EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Lanes Group plc

Heard at: Watford Employment Tribunal
(in public; in person)

On: **29 October to 1 November 2024**

Before: Employment Judge Quill (only)

Appearances
For the Claimant: In Person
For the Respondent: Mr J Boyd, counsel

Intermediary: Communicourt Ltd

REASONS

Introduction

1. On 1 November 2024, the Tribunal gave its liability decision with reasons. The same day, it also gave its remedy decision with reasons.

2. The written judgment was sent to the parties on 14 November 2024.

3. The Respondent subsequently requested written reasons, and the written reasons are contained in this document.

The hearing and the evidence

4. The hearing took place in person, save that the Respondent's witness attended by video. The Claimant and the Tribunal were assisted by an intermediary.

5. The bundle was approximately 213 pages. Some additional items were added during the hearing.

6. There was also cast list, chronology, and list of key documents. I was provided with the Respondent's counsel's cross-examination plan, and the intermediary's comments on it.

7. There was one witness for each side. The Claimant gave evidence, and so did, for the Respondent, Mr Rajesh Gill. Each of them had prepared a written statement (and, in the Claimant's case, a disability impact statement), which they swore to, and answered questions on oath from the other side and from the Tribunal

8. A case management preliminary hearing took place on Monday 28 October, and, as a result, the final hearing was reduced from 5 days to 4 days (29 October to 1 November 2024) but this was sufficient time for all matters to be resolved. With no objection from either party, the decision was made, on Tuesday 29 October 2024 (and for the reasons given orally) that the final hearing would proceed before a panel composed of a judge only.

The List of Issues

9. In the hearing bundle, [Bundle 77 to 81] was the list of issues drawn up at the 7 December 2023

10. This list was discussed with the parties, and was still up to date and accurate, and it formed the basis for the decisions I made.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 18 April 2022 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Disability [if not admitted by the Respondent]

2.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about?

The Tribunal will decide:

2.1.1 Did he have a physical or mental impairment: depression, Post Traumatic Stress Disorder, low testosterone and long Covid?

2.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

2.1.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

3. Direct race/disability discrimination (Equality Act 2010 section 13)

3.1 Did the Respondent do the following things:

3.1.1 failing to provide the Claimant with a laptop in May 2021 (race discrimination only);

3.1.2 failing to respond to the Claimant's emails promptly (race discrimination only);

3.1.3 consistently marking the Claimant's performance down;

3.1.4 dismissing the Claimant on 4 July 2022; and

3.1.5 on 5 July 2022, refusing to consider the Claimant's appeal.

3.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than: Alison Bush, Billy Joe, Samantha Parker, Samantha Robinson, Max Skelton, Idris Suleiman.

3.3 If so, was it because of race or disability?

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

4.1 Did the Respondent treat the Claimant unfavourably by:

4.1.1 as listed in 3.1.3 – 3.1.5 above

4.2 Did the following things arise in consequence of the Claimant's disability:

4.2.1 fatigue and lethargy, poor concentration and memory, always feeling sleepy and tired?

4.3 Was the unfavourable treatment because of any of those things?

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

4.4.1 [as and if pleaded in the Respondent's amended response]

4.5 The Tribunal will decide in particular:

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 could something less discriminatory have been done instead;

4.5.3 how should the needs of the Claimant and the Respondent be balanced?

5. Remedy

5.1 What financial losses has the discrimination caused the Claimant?

5.2 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the Claimant be compensated?

5.4 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

5.5 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

5.8 If so is it just and equitable to increase or decrease any award payable to the Claimant?

5.9 By what proportion, up to 25%?

5.10 Should interest be awarded? How much?

The Law – Liability Decision

11. The law which I needed to take into account includes the following matters.

Disability

12. Section 6 of the Equality Act 2010 ("EQA") defines disability.

> **6 Disability**
> (1) A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
> (2) A reference to a disabled person is a reference to a person who has a disability.
> (3) In relation to the protected characteristic of disability—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
> (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
> (a) a reference (however expressed) to a person who has a disability includes a reference
> to a person who has had the disability, and
> (b) a reference (however expressed) to a person who does not have a disability includes a
> reference to a person who has not had the disability.
> ...
> (6) Schedule 1 (disability: supplementary provision) has effect.

13. The section refers to the need to take into account Schedule 1. The paragraphs in that schedule include the following extracts in Part 1.

> **2 Long-term effects**
> (1) The effect of an impairment is long-term if—
> (a) it has lasted for at least 12 months,
> (b) it is likely to last for at least 12 months, or
> (c) it is likely to last for the rest of the life of the person affected.
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
>
> **5 Effect of medical treatment**
> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
> (a) measures are being taken to treat or correct it, and
> (b) but for that, it would be likely to have that effect.
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
> (3) Sub-paragraph (1) does not apply—
> (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

14. The "Guidance on matters to be taken into account in determining questions relating to the definition of disability" is issued by the Secretary of State under section 6(5) of the Equality Act 2010. The guidance does not impose any legal obligations and is not an authoritative statement of the law. In other words, where appellate court decisions differ from the guidance, then it is the court decision which takes precedence in the interpretation of the legislation. The guidance must be taken into account (Part 2 of Schedule 1, paragraph 12), but, ultimately, it is the legislation itself which must be interpreted and applied by the Tribunal.

15. The Guidance includes the following extracts.

Meaning of 'impairment'

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. ….

A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.

Section B: Substantial

Effects of treatment

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

Section C: Long-term

Recurring or fluctuating effects

C5. **The Act states** that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (**Sch1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).**)

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the

definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

Assessing whether a past disability was long-term

C12. The Act provides that a person who has had a disability within the definition is protected from some forms of discrimination even if he or she has since recovered or the effects have become less than substantial. In deciding whether a past condition was a disability, its effects count as long-term if they lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence (S6(4) and Sch1, Para 2).

Section D: Normal day-to-day activities

Meaning of 'normal day-to-day activities'

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education- related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

D5. A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as breast-feeding or applying make-up, and cannot therefore be said to be normal for most people. They would nevertheless be considered to be normal day-to-day activities.

Specialised activities

D10. However, many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving; using everyday objects such as a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner.

Indirect effects

D22. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities. For example:

• pain or fatigue: where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so. Or the impairment might make the activity more than usually fatiguing so that the person might not be

able to repeat the task over a sustained period of time. (See also paragraphs B7 to B10 (effects of behaviour));

16. Furthermore, by virtue of section 15 of the Equality Act 2006, the Tribunal should take the Equality and Human Rights Commission's Equality Act 2010 Code of Practice into account. The EHRC has published both an Employment Statutory Code of Practice and a supplement to it.

The questions to be answered

17. In Goodwin v Patent Office [1999] I.C.R. 302, the EAT provided guidance on the for the Tribunal to adopt when making a decision about "disability" in accordance with the definition in the Disability Discrimination Act 1995. The following four questions should be answered, and treated as separate questions, albeit some of the evidence and analysis will overlap between the questions and albeit answering these questions separately must not get in the way of examining the evidence as a whole and adopting a purposive approach to interpreting and applying the actual statutory wording.

17.1 Did the Claimant have a mental or physical impairment? (the 'impairment condition');

17.2 Did the impairment affect the Claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');

17.3 Was the adverse condition substantial? (the 'substantial condition');

17.4 Was the adverse condition long term? (the 'long-term condition').

18. In Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694, the Court of Appeal approved the following list as setting out the questions that a tribunal is required to address when determining whether or not a Claimant is disabled for the purposes of the Equality Act 2010.

18.1 Was there an impairment?

18.2 What were its adverse effects?

18.3 Were they more than minor or trivial?

18.4 Was there a real possibility that they would continue for more than 12 months or that they would recur?

19. Effectively this is the same as the list produced in Goodwin (and the fourth question is to be re-worded when the Claimant is seeking to argue that the effects had already lasted 12 months by the relevant date).

