the case and for the claimant to prepare his case. This was more than enough time for the claimant to undertake this task. This was an adjustment made to the hearing for the benefit of the claimant. Evidence in this case was delayed and started on day 2 of this hearing.

CREDIBILITY

26. The tribunal considered it appropriate and necessary to make findings on credibility of the witnesses that gave evidence in this tribunal.

27. With both Ms Delaney and Ms Dickinson, the tribunal had no reason to question their credibility of either of those individuals. The evidence that both gave respectively was consistent when under challenge, and consistent with contemporaneous documents, where such documents existed. Both gave direct and clear answers to the questions being asked. And both tried to answer the questions that both the claimant and the

tribunal were asking them. All of this led the tribunal to find both witnesses to be credible and reliable witnesses of fact.

28. Turning to the claimant. The tribunal finds the claimant not to have been a credible witness. The tribunal considers that the claimant presented various untruths in his evidence which were with a view to mislead the tribunal. There are several aspects of the claimant's evidence which the support this view, and led the tribunal to this conclusion, including:

    a. In the specific victimisation allegation found at para 5.2(c) of the list of issues, the claimant alleges that the specific comments of 'you're an old man' was used by Ms Delaney about the claimant. The claimant expressed this specifically at the preliminary hearing with EJ Shotter, which was recorded as an allegation of victimisation. The claimant then maintained this in this hearing when he was asked to confirm the accuracy of the list of issues at the beginning of this hearing. And then under cross-examination on questioning, and being pushed on this matter, he later accepted that this specific phrase was not used. The claimant must have known throughout that this phrase has never been used by Ms Delaney.

    b. The tribunal put significant reliance on the documentary evidence, the claimant's evidence and on his cross-examination of respondent witnesses in respect of the probation meetings of 01 and 29 July 2022. The claimant constantly changed his story, starting off with a serious allegation of fabrication of documents and meetings, which his own cross-examination of Ms Delaney undermined, and which then supports the tribunal's view of the claimant's evidence being an untruth:

        i. When cross-examined on this point, the claimant introduced for the first time that the meetings on 01 and 29 July 2022 did not take place. And that the documents that were created from those meetings were wholly fabricated. The claimant explained that he had no probation meetings on those dates and that the only probation meeting that he had with the respondent was on 23 August 2022.

        ii. When Mr Profitt explained to the claimant that an allegation of fabrication of evidence by Ms Delaney was a serious allegation to make, the claimant then attempted to backtrack. And changed his evidence to being that he could not remember whether probation meetings or any meetings took place on 01 and 29 July 2022.

        iii. When the claimant was cross-examining Ms Delaney, and following specific questions asked by the claimant, the tribunal had to ask what the claimant's position was with respect these meetings. This led to a further change in the claimant's position. He explained that the meetings had taken place but that he had not been sent a formal letter to invite him to those meetings. The claimant was now suggesting that meetings did

take place on both 01 and 29 July 2022, but that he did not consider them to have followed the correct process to be probation meetings.

iv. The claimant returned to explain in his closing argument that he did not sign the documents in question, and that is position was that the notes were fabricated and that the meetings had not happened.

v. The tribunal considered various documents in the bundle in respect this issue. Including the grievance meeting notes from the meeting claimant had with Ms Chaudhry on 04 November 2022 (which the claimant has never challenged as being inaccurate), and particularly the references on p.288 by the claimant to 'initial probation meeting feedback' before Ms Chaudhry then asks about probation meetings in the plural and bow feedback as provided, to which the claimant responds to say 'Quick 10-15 mins…' The claimant's answer supports that there were more than one probation meeting. And in the claimant's grievance outcome letter, sent to him, again which the claimant does not challenge as inaccurate, references two probation meeting the claimant had at 4 weeks and 8 weeks see (p.297).

vi. When Ms Delaney sent docs to Ms Chaudhry as part of the grievance investigation, those probation review documents existed at that time. It is not plausible that they were fabricated that same day to be presented as part of the investigation.

c. Given the above, the claimant knew that these meetings took place, and that was particularly clear given the way he cross-examined Ms Delaney. The documents the tribunal have support that they did happen, and yet the clamant sought to present a picture that no such probation meetings took place. That is a deliberate untruth by the claimant in respect of meetings that are central and crucial to his allegations. And given the importance of these meetings, significant weight was therefore attached to this in the tribunal making the finding it did.

d. Further doubting the claimant's credibility is the claimant's position as to whether Ms Delaney raised performance concerns with the claimant before 23 August 2022. The claimant says that no such performance concerns were raised with him, whilst the documentary evidence suggest otherwise.