20. The Respondent's knowledge is not directly relevant to any of these questions or the issue of whether a person meets the definition in section 6 EQA. However, of course, evidence from the Respondent (whether witnesses or documents) can be taken into account whether there is any corroboration for (or undermining of) the Claimant's account to have been suffering from particular adverse effects at particular times.

21. The point in time for which the question of disability is to be determined is the date of the alleged discriminatory act or omission. That therefore is the date to be used when deciding all of the four questions, including, importantly, the fourth (the long term condition).

22. If the definition is satisfied as of the date of the earliest alleged act, then it may not be necessary to separately consider later dates as well. However, where necessary that can be done. In any event, if the definition is not satisfied as of the earliest alleged discriminatory act or omission, then the four questions can be answered as of the dates of each later complaint.

Impairment Condition

23. For the first of the four Goodwin questions, there is no further statutory definition of either "physical impairment" or "mental impairment". The expressions should be given their ordinary and natural meaning. If there is found to be no impairment, then the definition in section 6 EQA is not met. An adverse effect on day to day activities is not sufficient, if not caused by an impairment. However, the existence of an impairment can, in an appropriate case, be inferred from the evidence. As noted in paragraph 40 of in J v DLA Piper UK LLP [2010] UKEAT 0263/09/1506 (in a passage which is reflected in the Guidance):

> *"In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues."*

24. In Walker v Sita Information Networking Computing Ltd [2013] UKEAT 0097/12/0802, the EAT said:

> "That is not to say that the absence of an apparent cause for an impairment is without significance. The significance is, however, not legal but evidential."

In other words, where there is no recognised cause of the alleged effects/symptoms, it is open to a Tribunal to conclude that the Claimant does not genuinely suffer from them. The EAT pointed out that *"that is a judgment made on the whole of the evidence*".

Adverse Effect Condition

25. For the second of the four Goodwin questions, the focus is on what the Claimant cannot do, or can only do with difficulty, rather than on the things that they can do. The fact that a Claimant can carry out a particular normal day-to-day activity does not mean that their ability to carry it out has not been impaired. When deciding the legal question, it is wrong to conduct an exercise balancing what the Claimant cannot do against the things that they can do (because the focus must only be on what they cannot do, or can only do with difficulty). That does not mean that there can be no evidence/analysis about what the Claimant can do. For one thing, it can be part of identifying the boundary between what they can and cannot do. So knowing that a person can walk 500m unaided would be a relevant part of the analysis if the evidence was that they could not walk 1000m unaided. Furthermore, where the Claimant's evidence is disputed, then evidence that they can actually perform certain activities might be relevant evidence when deciding whether to accept their assertions that there are other particular activities that they cannot do.

26. As per Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522, the requirement is to examine the effect on the individual, and this involves considering how the Claimant in fact carries out the activity compared with how they would do if not suffering the impairment.

27. The expression "day to day activities" encompasses activities which are relevant to participation in professional life as well as participation in personal life. It is not further defined in the legislation, and should be given its ordinary meaning, taking into account the Guidance and the Code. D3 of the Guidance give some examples, but, of course, it would be impossible to create a complete list of an expression which is capable of covering such a large range of the things that humans do.

28. As per D5 of the Guidance, the fact that only a minority of people perform a particular activity does not necessarily mean that it is not within the definition "normal day-to-day activities" and nor does the fact that people do not perform the activity on more days than they do not perform it. However, there are some things that are so specialised, or so rarely done by any human, that they would not be considered "normal day-to-day activities".

Substantial Condition

29. For the third of the four questions identified in Goodwin, *section 212(1) EQA defines "substantial" as meaning "more than minor or trivial."*

30. It was pointed out in Aderemi v London South East Railway Limited [2013] ICR 591 that the analysis must not proceed on the basis that there is *"a spectrum running smoothly from those matters which are clearly of substantial effect to those*

matters which are clearly trivial" but rather on the basis that "unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial".

31. When deciding which (if any) day-to-day activities are affected and whether the effect was substantial, then various matters might need to be taken into account, depending on the particular circumstances of the case. These include:

31.1 Does the impairment cause the Claimant to avoid doing a particular thing because (for example), it causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation.

31.2 The time taken to carry out an activity.

31.3 The way in which the Claimant carries out the activity;

31.4 The cumulative effects of the impairment;

31.5 the cumulative effects of more than one of impairment;

31.6 the effect of behaviour;

31.7 the effect of environment

31.8 the effect of treatment (which is any treatment, not just medication).

Long term condition

32. The fourth Goodwin question is the long term condition. As mentioned above, the question is to be answered as of the date of the alleged contravention of EQA. [Subject to the qualification that, as per section 6(4) EQA, someone who previously met all elements of the definition, is no longer does so, is also covered, if the alleged contravention is due to the past disability. To be covered as having a past disability, the Claimant would have to demonstrate that there was a time in the past, that is before the alleged contravention in question, that they met the long term condition (as well as the all the other requirements)].

33. There are three different routes by which a Claimant can satisfy the long term condition (paragraph 2 of schedule 1 EQA). Where the Claimant cannot demonstrate that the substantial adverse effects of the impairment had already lasted 12 months (by the relevant date), then they must demonstrate that the substantial adverse effects of the impairment were (as of that date) "likely" to last either long enough to reach the 12 month mark, or else for the rest of the Claimant's life.

34. The question of whether the effects are likely to last for more than 12 months is an objective test based on all the evidence, and it is not relevant whether the employer

or employee knew (or could have known) that the effects were likely to last long enough.

35. In this context, the word “likely” means "it could well happen" and does not impose a requirement that it was more probable than to occur than not occur: SCA Packaging Limited v Boyle [2009] UKHL 37; [2009] ICR 1056.

36. Conditions with effects which recur only sporadically or for short periods can still qualify as long term impairments if the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. It is for the Claimant to establish this, but it is sufficient that they show that "it could well happen" that the substantial adverse effects recur (beyond 12 months).

37. The likelihood of recurrence is to be assessed as at the time of the alleged contravention. It does not follow from the fact that there was actually a subsequent recurrence of an impairment that, as of the date of the alleged discrimination, it must have been “likely” that there would be a recurrence. The issue of whether a recurrence was “likely” cannot be judged retrospectively, based on what actually did happen after the relevant date; however, evidence created later (especially medical reports) can still be taken into account to help answer the question about whether, as of the relevant date, recurrence was likely.

38. As noted in Sullivan, the fact that the substantial adverse effect has recurred episodically might strongly suggest that a further episode was something that (as of the relevant date) “could well happen” again in the future. However, that is not an inevitable finding. Each case must be decided on its own facts and evidence.

Treatment

39. When considering each of the four Goodwin questions, as per paragraph 5 of schedule 1, it is important to effectively ignore any beneficial effects of treatment and to ascertain the effects on day-to-day activities as it would otherwise be but for that medical treatment.

40. This provision applies even if the ongoing treatment results in the effects being completely under control or not at all apparent. However, if the treatment results in a permanent improvement or “cure” it will be necessary to consider whether the effects of the impairment, prior to the treatment, were sufficiently “long term”.

Evidence Issues

41. Medical evidence is likely to assist the Tribunal but, ultimately, it is the Tribunal’s legal determination, based on the totality of the evidence, which is what counts. A Claimant who fails to produce medical evidence to support their case runs the risk that the Tribunal will decide that they have failed to meet their burden of showing

that the Section 6 definition is met. However, there is no rule of law that medical evidence is essential in order for the Tribunal to be satisfied that the definition is met.

42. In accordance with normal principles, if the Tribunal decides that either party (the Claimant or the Respondent) had documents in their possession that they have failed to disclose, then they run the risk of the Tribunal deciding that they did so deliberately, and that they did so because the documents undermined their case. However, in accordance with normal principles, not every failure to disclose will lead to that result, and the Tribunal might decide to accept the party's explanation for the failure, and/or accept that the missing documents did not assist the opposing party.