29. Given the tribunal's conclusions in respect the credibility and reliability of the claimant, and its views in respect of Ms Delaney and Ms Dickinson, where there was a conflict in the evidence, the tribunal preferred the evidence of Ms Delaney and Ms Dickinson over that of the claimant.

LIST OF ISSUES

30. The list of issues contained at pp.238-241 of the bundle were confirmed as the issues to be determined in this case. The tribunal was satisfied that this covered all of the matters brought in the claim form. For ease, the list of issues are attached to the back of this judgment.

31. It was explained to the tribunal that time limits were no longer an issue in this case. The respondent conceded that it had knowledge of the claimant's disability from 25 October 2022, that being the date the claimant raised a formal grievance. And the respondent also conceded that the grievance was a protected act for the purposes of the victimisation claims.

LAW

Direct discrimination

32. Protection against direct discrimination is provided for at s.13 of the Equality Act 2010:

> 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.

33. Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** gave guidance as to the approach an employment tribunal should consider when determining a direct discrimination complaint:

> "7. …In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
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> 8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable

> treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.
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> …
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> 11. …employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

34. This is further explained by Mr Justice Underhill P (as he then was), in **Amnesty International v Ahmed [2009] IRLR 884:**

> "32. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.[3] That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, e.g., art. 2.2 (a) of Directive EU/2000/43 ("the Race Directive"). There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (e.g. s. 2 (1) of the 1976 Act): see *per* Lord Nicholls in **Nagarajan** at p. 512 D-E (also, to the same effect, Lord Steyn at p. 521 C-D).[4]
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> 33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. **James v Eastleigh** is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p. 772 C-D), "gender based".[5] In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further

> inquiry is needed. It follows that, as the majority in **James v Eastleigh** decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.
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> 34. But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in **Nagarajan** (see para. 29 above). The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.
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> …
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> 37. …although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Victimisation

35. Protection from victimisation is contained at s.27 of the Equality Act 2010. It provides:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
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> (a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

A failure in the duty to make reasonable adjustments

36. The relevant statutory provisions, in respect of a failure to make reasonable adjustments complaint are as follows:

20. Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

21. Failure to comply with duty

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

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

37. The tribunal reminded itself that when considering a claim for a failure in the duty to make reasonable adjustments, that there is need to establish knowledge (actual or constructive) of the substantial disadvantage alleged on the part of the respondent.

Burden of proof under the Equality Act 2010

38. We reminded ourselves of the burden of proof in discrimination cases, with

reference to section 136 of the Equality Act 2010:

> (1) This section applies to any proceedings relating to a contravention of this Act.
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> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

39. Lord Justice Mummery (with which Laws and Maurice Kay LJJ agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

> "56. The court in **Igen v Wong**… expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
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> 57. "Could… conclude" in section 63A (2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.
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> 58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the

> respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

40. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

> "71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.
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> 72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground…."

41. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

42. The tribunal was reminded of two important matters (amongst others) by the then House of Lords in **Nagarajan v London Regional Transport** [1999] IRLR 572:

    a. If the burden shifts, the tribunal should then focus on the employer's conscious or subconscious reason for treating the worker as they did, and
    b. The protected characteristic needs to *"significant[ly] influence"* the less favourable treatment so as to be causally relevant.

43. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant succeeds in doing this, then the onus will be on the respondent to

prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

CLOSING SUBMISSIONS

44. The tribunal heard closing oral argument by both parties. These are not repeated here but have been considered and taken into account in reaching this decision.

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence, and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

45. The claimant was successful at interview stage with the respondent for the role of Senior Advisor. He received an offer letter for the role of Employment Advisor with the respondent dated 28 April 2022. This made it clear that his employment was subject to the respondent receiving two satisfactory references.