Equality Act - Burden of Proof

43. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

44. It is a two stage approach.

    44.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could reasonably conclude - in the absence of an adequate explanation - that a contravention has occurred.

    At this first stage it is not sufficient for the Claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

    44.2 If the Claimant succeeds at the first stage then that means the burden of proof is shifted to the Respondent and the claim is to be upheld unless the Respondent proves the contravention did not occur.

45. In Efobi v Royal Mail [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when

assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] EWCA Civ 142 and Madarassy v Nomura International [2007] EWCA Civ 33.

46. The burden of proof does not shift simply because, for example, the Claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct and/or that there was a protected act. Those things only indicate the possibility of discrimination or harassment or victimisation. They are not sufficient in themselves to shift the burden of proof; something more is needed.

47. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a Respondent or an evasive or untruthful answer from an important witness.

48. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA complaints

49. In EQA, time limits are covered in s123, which states (in part):

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

50. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

51. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run (for a complaint based on that decision), regardless of arguments about whether the policy itself is discriminatory.

52. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

53. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

54. The factors that may helpfully be considered include, but are not limited to:

    54.1 the length of, and the reasons for, the delay on the part of the Claimant;

    54.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

54.3 the conduct of the Respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

55. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) "*whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)*": Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

Definition of Direct Discrimination – section 13 EQA

56. Direct discrimination is defined in s.13 EQA.

> (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.

57. There are two questions: whether the Respondent has treated the Claimant less favourably than it treated others ("the less favourable treatment question") and whether the Respondent has done so because of the protected characteristic ("the reason why question").

58. For the less favourable treatment question, the comparison between the treatment of the Claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined.

59. When considering the "reason why question" for the treatment the Tribunal has found to have occurred, it must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the Respondent's various acts, omissions and decisions.

60. For comparators for direct disability discrimination allegations the EHRC Code gives useful guidance at paragraphs 3.29 and 3.30 in particular with the example quoted therein.

Discrimination arising from disability

61. Discrimination arising from disability is defined in s.15 of the Act.

> **15 Discrimination arising from disability**
>
> (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.

62. The elements that must be made out in order for the Claimant to succeed are that: there must be unfavourable treatment; there must be something that arises in consequence of the Claimant's disability; the unfavourable treatment must be because of, in other words caused by, the something that arises in consequence of the disability. Furthermore, the alleged discriminator must also be unable to show either that the unfavourable treatment was a proportionate means of achieving a legitimate aim or, alternatively, that it did not know and could not reasonably have been expected to know that the Claimant had the disability.

63. The word "unfavourably" in s.15 is not separately defined in the legislation but should be interpreted consistently with case law and the EHRC Code of Practice. Dismissal, for example, can amount to unfavourable treatment but so can treatment which is much less disadvantageous to an employee than dismissal.

64. Pnaiser v NHS England [2015] UKEAT 0137/15 makes clear that tribunal must identify that, if there was unfavourable treatment, the Tribunal must decide by whom. The Tribunal must then decide what caused that person or persons to subject the Claimant to the treatment in question. That includes making decisions about the conscious or unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the treatment and the "something arising in consequence of disability" need not be the main or sole reason for the unfavourable treatment but must have at least a significant (or more than trivial) influence so as to amount to an effective reason for or cause of it. Having made decisions about what caused the alleged discriminator to act as they did, the tribunal will then have to determine whether the reason or cause is "something arising in consequence of" the Claimant's disability.

65. In Risby v London Borough of Waltham Forest EAT 0318/15, the EAT made clear that an indirect connection between the Claimant's unfavourable treatment and the "something" that arises in consequence of the disability can be sufficient. The EAT decided that the employment tribunal had been wrong to reject the section 15 claim on the basis that an incident in which the employee lost his temper was unrelated to his disability. On the facts, an effective cause of the loss of temper had been the employer's decision to hold an event at a venue that was inaccessible to him because of his disability, that loss of temper led to his dismissal, and there was therefore a sufficient connection between the unfavourable treatment (his dismissal) and his disability for the purposes of section 15

66. When considering what the Respondent knew or could have reasonably been expected to know, the relevant time is the time at which the alleged unfavourable

treatment occurred. Thus, where there are different allegations, then the Respondent's knowledge has to be assessed at the time of each alleged act or omission. For that reason, for example, what the Respondent knew (or could have been expected to know) at the time of a dismissal might be different than what it knew (or could have been expected to know) at the time of an appeal hearing.

Proportionality

67. The complaint will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself, and must represent a real objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another is not likely to be sufficient.

68. In relation to proportionality, the Respondent is not obliged to go as far as proving that the discriminatory course of action was the only possible way of achieving the legitimate aim. However, if there are less discriminatory measures which could have been taken to achieve the same objective then that might imply that the treatment was not proportionate.

69. It is necessary for there to be a balancing exercise which takes into account the importance of the Respondent achieving its legitimate aim in comparison weighed against to the discriminatory effect of the treatment. Regardless of whether the Respondent carried out that balancing exercise at the time (and it is not necessary for the Respondent to prove that it did), the tribunal carries out its own balancing exercise - based on the evidence presented at the hearing – in order to decide if the section 15(1)(b) defence succeeds.

70. If a Respondent has failed to make reasonable adjustments which could have prevented or minimised the unfavourable treatment, then it is going to be very difficult for the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

71. The Tribunal must consider whether less severe measures might have been available and, if so, whether the Respondent has shown that the defence still succeeds despite the availability of such less severe measures.

72. Because it is a balancing exercise, and because a dismissal potentially has very severe consequences for a disabled employee, the factors necessary to persuade a tribunal that the defence succeeds in relation to a dismissal decision are likely to have to be more weighty than those which might be sufficient to justify some treatment that was short of dismissal (such as a warning, for example). See, for example, Gray v University of Portsmouth EA-2019-000891.

73. However, each case will turn on its own facts, and the Tribunal must take into account everything which is relevant, based on the evidence presented by the parties. The approach to the balancing exercise discussed by the Court of Appeal in Hardys & Hansons Plc v Lax [2005] EWCA Civ 84, a case based on section 19 EQA, is appropriate when considering section 15 EQA as well.

Knowledge

74. When considering, as part of the Section 15(2) analysis, what the Respondent knew and/or what it could not reasonably have been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. The EHRC employment code includes paragraphs 5.1.4 and 5.1.5 followed by an example.

> 5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
>
> 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> Example: A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened. The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

75. In A Ltd v Z [2020] ICR 199, UKEAT/0273/18, the EAT said at paragraph 23 in determining whether the employer had the requisite knowledge for section 15(2) purposes, approved the following principles (which had been agreed between the parties in that case).

> (1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.
>
> (2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a)

> suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.
>
> (3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.
>
> (4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.
>
> (5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:
>
> *[citations of 5.14 and 5.15 omitted as they are set out above]*
>
> (6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).
>
> (7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.

76. At paragraph 39 the EAT said:

> As to what a Respondent could reasonably have been expected to know, that is a question for the ET to determine. The burden of proof is on the Respondent but the expectation is to be assessed in terms of what was reasonable; that, in turn, will depend on all the circumstances of the case.

77. At the beginning of paragraph 42, referring to the particular case before it the EAT said the ET had already found as a fact that the actual knowledge of the Respondent fell short of knowing anything more than that the Claimant had faced a number of difficult personal circumstances and had sometimes experienced stress as a confidence. Of itself that did nothing more than suggest that she had suffered symptoms that could be seen as unremarkable and unsurprising reactions to life events.

78. That same paragraph concludes:

> That being so, the complete answer to the section 15(2) question in this case could only have been that, even if the Respondent could reasonably have been expected to do

more, it could not reasonably have been expected to have known of the Claimant's disability.

79. In paragraph 43, the EAT in overturning the Tribunal's decision said that the Tribunal had failed to apply the correct test. It had only asked itself what more might have been required of the Respondent in terms of process. Instead, it should have been asking what the Respondent might then have reasonably been expected to know (had it taken further steps).