46. The claimant commenced employment with the respondent on 06 June 2022 (see employment contract at p.243). Within the claimant's contract, clause 13 dealt specifically with the probation period, to which the claimant was subjected to (see pp.245-246). It states that:

> *13.1 Your position is subject to a twelve-week probation period and your employment may be terminated during this period at any time in line with notice provisions provided in clause 22. During this probationary period your performance and suitability for continued employment will be monitored. If you do not pass your probation after the initial period, we may, in our absolute discretion, extend the period for up to a further twelve weeks to allow you to demonstrate improvement in your performance.*
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> *13.2 We reserve the right to terminate employment at any point during the extension period if insufficient performance improvements*

are demonstrated or there have been instances of misconduct. At the end of that period, you will receive written notification stating whether you have passed your probation. If you do not pass your probation after the extended period, unless exceptional circumstances apply, we will normally dismiss you with one week's notice.

47. To pass probation, the claimant needed to demonstrate that he could give sound employment advice, that he could write up notes on respondent's systems and that he was able to follow Sodexo's processes (see para 4 of Ms Delaney's witness statement).

48. To assess an employee against the probation requirements, the respondent would undertake regular probation review meetings with the probationer. The process was that review meetings would take place every 4 weeks (see probation review docs).

49. The claimant had his first probation review on 01 July 2022. This was broadly in line with clause 13.1 of the claimant's contract. The probation review document at pp.255-256 was completed by Ms Delaney on that same date. The tribunal accepts that the date entered by Ms Delaney of 01 April 2022 as being the date the form was completed was an error. The probation review document was an accurate reflection of the discussion that took place between the claimant and Ms Delaney on 01 July 2024.

50. In the Probation review document of 01 July 2022, it was identified that improvements and further action was required, namely:

    a. Attention to the Suspension process required.
    b. Quality of letters need to be much more than a copy and paste
    c. Read the letter to see if is correct.
    d. Listen and respond with particle advise
    e. Currently standard of work seems transactional, following a process but the quality of
    f. investigation of advise, interpretation of the reports and output of letters needs to be of a higher
    g. standard.
    h. Managing workloads via CSM
    i. Feedback to be taken on board and changes observed.

51. Ms Delaney also recorded the following as being details of support and training to be provided to the claimant:

    a. Further coaching with Hannah, listen and take on board feedback.
    b. Particular detail to letters, suspensions, Advise and interpretation of investigation reports.
    c. Hannah to shadow Calls

52. Ms Delaney also recorded that by the next review there was a need for significant improvement by the claimant. The next Probation review meeting was arranged to take place on 29 July 2022.

53. The claimant made no reference to an impairment that required adjustments to be made during the hearing of 01 July 2022.

54. The claimant was sent the probation review document by email for him to check it, correct any errors and sign it to confirm its accuracy The claimant never questioned the contents of the documents. Nor did he return a signed version. The tribunal preferred the evidence of Ms Delaney on this matter.

55. The claimant had a second probation review on 29 July 2022. This was again with Ms Delaney. The document at pp.257-260 is a document that was accurately completed by Ms Delaney in respect of the claimant's probation review. Although this document has not been signed by the claimant, the tribunal accepted Ms Delaney's that this document was an accurate record of the matters discussed with the claimant at that meeting.

56. In the Probation review document of 29 July 2022, Ms Delaney identified several examples of the claimant not working at the standard required. She further identified that improvements and further action was required, namely:

    a. Review the Code of Conduct and identify the difference between Misconduct and GM. Consider the advice you give. Is it accurate? If unsure liaise with the team.
    b. If you are not sure if this is gross misconduct or misconduct liaise with the team and gain opinion.
    c. When receiving documents from an investigation ensure you read all documents. In the case RF1029131, you missed the Grievance completely. You must send an acknowledgment to employee to demonstrate that we have got it and will be obtaining a chairperson to hear the GR
    d. When feedback is being given, listen and take on board the feedback and apply this to future cases.

57. Ms Delaney also recorded the following as being details of support and training to be provided to the claimant:

    a. Team discussion, observe, listen and contribute appropriately.
    b. Rules of conduct to review,
    c. Check if you are unsure about the difference of Misconduct and Gross Misconduct
    d. Before giving advice, if you are unsure then check with the team.