80. In Gallop v Newport City Council [2013] EWCA Civ 1583, the court of appeal considered the issue of employer's knowledge as relevant to the old section 4 in the Disability Discrimination Act 1995. The wording is similar to the current wording in section 15(2) of the 2010 Act. The mere fact that an employer might have been advised by (for example) its occupational health advisor that the employee was not disabled does not in itself discharge the employer's burden of showing that it could not reasonably have been expected to know about the disability.

81. The Tribunal has to decide whether the employer had actual or constructive knowledge of the facts constituting the disability and it is an error of law for the Tribunal to allow the employer to deny relevant knowledge by an unquestioning adoption of (say) occupational health advice.

82. Section136 EQA applies to alleged contraventions of section 15 EQA.

Dismissal

83. Section 39 EQA makes it a contravention of EQA if (amongst other things) an employer discriminates against an employee. Dismissal is expressly covered under section 39:

Findings of Fact and Conclusions re Disability Issue

84. At [Bundle 78], section 2 of list of issues has the questions to be addressed for the decision about the Claimant's alleged disabilities.

85. There are four alleged disabilities:

85.1 The Claimant has three disabilities which are admitted by the Respondent, for all relevant time periods. These are: post-traumatic stress disorder, and depression and low testosterone.

85.2 The fourth is long covid. The Respondent disputes that it meets the definition of disability.

86. Around 20 October 2021, after the Claimant had been offered a job, he filled out a pre-employment medical questionnaire. He mentioned depression on the form. He also stated that he had asthma (which is not one of the four alleged impairments relied on for this claim). He did not mention post-traumatic stress disorder or low testosterone or long Covid.

86.1 The reason the Claimant did not mention post-traumatic stress disorder is that he regarded it as private and confidential. In particular, he regarded the events that had caused that condition to be private and confidential.

86.2 The reason he did not mention low testosterone is that at the time he had had no diagnosis. He believes he had experienced some symptoms. This is borne out by the fact that he was undergoing tests at the time, which eventually led to the diagnosis.

86.3 The reason he did not mention long covid is that he does not claim that he had begun to experience that alleged impairment at the time.

87. The contents of the pre-employment medical questionnaire were kept confidential by the Respondent's Human Resources ("HR") department. They were not shared with line management.

88. There came a time when the Claimant had meetings with the Respondent's Wellbeing Practitioner, Kelly Hansford, and when he spoke fully about his post-traumatic stress disorder to Ms Hansford. While the Claimant's line manager at the time (Mr Matadi) was aware that the Claimant was having these meetings, he did not know the reasons for it. None of the content of the discussions was shared with the Claimant's line management by Ms Hansford or by the Claimant.

89. The Claimant's medical notes from his GP are at [Bundle 105-108]. They were printed on 30 August 2018 and therefore do not contain information from later than the date. [Bundle 107] gives details of the Claimant's medication and also dates of consultations, but does not give details of which specific symptoms he had (on specific dates).

90. There are some details on [Bundle 106] about different consultations.

90.1 On 5 October 2017, it was reported that the Claimant had had poor sleep for years

90.2 On 19 October 2017, it was reported that the Claimant's sleep was much better

90.3 On 15 February 2018, it was reported that while the Claimant had not been seen in surgery since the previous October, his poor sleep had returned.

90.4 In both October and February, it was noted that the poor sleep was connected to nightmares.

91. A doctor's letter dated 18 January 2022 makes an express connection between the depression and PTSD. It is suggested that they both potentially had the same underlying cause. In any event, it is my finding based on the evidence that the poor sleep (as mentioned in the notes, and in the Claimant's evidence) was caused by both the depression and the PTSD.

92. In the documents in the bundle, the earliest reference to low testosterone is the notes of a meeting which took place around 27 January 2022. The notes were produced by the Claimant's manager.

    92.1 On that date, the Claimant told his manager that he had been referred to 3 hospitals by his GP and was awaiting an appointment. He told his manager that low levels of testosterone were causing tiredness and for him to feel sleepy and with loss of energy. It was stated that he had these symptoms, both at work and at home.

    92.2 One particular thing that was discussed was that the Claimant had been observed sleeping on his desk. The manager's opinion was that this had happened twice the previous day 26 January 2022. The Claimant agreed at the time agreed in evidence before the tribunal that this was accurate, he had been asleep at his desk.

93. The Claimant was examined at hospital on 17 March 2022. The hospital produced the letter shown at [Bundle 127]. It was a diagnosis of low testosterone without specific information about the symptoms, and in particular without any mention of the specific things alleged (at paragraph 4.2.1 of list of issues) to arise in consequence of disability: fatigue and lethargy, poor concentration and memory, or that the Claimant was always feeling sleepy and tired.

94. The same is true of the June 2022, letter that appears at [Bundle 129].

95. The letter on [Bundle 132] was written in November 2022, which was several months after the end of the Claimant's employment. It does describe in more detail some of the effects of low testosterone on the Claimant but it does not refer to: "fatigue and lethargy, poor concentration and memory, always feeling sleepy and tired".

96. The February 2023 document [Bundle 136] confirms that the Claimant's treatment is ongoing, but again without commenting specifically on any of the effects of low testosterone on the Claimant

97. There is a letter dated 19 September 2023 - addressed "to whom it may concern" – which is from the consultant at the hospital. It contains no express acknowledgement that the author has been made aware that it might be used in legal proceedings, let alone any of the formal details that might be required from an expert who had been tasked with providing a report to a court or tribunal. From

the fact that the letter specifically refers to the period October 2021 to September 2022, I infer that the Claimant asked the consultant to write this letter because of the ongoing tribunal claim. The date of the letter is after the first preliminary hearing and before the second preliminary hearing.

97.1 I am satisfied that the letter represents the consultant's genuine opinion.

97.2 It states that the Claimant did have low testosterone levels during the period of his employment, and states that therefore he may have had symptoms related to the condition at that time.

97.3 It states that the Claimant described symptoms of fatigue, weakness and reduced libido in March 2022, which was the first meeting with the consultant.

97.4 The letter makes no *express* comment one way or the other as to whether the consultant believes that all of those things are likely to be symptoms of low testosterone. However, I infer that the consultant believed that that was at the very least a possibility. I do not believe that the author would have worded the letter – especially the final paragraph – if they did not have such a belief. I am confident that the author would have been aware of how misleading the letter would have been if they did not think it plausible that the symptoms which the Claimant had described were because of low testosterone, and I am confident they would not have written a deliberately misleading letter.

97.5 The Claimant did, in fact, have the symptoms which he described to the consultant, and he did, in fact, report those symptoms in March 2022.

98. Asthma was not pleaded as a disability and I therefore make no formal findings as to whether I would have decided that it was a disability in its own right.

99. However, in making my decisions about whether Covid 19 was disability, I take into account that the medical evidence in the bundle demonstrates that the Claimant had adult onset asthma, which commenced in his 30s, so some time in the 2010s. The Claimant therefore had had asthma since before the start of his employment with the Respondent.

100. I accept that, as stated in paragraph 38 of the Claimant's witness statement, he needed to attend hospital around 28 March 2023 (long after the end of employment) because of asthma. The specific assertion that this was because of Covid is not supported by medical evidence and my finding is that it is not the case.

100.1 Between around 1 January 2022 and around 11 January 2022, the Claimant had Covid. He had started testing negative and had returned to work within the month of January.

100.2 The next time he tested positive was in June 2022.

100.3 Even based the Claimant's own account, he was not testing positive between mid-January 2022 and late June 2022.

100.4 Given that the Claimant already had asthma prior to January 2022, and indeed prior to starting work with the Respondent, the Claimant's own opinion that this March 2023 asthma attack was because of long Covid is not sufficient for me to conclude that that is in fact the case.

101. The Claimant had Covid twice during his employment with the Respondent. I accept that it is the Claimant's sincere belief that he caught it at work each time.

101.1 However, firstly, there would not be sufficient evidence to persuade me that that is true.

101.2 Secondly, and more importantly, it does not make any difference to the legal issues which I have to decide. Having two (or more) separate instances of Covid is not the same thing as having long Covid. Ie is not the same as becoming infected by the Covid virus, and suffering long term effects from that particular infection. Whether the Claimant caught Covid at work or not (either or both times) is irrelevant to the issue of whether it amounted to a disability.

102. Based on the evidence presented to me, my decision is that these were two separate incidents in which the Claimant became infected with the Covid virus on two different occasions. In other words, the second example of the Claimant having Covid was not a return of the first illness but rather was a new illness.

103. Each time the Claimant had Covid there was a significant effect on his day-to-day activities and a significant exacerbation of his asthma. However, each bout of the illness was comparatively short lasting. In neither case was the significant effect on his day-to-day activities ever likely to last for a period of at least 12 months; nor was it ever likely that the effects of (either) Covid infection would intermittently come and go over a period which would exceed 12 months.

104. As with anybody else, after the symptoms of one bout of infection had ended, the Claimant did remain at risk of potentially catching the virus again in the future, but I am satisfied that there was no underlying condition or ongoing effects.

105. In other words, on the evidence presented to me there is no basis for me to decide that the Claimant had the impairment which he describes as "long Covid". My decision is that the Claimant did not have "long Covid" such that it met the definition of disability within section 6 EQA.

106. For completeness, answering the questions in list of issues:

2.1.1 Did he have a physical or mental impairment: depression, Post Traumatic Stress Disorder, low testosterone and long Covid?

107. The answer is yes for the first three (as conceded by the Respondent). For the fourth, as just mentioned, the answer is "no". The Claimant did have Covid on two particular occasions: in January; and end of June / start of July 2022. However, he did not have Covid in between those two separate occasions

2.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

108. Again, for the first three conditions, they are conceded by Respondent to be disabilities

109. I accept - as per the Claimant's impact statement [Bundle 43] and the other evidence presented - that the Claimant did experience fatigue and sleepiness. I accept that low testosterone contributed to those matters. The depression and PTSD also each contributed to those matters.

110. I also accept that the Claimant experienced loss of concentration frequently. That included while at work, but was outside of work as well. The main single issue that the Claimant referred to frequently during the hearing, as being something which he would think about often, was the very sad loss of his mother on 7 January 2022. Her death itself impacted him, and so did the way in which he found out about it, and so did the fact that he was unable to travel to the funeral.

111. Although a reaction to a life event of this type would not in itself be sufficient to demonstrate that a particular person potentially had a disability, I am satisfied - on the evidence - that the Claimant's disability of PTSD and his disability of depression meant that he was potentially liable to be very severely affected. Further, it is true that he was very severely affected by the loss of his mother .

2.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

112. In relation to the allegation about "long Covid", my finding of fact is that the Claimant ceased to have the virus in January and he did not have it again until June. It is not the case that the virus was impacting him between January and June and it is not the case that the effects of the virus were masked by medication during that period. He did not have the virus, or adverse effects, in that period.

113. In relation to asthma, the Claimant was prescribed medication for that asthma and the evidence shows that would have caused a severe effect on his day-to-day activities, but for that asthma medication. However, asthma is not one of the alleged disabilities, and it is not the case that his asthma medication was masking the effects of long Covid.

114. To the extent that the Claimant invites me to decide that having had Covid made his asthma worse than it was before Covid , while it is not inconceivable that that is true, it is not a point that the Claimant has proven.

2.1.5 Were the effects of the impairment long-term?

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

2.1.5.2 if not, were they likely to recur?

115. On the evidence, even ignoring the beneficial effects of any treatment whatsoever, including asthma medication, I am not persuaded that in the period from the middle of January 2022 to the end of June 2022, the Claimant's day-to-day activities were affected by Covid.

116. I am not persuaded that the effect of either bout of Covid was "long-term" within the meaning of paragraph 2 of Schedule 1 EQA.

117. The final item on [Bundle 78] (numbered 1.1.6 on that page, but which I have re-numbered 2.1.6) will be discussed later.

118. Next I make my findings of fact.

Some matters relevant to the approach to the findings of fact

119. When the Claimant began working for the Respondent, his line manager was Nobert Matadi, Regional Team Manager of Central South ("Mr Matadi"). Mr Matadi has not given evidence.

120. The Respondent's witness is Rajesh Gill ("Mr Gill"). When the Claimant began working for the Respondent, Mr Gill was Regional Team Manager of the Eastern North Division. So he was at a similar level of seniority to Mr Matadi.

121. I have not been given any specific and detailed reasons for the fact that Mr Matadi has not been called as a witness by the Respondent. It has been stated by Mr Gill, and I accept it to be true, that Mr Matadi is no longer an employee of the Respondent. That fact, of course, would not prevent the Respondent asking him to be a witness voluntarily or, alternatively, from applying for a witness order.

122. Mr Gill is in a position to be able to comment on how customer coordinators were usually trained and how probation usually worked. He can do this because, on his own team, has had had experience of dealing with new employees, who were performing the role of customer coordinator.

123. It is Mr Gill's opinion that a written probation policy exists. There is no express confirmation in the documents I have seen that such a policy does exist. The

existence of such a policy would be consistent with the way in which the handbook is worded. However, the handbook would also be consistent with there being no such written policy document.

124. Mr Gill's recollection, which I accept to be correct is that he was once emailed a copy of the probation policy. Mr Gill's evidence which I also find to be correct is that various standard documents such as the probation forms that appear on [Bundle 120 and 139], for example, were available electronically to managers, by directly accessing a particular part of the Respondent's stored documents to which they had access, or alternatively by obtaining a copy from HR.

125. I ordered that a copy of the probation policy which had been supplied to Mr Gill be supplied to me and the Claimant. I did not receive it. The Respondent's position is that neither Mr Gill nor HR can find it.

126. For the period from October 2021 to around May 2022, Mr Gill is in no position to give direct evidence of the interactions between the Claimant and Mr Matadi and he can only supply comments on documents which he has seen later.

127. After the Claimant had been dismissed, the Claimant wrote to the Respondent challenging the dismissal. Mr Gill played no part in the Respondent's decision that there would be no action taken in response to the documents which the Claimant submitted after his dismissal.

128. The decision to take no action was communicated to the Claimant on 5 July 2022 at 9.40am. The person who sent the email was "Momnah Ashfaque, Assoc CIPD - HR Advisor".

129. Since Momnah Ashfaque was not a witness, I have no way of knowing whether she spoke to anybody else before sending that email, and no way of knowing whether it was a decision that she took (on behalf of the company), or whether it was a decision which somebody else took, which she was instructed to communicate to the Claimant on behalf of the company.

130. I have not been given any specific and detailed reasons for the fact that Ms Ashfaque has not been called as a witness by the Respondent. It has been stated by Mr Gill, and I accept, that she is no longer an employee of the Respondent. Again, that would not prevent the Respondent asking her to voluntarily be a witness or alternatively applying for a witness order for her to attend.

131. The absence of these witnesses and documents are all factors which I have to take into account as part of my decision-making. It does not automatically follow that just because a particular witness has not attended that I should draw adverse inferences from that absence. Nor does it necessarily follow that I would be obliged to accept, as a matter of law or procedure, the Claimant's account of particular incidents simply because he was there, and he witnessed them, and the

Respondent failed to call somebody else who was present and who gave an opposing version of events.

132. However, to state the obvious, where the Claimant has given a particular account in his evidence on oath, it is potentially possible that I will accept that evidence, even after taking into account whatever hearsay evidence there is to the contrary, whether that be in the form of allegedly contemporaneous documents, or of Mr Gill's account of what he was told at the time, or of what Mr Gill believes was common practice or procedure inside the Respondent.