58. Ms Delaney recorded that she had some concerns in relation to the skill level being demonstrated by the claimant, and that significant improvement in the quality of advice needed to be demonstrated. The next review meeting was arranged to take place on 16 August 2022.

59. The claimant made no reference to an impairment that required adjustments to be made during the hearing of 29 July 2022.

60. To further support the claimant, Ms Delaney suggested that the claimant sit with another Senior Advisor (Helen). The claimant refused this

suggestion and told Ms Delaney that he did not agree with Helen's advice. The claimant was becoming less receptive to feedback and support from this point forward. This is the unchallenged evidence of Ms Delaney (see para 11 of Ms Delaney witness statement).

61. A third probation review was initially arranged to take place on 16 August 2022.

62. The claimant had a third probation review with Ms Delaney. This took place on 23 August 2022, rather than 16 August 2023 as initially planned. An accurate record of that review is at pp.262-265. Ms Delaney records that she has seen some improvement in the last couple of weeks but that that needed to continue. The claimant was also informed that only 1 of his references had been received and that his second reference was needed. Ms Delaney used her discretion under clause 13.1 of the claimant's employment contract and extended his probation period by 12 weeks.

63. There was no conversation in July or August 2022 between the claimant and Ms Delaney around the claimant's background, which referenced him either being from India or Pakistan. The tribunal was faced with a direct conflict in case on this matter. The claimant says there was a conversation in or around July or August 2022 (but most likely August) where Ms Delaney referred to him as being from India, before he corrected her to explain that he was from Pakistan. Whilst, Ms Delaney is clear in her evidence that no such conversation took place. Ms Delaney's evidence is that the only conversation she had with the claimant that referenced India was when Ms Delaney spoke of her family background. And that there was no reference to the claimant's background during that conversation (see para 30 of Ms Delaney's witness statement). The tribunal preferred the evidence of Ms Delaney in making its findings. The tribunal took into account the credibility of both witnesses in preferring the evidence of Ms Delaney. Further, the claimant has not raised any complaint about this issue at the time, in circumstances where the claimant was a Senior Employment Advisor and understands the need to document such issues if they are serious. And although there is reference to the matter in the claim form, presented in December 2022, there was no mention of the incident when the claimant did raise a grievance against Ms Delaney on 25 October 2022 (see p.279), nor when he raised further issues about Ms Delaney on 27 November 2022, after dismissal and when the claimant was able to raise any issues who wanted to. This all led the tribunal to find on balance that this conversation did not take place.

64. On 20 October 2022, a manager of one of the respondent's clients raised some concerns with Ms Delaney about advice given to them by the claimant (file number RF1047796). Ms Delaney arranged a meeting with the claimant to talk this through (see p.269).

65. The claimant responded to Ms Delaney that same day at 14.02 to explain that it had now been sorted but would still discuss it with Ms Delaney if she still wanted to (see p.269). Ms Delaney retained the meeting on 21 October 2022 and informed the claimant (p.268).

66. As part of arranging this meeting/discussion, the claimant for the first time raised that he had diabetes with the respondent and that his blood pressure readings were very high (see p.268).

67. On 21 October 2022 at 08.06, the claimant emailed Ms Delaney to ask whether he could reschedule the one-to-one meeting and referred to a GP appointment around the claimant's diabetes and high blood pressure and as the GP wanted to perform an ECG on the claimant at 08.40 (see p.268).

68. Later on during 21 October 2022, the claimant attended a call with Ms Delaney, at which performance concerns were raised about the claimant's handling of ticket number RF104779. A record of the discussion along with feedback was provided to the claimant following that discussion (pp.266-267). Ms Delaney requested that the claimant send to her his previous 5 disciplinary invite letters for review.

69. On 24 October 2022, Ms Delaney had a further call with the claimant concerning the way the claimant was working and the quality of the advice he was giving. The discussion concerned the claimant having given his opinions to clients, rather than giving them advice or suggestions to enable the client to make their own decisions (see p.273). The claimant under cross-examination described this as a misunderstanding, however, did not deny that such conversations were being had with him.