133. In terms of making decisions about whether any of the Respondent's other employees had any discriminatory motives, the evidence of Mr Gill is of very limited assistance. Apart from the fact that an employee might have unconsciously discriminated, and therefore not have been in a position to confess to Mr Gill, it is fairly unlikely that somebody who consciously had discriminatory motives would actually confess them to Mr Gill in any event.

Findings of Fact

134. The Respondent provides drainage and wastewater utility solutions. It is contracted to provide its services to a number of utility companies and coordinates its services in utility hubs.

135. The Slough utility hub ("the hub") is responsible for the Thames Water contract. Services are split into regions across Thames Water's service area. This area is split into geographical regions.

136. The hub contains office-based staff which provide a number of functions, including supporting reactive and post-reactive services.

137. This function is supported by Customer Coordinators ("CCs").

138. The Claimant began working for the Respondent as "Customer Co-ordinator" on or around 20 October 2021. He was sent an offer letter [Bundle 92] with contract.

139. Having attended a job interview, the Claimant was made an offer of employment as a customer coordinator. The offer letter is dated 18 October 2021. It included:

> 7. Your hours of work will be based on a normal working week of 44 hours on a shift pattern of 4 on 4 off, inclusive of 1 hour unpaid break to be taken during each shift at a time to be determined by the Company, depending on the requirements of the business. The hours will be between 06:30 to 22:30. However, due to the nature of this position, you may be required to work additional hours should this be necessary to fulfil your responsibilities.

140. The items sent with the offer letter included staff handbook (which I had as part of the evidence) and statement of main terms and conditions [Bundle 95-100]

141. Each of the offer letter and the statement of main terms and conditions and the staff handbook referred to the probationary period in similar terms.

142. The extract in the contract was:

> PROBATIONARY PERIOD: You will be subject to a probationary period of 6 months, during which time your progress will be monitored and feedback provided. During this period, your performance and suitability for continued employment with the company will be reviewed and an assessment made as to suitability for future employment. The Company may at it's discretion, extend this period if it deems necessary and you will be advised at the time should this happen by how much longer the probationary period will be extended by. Without prejudice, the Company may also exercise it's right to terminate your employment before or on expiry of the original probationary period. During the probationary period you will not be subject to the Disciplinary Policy.
>
> Unless otherwise stated the notice periods within the probationary period:
>
> Less than 4 weeks – no entitlement to notice pay
>
> Over 4 weeks – 1 week's notice in writing by employee and employer

143. In terms of specific duties, the contract stated:

> JOB TITLE: You will be employed by the Company as a Customer Coordinator. Your duties are those which the Company may from time to time consider as falling within the general remit of your appointment Customer Coordinator. However, the Company may at its discretion amend your duties from time to time, and, in addition to your normal duties you may from time to time be required to undertake additional or other duties within your capabilities as necessary to meet the needs of the business.

144. The was no separate written document called job description, for example.

145. In practice, and at the relevant times, there were three different roles which CCs undertook: (i) forward planning (ii) in-day coordination ("IDC") (iii) complex planning.

146. As well as CCs, the teams consisted of schedulers, who had different duties.

146.1 Schedulers worked on reactive services, such as response to emergencies

146.2 CCs worked on post-reactive services. Ie service for customers who experienced a post-emergency issue. This work involved more planning over an extended period of time.

147. The Respondent had no formal training program for CCs.

148. The Respondent issued new joiners with a notebook and the training method was that new joiners would observe colleagues performing the role and would make notes of what they were supposed to do.

149. The Claimant alleges that some new joiners were given documents. In other words, he alleges that he was treated differently to them.

149.1 The Claimant has produced a document called "Apply for a Permit". This was not given to the Claimant by the Respondent (either near to the start of his employment, or at all). I am not satisfied that this is a document that was given to all/most customer coordinators when they started. The Claimant's evidence does not persuade me that he knows which customer coordinators were given this document or when they were given it.

149.2 The document speaks for itself in terms of the fact that it apparently gives instructions about how to apply for a permit. I accept Mr Gill's evidence that he has not come across this particular document before. He speculates that it might have been created by a particular team member in order to help other team members. I do not know whether Mr Gill's speculation is correct or not, but I do accept that it was not the company's policy to generally give out this item to all customer coordinators.

149.3 This item was not raised in the particulars of claim or the further information or at the preliminary hearings. Although the Claimant has explained why that is the case, that does not change the fact that the Respondent was not on notice that there might potentially an allegation that a particular team manager, Mr Matadi, gave this item to everybody on his team. In any event, the Claimant has not proved on the balance of probabilities that Mr Matadi did so.

149.4 When a permit was required then the role of the customer coordinator included making the application for that permit. It was not required on every job.

150. At the start of the Claimant's employment, his shift pattern was the one mentioned in the offer document sent to him and as described in paragraph 7 of his witness statement.

151. At that time, the Respondent had temporary measures in place because of Covid. Those temporary measures were taken in order to reduce the number of employees actually in the office at a given time.

151.1 In particular, at the time the Claimant joined, the Respondent was in a transition period. It was gradually ending the temporary Covid arrangements, and was in the process of moving people back to the office permanently.

151.2 Prior to Covid, generally the hub's office-based staff did not work from home. During Covid, many of them did work from home, but on a rotating basis, so that on any given shift, some would be at home, and some in the office, and over a period of time, most workers would do some shifts at home and some in the office.

151.3 During the transition period (where the Respondent was ending the Covid arrangements gradually), new joiners did not work from home because they were required to be in the office for training purposes. They were shadowing and observing what more experienced staff were doing. Another reason for being in the office was to enable them to ask questions of colleagues when necessary.

151.4 Around this time, schedulers and more experienced customer coordinators potentially worked about one shift in four (on average) from home.

152. The Respondent had a limited number of laptops. It did not have sufficient laptops to give one each to every employee, including all new joiners.

152.1 The Respondent prioritised experienced schedulers when allocating laptops. This was because of the nature of their work required them to have full access to the Respondent's systems if they were working from home.

152.2 Those customer coordinators who were required to work from home because of the temporary Covid arrangements generally also had a work laptop provided to them, to enable them to work from home.

153. Mr Gill's opinion - based on his own experience of how he worked with his own new joiners and his own experience of how the temporary Covid arrangements were implemented - is that there would be no fixed amount of time between the date a customer coordinator became an employee and the date on which they were granted permission (or required) to do some shifts from home. Mr Gill's opinion is that it was up the team manager to decide when the relevant individual had gained sufficient experience; at which point, they would potentially be scheduled to work from home around one shift in four. However, if the individual had not yet gained the required skills then they would not be required to work from home; they would do all of their shifts in the office. There was no need – as far as the Respondent was concerned - to allocate laptops to anybody who was doing all of their shifts in the office. This was because the workstations in the office provided access to all the necessary software.

154. To the extent that the Claimant argues that the sequence of events was that there was first a decision to decline to provide him with a laptop and that then, second, because he had no laptop, there was a consequence that he was required to work in the office, I reject that argument on the facts.

155. I accept that in general, the Respondent's approach was the other way round. I accept that the Respondent's approach was the one described by Mr Gill. Namely, it was only after the Respondent had decided that a particular customer coordinator could or should work from home (because of the interim Covid arrangements) that they might be provided with a laptop.

156. The Claimant had Covid in early January and, at that time, his mother died. She lived outside the UK. Because of the pandemic, the Claimant was not able to travel to attend the funeral.

157. On 27 January 2022, a meeting took place, which is documented at [Bundle 115]. The meeting took place because Mr Matadi had noted the Claimant sleeping at his desk and had noted the Claimant using his mobile phone.

158. In this litigation, and at the time, the Claimant, agreed that both of these observations were accurate.

158.1 He believes his use of the phone was justified in the circumstances, including the need to speak to his bank, and the need to speak to people about funeral arrangements for his mother, and the need to speak to his GP.

158.2 At the time, and to this day, the Claimant believed that the issue of falling asleep at his desk, was connected to low testosterone. He said that in the meeting.