70. The claimant received an invite to a probation review on 24 October 2022, this was initially to take place on 28 October 2022 (see p.271). It was made clear in that invite that the purpose of the meeting was to discuss the claimant's performance and suitability in the role of Employee Relations Senior Advisor, during his extended probation period. The claimant was made aware that the meeting could result in termination of his employment (see p.271).

71. On 25 October 2022, at 09.22, the claimant emailed Ms Delaney to explain that he would be unable to work from the office that day, and this was due to diabetes which he says he had had from 09 September 2021 and high blood pressure, which he says he had had since 2017. The claimant references a need for reasonable adjustments and explains that he needed a display monitor because his eyesight was unstable, and references that he had made this request previously in the huddle but that a display monitor was never provided.

72. The claimant in his email of 25 October 2022 also states: 'Can you please make reasonable adjustments for me around my task and duties?' These adjustments only related to adjustments for diabetes and hypertension and were not required for or related to anxiety and depression. The claimant did not raise that his health was impacting his work performance or that his disabilities were making it difficult for him to maintain his workload. He was simply raising concerns about his workload generally, and that was not the purpose of this email (the claimant accepted this under cross-examination).

73. The claimant discussed his email with Ms Delaney on 25 October 2022 at around 11.43. Ms Delaney was not aware of the claimant's grievance at this

stage. After the phone call, Ms Delaney sent the claimant an email (see p.277) to confirm the contents of the discussion and explain the following:

> "Further to our call, I will contact Giz to organise the Monitor and come back to you to collect.
>
> I have today removed some of the tickets, to support your task and duties, please let me know if this helps you.
>
> In terms of your Medical condition, as discussed it is important that you take the medication as instructed by your GP. Set a reminder in your Calendar so you don't forget and if you need a break, just let me know."

74. During the phone call on 25 October 2022 between the claimant and Ms Delaney, Ms Delaney at no point referred to the claimant as being an old man. The claimant accepted this when cross-examined on this matter. The claimant also accepted that para 14 of Ms Delaney's witness statement in respect of this conversation was an accurate and fair reflection of the phone call. That the claimant told Ms Delaney that he often forgot to take his medication. And that Ms Delaney said that he needed to take his pills, and that her husband took the same pills and that Ms Delaney understood the importance of taking the medication.

75. Ms Delaney emailed the claimant again on 25 October 2022 at 15.25 to explain that the claimant can pick up a monitor from the Salford Office (p.277).

76. The claimant sent a grievance to Ms Chaudhry on 25 October 2022 at 10.54 (see pp.279-280). This grievance was arranged to take place on 28 October 2022 (see p.274). In the grievance, the claimant alleged that he was being unfairly treated by Ms Delaney through allegations of underperformance, that he was being treated differently to other advisors in the team and that no reasonable adjustments had been made for him despite him having disclosed his medical conditions. The claimant in his grievance does not identify in what way he says his disabilities are affecting him in the workplace. The claimant does not identify what adjustments he says should be made for him, save for the provision of a display monitor, which he says he has asked for and which had not been provided.

77. From the 28 October 2022 up until dismissal, the claimant worked a reduced workload, with the number of tickets he was responsible for being reduced as from 28 October 2022 (see p.374). Although the claimant raised questions about the reliability of this data, his evidence on this was rejected by the tribunal. He produced no evidence to support that the data was incorrect or data to contradict that provided by the respondent. And given our findings of credibility, the tribunal accepted Ms Delaney's evidence that this data was accurate. The claimant did say under oath that his ticket numbers were reduced following his email, which is consistent with the data trend at p.374.

78. The claimant wrote the Ms Chaudhry on 26 October 2022, seeking a

postponement of the grievance meeting due to illness (see p.281).

79. The claimant attended a Return-to-Work meeting with Ms Dickinson on or around 04 November 2022 (see p.284). In this meeting the claimant explained that he had now fully recovered and was able to return to work with no further adjustments. The claimant also explained that Ms Delaney had already reduced his workload and that he would be collecting a monitor from the office that day.