159. Mr Matadi did not say that he disbelieved the Claimant's explanation. He did not ask for medical evidence or suggest that there be a referral to an Occupational Health ("OH") adviser. Mr Matadi did not refer the Claimant to OH as a result of this meeting, or at any subsequent time.

160. Mr Matadi asked whether the 12 hour shift was too long for the Claimant. The Claimant responded by saying that it was not. Generally, the Claimant spoke about his own efforts to deal with the tiredness issue, which was to make sure that he kept busy. I infer that what the Claimant meant was that if he was tired when he went to bed, he would potentially be able to get a good night's sleep. I therefore think that potentially some of the measures that the Claimant spoke about were to do with what he did to counteract the effect that his depression or PTSD had on his ability to sleep. So he was not only speaking about the effects of low testosterone in making him tired. However, sleeping difficulties because of PTSD / depression were not specifically and expressly stated to Mr Matadi as reasons for tiredness. It is clear from the notes that Mr Matadi could not understand why - on one hand - the Claimant was saying he was very tired, but - on the other hand - was saying that, going to the gym and having extra work would help him with that.

161. The Claimant did make clear in the meeting that he had a health issue; he made comments about his GP and made references to having asked the Respondent about a private healthcare scheme. However, other than low testosterone - and blood tests connected with that condition - he did not give any specific information about any health condition that was causing the effects he described in the meeting (namely feeling tired and sleepy and with less energy).

162. In the meeting Mr Matadi asked if the Claimant wanted any extra training. Different aspects of the customer coordinator were discussed, with the Claimant making clear which he thought he now understood, and which he sought some training for (that is, which parts of the role he had not yet started doing, but wanted to do). Mr Matadi agreed to all of the Claimant's suggestions.

163. There was a brief discussion about whether the Claimant felt isolated and about the Claimant's suggestion that it might be a good idea for the team to go out socially occasionally.

164. It was made clear to the Claimant that no formal action was being taken in relation to the issues about having been sleeping at his desk or having used his mobile phone during shifts.

165. It is the Claimant's evidence that Mr Matadi knew that the Claimant had some sessions with Wellbeing Practitioner Kelly Hansford. My finding is that Mr Matadi was not told - either by the Claimant or by anybody else - what the reason was for those sessions. Even though Mr Matadi has not given evidence to comment on this, and nor has Kelly Hansford, the Claimant has not put forward any evidence or argument which causes me to be suspicious that the normal confidentiality requirements may have been breached in this particular case.

166. I do not have a specific account from Mr Matadi about whether he ever gave any consideration to seeking an occupational health report in relation to the Claimant. An occupational health report – if obtained - might contain advice for a manager. It also provides a mechanism by which the employee can provide information to the employer's representative about any health issues, while allowing the OH practitioner to decide which of those details need to be shared with the manager. There might be sensitive information that the manager did not need to have, but the report could potentially assist a manager by making suggestions for what the employee might need from the manager. An OH report might also assist the manager in deciding whether any matters raised by an employee (for example, tiredness in this case) might need further investigation for a possible medical cause and/or whether there were any health issues that needed to be taken into account when the managers were making relevant decisions which affected the employee.

167. My finding is that the next meeting for which there is a written record is the three-month probationary review, which took place on 4 February 2022. [Bundle 120]. This was a regular meeting between the Claimant and Mr Matadi as part of the probation process. It was not arranged specifically because of anything which the Claimant had done or failed to do.

167.1 The Claimant's job title described in this document as "planner".

167.2 I accept the Claimant's account that when he completed the information on the first page of this four page document, he was seeking to be accommodating and

was not seeking to criticise the manager. He states that, in part, that was for cultural reasons and I am content to accept that, but in any event, I accept his account that he did not think that it was appropriate to be critical of the manager. That of course does not necessarily imply anything either way as to whether he had particular concerns about the manager or not.

167.3 In any event, it is a fact that the Claimant stated that he believed that he was well suited to the job and that he had received a lot of support.

167.4 He suggested that - because there was such a wide variety of issues that might arise - the training that he received in advance might not necessarily be adequate for every future scenario. He said that it was a challenging role and more challenging than he had expected at the interview and induction.

167.5 He mentioned that there were some things that he did not know how to do. He said he would take notes for future reference.

167.6 At question 5, the Claimant suggested that he would like further training, including questions and answers notes

167.7 At question 6, he suggested that the Respondent should take into account that he had been referred to hospital for low hormone issues and that he hoped the manager would therefore not hold it against him that he had had tiredness and had been sleepy during working hours.

167.8 The manager's typed notes stated that verbal communication was important in order to clarify various matters. In was noted that the Claimant needed "further training and also retraining on planning jobs". The notes gave some examples and stated that training had been arranged with two particular individuals.

167.9 One of the manager's comments was that the Claimant was omitting some basic required information when planning jobs.

168. [Bundle 123] is part of the 3 month probation meeting form. It is a scoring table in which each row describes a particular quality / criteria. There are 5 columns, and a tick is to be placed in one of the columns for each row. From left to right, the options are to give the employee the lowest rating to the highest rating.

168.1 Mr Matadi gave the Claimant the second highest rating for "attendance" and for "flexibility and adaptability" and for "working relationships".

168.2 The Claimant did not receive the lowest mark of all in any of the categories.

168.3 He did get the second lowest for each of "knowledge of job", "communication skills", "quality of work", and "productivity".

168.4 He also got the second lowest for the bottom row described as "competency (general overview of the employee's ability in the role)". Possibly this was intended as the overall score, based on the scores in the above rows, but I do not need to decide that specific point.

168.5 This second lowest rating was headed "improvement required".

168.6 I am satisfied that the Claimant had the opportunity to understand that – in Mr Matadi's opinion - improvement was required. The Claimant had the opportunity to understand that both from what Mr Matadi said/wrote in the discussion part of the document, and also from the scoring page itself.

169. Page 4 of the document [Bundle 124] also itemised specific areas in which improvement was required and stated that the review date was 9 March 2022. In Section 2 "general comments, observations, areas of concern", my finding is that the Claimant did not raise anything specific other than what he had written in response to question 6. The manager suggested that the commuting time meant that the Claimant was away from home for up to 16 hours and that this was something that the Claimant might think about. In other words, that he might think about moving closer to the office. My finding is that neither the Claimant nor Mr Matadi considered seeking any specific occupational health advice at this time.

170. It is one of the Claimant's assertions that he was "marked down" (paragraph 3.1.3 of list of issues). As a finding of fact, while no specific numerical score was allocated, the manager's comments do demonstrate that Mr Matadi was stating that there were concerns over some aspects of the Claimant's performance.

170.1 Amongst other things, this is implied by the word "re-training". It is expressly used in addition to the word "training". It is also implied by use of the word "basic" in describing some of the Claimant's omissions.

170.2 There is a reference to a review to check progress and performance improvement, scheduled for about four weeks time. Since I do not have the probation policy, if any, I do not know whether it was out of the ordinary to do that, but the reference to performance improvement potentially speaks for itself.

170.3 In any event, I am satisfied that the manager was stating the opinion that improvement in performance was required and satisfied that that meets the description of "marking down" the Claimant.

171. The Claimant also argues, however, that the notes of meetings highlighted only minor issues and the type of thing that would be covered for any employee. His suggestion is that anybody who read the notes would infer that the employee was generally doing well. I do not agree with that interpretation of the notes . My finding is that the opposite trip is true. From an objective point of view, the notes are stating that the manager's opinion is that significant improvement is required.

172. There are notes of some one-to-one meetings in the bundle (for example, [Bundle 118], [Bundle 137]. [Bundle 138]). I do not need to comment on them extensively. In February, the Claimant referred to Covid having affected his health and his mood. He spoke about the training and that he had asked lots of questions to his colleagues, he did not state that he required written documents to be provided to him by those colleagues, or his manager, or the Respondent.