80. Around 18 November 2022, members of the respondent were seeking to organise a Christmas party. This included a meal at a restaurant. Ms Delaney was not involved in organising the Christmas meal, and her only involvement was to forward to members of staff a Teams poll that had been created by Chris Moorhead (see pp.301-302). The tribunal accepted Ms Delaney's evidence that she had no other involvement in the organization of the meal, nor did she attend.

81. In advance of the Botanist being selected as the venue, the claimant suggested during a huddle that the meal could take place at a Curry House in Rusholme. This was during the period where ideas were being considered. Ms Dickinson accepts that that had taken place. However, the claimant did not at the same time make a request for a restaurant serving Halal food. There was no meeting held in October between the claimant, Ms Delaney, Holly and HR specialists at which there was an agreement to go to a restaurant where Halal food was available at the claimant's request. There is a direct conflict on this point, and the tribunal preferred the evidence of Ms Dickinson given the views of the tribunal on credibility, and given the claimant's response to receiving the menu of the selected venue (noted below). And further, the claimant's evidence on this was ambiguous, whilst Ms Dickinson was precise and definite.

82. As part of that forwarded by Ms Delaney was the menu for the Botanist, which had been selected as the venue for the Christmas meal. The claimant received this, raised no complaints, but rather had replied to state 'Have a nice day everyone'. The claimant raised no complaints about the choice of venue.

83. On 21 November 2022, Ms Delaney received an email from the claimant which the claimant says included examples of good work that he had produced (see p.303). Ms Delaney reviewed those examples and considered that they contained errors and incorrect advice. In short, Ms Delaney did not consider these to be examples of good work.

84. The claimant's final probation review took place on 22 November 2022, an accurate note of what was discussed at that meeting is at pp.304-309. These notes were taken Annie Patel. Ms Delaney had no involvement in producing those notes.

85. Ms Delaney, following an adjournment, and having considered the claimant's performance to date, having considered the supportive mechanisms put in place, having considered the extend of the claimant's improvement during his probation period and have considered alternatives,

decided that the claimant had failed his probation with the respondent and that his employment was to be terminated his employment. The claimant's termination was because of performance reasons.

86. The claimant was sent an outcome letter, dated 24 November 2022 (see p.314)

87. The claimant emailed Ms Delaney on 27 November 2022 (see p.315). This made various allegations against Ms Delaney, including making reference to matters that was questioning the competency of Ms Delaney. Ms Delaney did not respond to this email because of the claimant's behavior following his dismissal. She passed this email to her legal department to address.

88. The claimant requested the notes from the meeting following receiving the termination letter, on 27 November 2022 (see p.316). The notes were provided to him within 1 or 2 days of his request. This was evidence the claimant gave when cross-examined.

89. Ms Delaney was not involved in either producing the notes, storing the noes or providing them to the claimant following his request. Ms Delaney was not sent the notes from the meeting of 22 November 2022 in advance of them being sent to the claimant. She had no opportunity make any amendments to them. The extent of the claimant's evidence on this matter was that as the file was saved as a word file, then they could have been changed by Ms Delaney and that the notes did not record the use of specific phrases. This was not enough to convince the tribunal that Ms Delaney had accessed the notes somehow and made alterations to them.

90. The claimant raised a formal grievance on 08 December 2022 (see p.326-329).

91. Ms Latto investigated the claimant's grievance. As part of that process, Ms Delaney was spoken to. Ms Delaney provided Ms Latto with examples of the claimant's performance (see pp.337-369).

92. The claimant received a grievance outcome letter on 09 January 2023 (see pp.370-371). The decision was to not uphold any of the claimant's grievance.

93. The claimant's evidence was that he was treated differently from other Senior Employment Advisors in respect of case numbers. This was not challenged by the respondent and is accepted as being accurate.

94. There was no practice of Senior Employment Advisors being required to deal with 100+ cases (see p.374). The claimant was never required to cover 100+ cases.

CONCLUSIONS

Direct race discrimination, direct religion discrimination, victimisation: failing of probation and the termination of employment

95. The claimant has adduced no evidence that supports that the reason he failed his probation period and had his employment terminated was either because of his race, his religion or for having raised a grievance on 25 October 2022. The burden of proof rests on the claimant to establish facts from which the tribunal could include that he was subjected to this treatment either because of his race, religion or for having made a protected act. He has failed in this regard. In those circumstances, the claims of direct race discrimination, direct religion or belief discrimination and of victimisation, insofar as they relate to the claimant failing his probation period and having his employment terminated, fail and are dismissed.

96. Even had the claimant adduced sufficient evidence to shift the initial burden that rested on him for these allegations, the claims would still have failed as the tribunal was satisfied, given the evidence we have seen and the findings that the tribunal has made, that the respondent had evidenced that the reason for that treatment was due to the claimant's performance whilst on probation.

97. Furthermore, in the circumstances outlined above, the tribunal considers that the claimant was not subjected to a detriment, as it would be unreasonable to view extending a probation period as a detriment where it was necessitated because of performance concerns and where the respondent retained such a discretion under the agreed employment contract.

Direct race discrimination: extending of the claimant's probation period

98. Given the tribunal's findings above, the claimant has failed to establish the facts on which this allegation is brought. Specifically, the tribunal did not accept that there was any conversation between him and Ms Delaney about where he was from, from which a decision was made to extend the claimant's probation period.

99. It is clear that the claimant's probation period was extended. However, there was no evidence brought by the claimant that would support any findings of facts from which the tribunal could conclude that that treatment was because of the claimant's race. The burden of proof therefore does not pass to the respondent. And like above, in any event, the tribunal was satisfied that the respondent had established that the reason behind the claimant's probation period being extended was because of the claimant's work performance. This is evidenced throughout the probation review forms and in the documents recording conversations between the claimant and Ms Delaney.

100. The illogic to the claimant's argument that Ms Delaney wanted rid of him once she knew he was from Pakistan (which was the thrust of the claimant's case), is borne out by the fact of probation being extended by Ms Delaney. If the Respondent, or more specifically Ms Delaney, wanted to get rid of the clamant for reasons connected to his race and/or religion, in circumstances where Ms Delaney knew that the claimant was from Pakistan in advance of any decisions on probation were made (which is the

claimant's case), then why would Ms Delaney extend the probation period rather than simply terminating his employment? In short, Ms Delaney had the perfect opportunity to terminate the claimant's employment, if that was her desire, on discovering the claimant's ethnic origin (as put by the claimant) and yet decided to try to retain his services through extending the probation period.

Direct religion discrimination: Christmas party/Halal Food

101. Given our findings above and given that the tribunal has not found the facts on which this allegation is brought, this allegation must fail and is dismissed.

The respondent has failed in its duty to make reasonable adjustments

102. The claimant has failed to establish that the Provision, Criterion or Practice ('PCP') on which he brings his failure to make reasonable adjustments complaint exists within the respondent. And this is on his own evidence, with the claimant's own position being supported by the evidence brought by the respondent. The claimant gave evidence that there was no repetition in terms of treatment, and that he was treated differently. In short, he was complaining about treatment of himself only. This, in essence, repeats that which he explained to Employment Judge Ross at the hearing on 31 October 2023 and which was the reason why EJ Ross applied a deposit to this specific allegation. It was explained to him in the decision on deposit order (which starts at p.180 of the bundle), in paragraph 26 and 27 (see p.186), that a PCP must apply more broadly than just him. The claimant maintained this approach at this hearing, relying on treatment, which in his evidence applied to him only. This is not a PCP. The claimant has failed to evidence that the PCP on which he brings this claim could have been in existence at the respondent and therefore this claim must fail.

103. Even if the tribunal was wrong on that conclusion, the tribunal would have concluded that the claimant had not adduced any evidence to support that he was put to the substantial disadvantage on which he brings this claim, that those without disability would not have been put to. There is an evidential burden placed on the claimant, which he simply did not meet. And even further, the tribunal would have concluded that the respondent did not have actual or constructive knowledge of the substantial disadvantage on which he brings that complaint. At no point has he raised any concerns with case load being difficult for reasons connected to his disability. And this is particularly so during the return-to-work meeting, where the claimant accepts that no further adjustments were needed.

Victimisation

104. Given our findings above, the claimant has not established the facts on which the victimisation complaint is brought.

105. Particular, reference is made to allegation 5.2(c), for which the claimant expressly accepted that the words 'you're an old man' were not used by Ms Delaney. The claimant should not have brought this claim or

should have withdrawn it in circumstances where his own evidence was that the allegation as alleged did not happen.

Overall conclusion

106. Given the above, all allegations in this case fail and are dismissed, for the reasons explained.

Employment Judge **Mark Butler**
Date_20 September 2024____

JUDGMENT SENT TO THE PARTIES ON
24 September 2024

FOR THE TRIBUNAL OFFICE

Notes

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/

ISSUES TO BE DETERMINED BY THIS TRIBUNAL

2 Direct race discrimination (Equality Act 2010 section 13)

2.1 The claimant describes himself as a Pakistani national.

2.2 What are the facts in relation to the following allegations:

(a) Bring dismissed due to failing his probation/poor performance.

(b) Suzanne Delaney interviewed the claimant and offered him the job believing him to originate from India. Suzanne Delaney's mother is from India. In August when the claimant told Suzanne Delaney that he was from Pakistan she extended his probation period as his reference had arrived late, having said to him "you're from India" to which the claimant replied, "I'm not, I'm from Pakistan".

2.3 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race? The claimant says he was treated less favourably than a white British male, Dean (surname unknown) and an Employment Relations member of staff Olay, and the female colleague Kate who had previously worked at Sainsbury's. The claimant describes all these comparators as white. It is unclear whether any of them were employed in the same capacity as the claimant. The Tribunal may have to construct a hypothetical comparator.

2.4 If so, has the respondent shown that there was no less favourable treatment because of race?

3 Direct discrimination due to religion/belief (Equality Act 2010 section 13)

3.1 The claimant is Muslim.

3.2 What are the facts in relation to the following allegations:

(a) The claimant is Muslim and only eats Halal food. The respondent was preparing for the Christmas party which was to take place in December 2022. There was an agreement in a meeting held in October 2022 with Suzanne Delaney, Holly (surname not known) and other HR specialists (unnamed) when it was agreed they would all go to a restaurant where Halal food was available at the claimant's request. On the 14/15 November 2022 the claimant asked Suzanne Delaney and Holly the name of the restaurant and party and his question was ignored. The reason for this is that Suzanne Delaney had already predetermined the claimant would be dismissed and not going to the restaurant/Christmas party and his probation was failed because he was Muslim and had asked for Halal food. The claimant clarified that this act of direct discrimination was that Suzanne Delaney and Holly did not want to include Halal food and did not respond to the claimant's question. The claimant relies on a hypothetical comparator.

(b) Being dismissed due to failing his probation/poor performance. The Tribunal may have to construct a hypothetical comparator.

3.3 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of religion?

3.4 If so, has the respondent shown that there was no less favourable treatment because of religion?

4 Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

4.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: PCP1: The claimant was required to deal with 100+ cases.

4.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant's disability of anxiety and depression made it hard for him to concentrate and recall details and affected his memory, meaning it was difficult to deal with his caseload. The claimant's hypertension meant sitting for long periods of time increased his blood pressure.

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

4.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

(a) Reduce the claimant's workload/caseload.
(b) Assist the claimant with drafting.

4.6 By what date should the respondent reasonably have taken those steps?

5 Victimisation (Equality Act 2010 section 27)

5.1 Did the claimant do a protected act as follows:

(a) The claimant's grievance dated 25 October 2022.

5.2 Did the respondent do the following things:

(a) Suzanne Delaney failed to provide the claimant with minutes of the meeting of 22 November 2022.

(b) Suzanne Delaney altered the minutes of the meeting of 22 November 2022.

(c) Suzanne Delaney (between 26 October and 3 November 2022 on a telephone with the claimant) discussed the claimant's medication with him and when he said, "I'm taking these pills" she commented referring back to her husband (age 70), "Like my husband" stating "you're an old man". The claimant does not rely on this comment as an act of age discrimination but an act of detriment for victimisation.

(d) Suzanne Delaney failed the claimant on his probation.

5.3 By doing so, did it subject the claimant to detriment?

5.4 If so, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

5.5 If so, has the respondent shown that there was no contravention of section 27?