173. The training that had been discussed in the three month probationary view did take place. As per [Bundle 170], one of the individuals who gave the training commented on it in contemporaneous emails to Mr Matadi and to Mr Matadi's manager, Justin Bernard.

173.1 The trainer was Pavinder Jutla. During this litigation, the Claimant has mentioned that Pavinder Jutla was somebody with whom he had a good working relationship. There are no allegations of discrimination against her.

173.2 I am satisfied that what she wrote in those documents at the time was her genuine opinion.

173.3 I am also satisfied that Mr Matadi read what Ms Jutla had written and thought her opinions were significant when he needed to form opinions about the Claimant and the Claimant's ability to learn what was required in the role of customer coordinator.

174. There was no onus on the Claimant to have raised any health issues (that were affecting his ability to work/learn) with Ms Jutla. It is not suggested by the Claimant that he did so.

175. The Claimant had a short absence at the beginning of March. As documented on [Bundle 125, 126], on his return to work the Claimant stated that he did not have a disability

176. Although it is not documented, I accept the Claimant's evidence – uncontradicted by any evidence from the Respondent - that the Claimant was told that after he had completed three months, that Mr Matadi was content for him to work from home. In other words, the Claimant's lack of experience was no longer preventing his working from home for some shifts.

177. However, the Claimant was not provided with a work laptop. For that reason, he did not immediately start doing any shifts at home.

178. I also accept the Claimant's account that there was one particular week when he did work from home. This was in March 2022. To enable himself to work from home, the Claimant had to purchase a subscription to some software

178.1 Even on the Claimant's own account, this purchase was made without first having a discussion with Mr Matadi or Mr Bernard about it.

178.2 The fact that the Claimant had to make this purchase, and the fact that the Respondent did not reimburse him, are not acts/omissions which form the basis of any of the specific claims brought.

178.3 On the evidence, I have not been persuaded that there was a different employee who purchased the same software for their own personal laptop and who did have reimbursement approved.

179. My findings of fact are:

179.1 In order to be permitted to work at home, one thing that was required was that the company had to have decided that the person was sufficiently competent to do so. From February 2022 onwards, the Claimant met that criteria.

179.2 However, another thing that was required was that the employee had to have the necessary equipment to do so. That might be a work laptop. However, it might be a personal device, provided that personal device was suitable.

179.3 When the company provided work laptops, it did so without charge to the employee. The company did not, based on the evidence available to me, provide payments to those who used their own equipment.

179.4 As mentioned above, (i) home working was not allowed for all, or the majority of a customer coordinator's shifts and (ii) had been introduced as a temporary measure because of Covid and (iii) the Respondent was phasing it out.

180. As far as the Respondent, was concerned individuals always had the choice of working from the office. I accept Mr Gill's account that employees were not forced to work from home, at least not during the period from October 2021 onwards, while Claimant was an employee.

181. I also accept Mr Gill's evidence that - in around May 2022 - the interim arrangement ceased completely, and that nobody who was a customer coordinator worked from home after that.

182. There was therefore a period in February, March and April 2022, during which, because the Claimant had no work laptop, he was faced with the choice of either using his own device at his own expense, or else coming into the office. I will discuss that in the analysis below, because the Claimant alleges that the failure to provide him with a work laptop was discrimination.

183. The Claimant's 6 Month Probationary Review took place on 22 April 2022. It is documented at [Bundle 139].

183.1 As with the 3 month review, the Claimant's evidence at this hearing was that he had a desire to avoid confrontation, and/or avoid making the manager look bad by what he, the Claimant, wrote in this document.

183.2 On the face of the document, the Claimant said there were areas in which he needed to improve and that he had had sufficient training.

183.3 The Claimant said he thought he had all the basic knowledge and that he would seek help in the future when unsure about something.

183.4 At question 5, the Claimant listed the specific areas for which he thought he needed additional training, one of which was permits.

183.5 Mr Matadi wrote that the Claimant was not at the required level of understanding that would be expected of someone who been on the role for six months.

183.6 One particular contributory factor for the Claimant's not being at the required standard was suggested. That was that there had been a six week delay in getting login information.

183.7 Nothing was mentioned about the Claimant's health - either by the Claimant or his manager - in these notes.

183.8 Mr Matadi's comments included: "*I hope with extra training he may improve and get to where we expect him to be in terms of [performance] and competence*".

183.9 Page 3 of the 6 month review document contained a similar scoring page to the 3 month review document.

183.9.1 In relation to "productivity" (as well as various other matters), the Claimant was given the middle rating of "satisfactory".

183.9.2 For the bottom row, the general overview about competency in role was marked as "improvement required" (the second lowest of the 5 possible ratings).

184. As noted on the fourth page of the review document [Bundle 142], the decision was that probation was to be extended by two months. Some specific areas for improvement were identified with review dates 25 May and 10 June 2022. Mr Matadi wrote that the next two months were that were "very critical" for the Claimant to show improvement.

185. Again, my finding of fact is that this item matches the description of "marking down".

185.1 It is clear that the Claimant's performance was criticised.

185.2 Again, I do not agree with the Claimant's suggestion that only minor issues were highlighted. On the contrary, several significant issues were mentioned, and, in particular, the very fact that probation was extended showed that the Respondent was asserting that there were significant concerns over his performance.

185.3 I am satisfied that the Claimant knew - at the time – that Mr Matadi was asserting that improvement was required. Whether the Claimant agreed that there was a proper basis for the assertion and/or whether the Claimant believed – at the time – that Mr Matadi had improper motivations, are, of course, different points. However, I do not accept that the Claimant was misled into thinking that the Respondent's position was that all was going well, and that he, the Claimant, had nothing to worry about in terms of passing probation.

185.4 The Claimant states that Mr Matadi told him that his employment could end at the six-month stage and that there was a discussion between him and Mr Matadi, which led to the decision to extend. Regardless of Mr Matadi's exact words to the Claimant, a discussion about the possibility of employment, ending clearly did take place on the Claimant's own account.

186. After the decision to extend probation, the Claimant had a temporary period on Mr Gill's team. At around the same time Mr Bernard left, as did some other senior employees. Mr Gill started acting up into the role previously performed by Mr Bernard.

187. While on Mr Gill's team, the Claimant had some further training. To help facilitate that, Mr Gill authorised the payment of overtime to the colleague providing that training.

188. Mr Bernard is somebody that the Claimant got on well with. One issue which the Claimant had raised with Mr Bernard is that there were some occasions on which the Respondent's client partner Thames Water had been slow to reply to queries which the Claimant had raised.

188.1 On the evidence, I am satisfied that Mr Gill and Mr Benard and Mr Matadi fully understood that if there was a delayed reply from Thames Water, then that was not the Claimant's fault.

188.2 I am also satisfied that, in fact, the Claimant was not marked down for that particular reason.

188.3 The correct procedure to follow was that if a CC was having problems in obtaining a response from their own counterpart at Thames Water, then the CC should raise it with their own line manager; in turn, the customer coordinator's line manager would speak to the corresponding manager at Thames Water and seek to resolve the matter.

188.4 I am satisfied that there was never any criticism of the Claimant for raising, or of failing to raise, issues of delay by Thames Water. I am satisfied that the Claimant knew the procedure for reporting such delays.

189. The Claimant makes a dual criticism.

189.1 Firstly, that when he did escalate to Mr Matadi, Mr Matadi did not follow up quickly enough.

189.2 Secondly, that the reason Thames Water was slow to reply to him was because of race. In other words, he suggests that Thames Water took longer to reply to him, than it did to reply to the Respondent's other staff, and that the reason for that was race.

190. The points made in the previous paragraph are not specific claims which I need to decide. However, I need to address them as background material. There is insufficient evidence for me to conclude that Thames Water took longer to reply to the Claimant's queries than to comparable queries raised by the Claimant's colleagues. There is no evidence that there was any particular occasion when any particular employee of Thames Water was slow to reply to the Claimant because of the Claimant's race (and/or because of what was inferred about the Claimant's race from his name in his email). To be clear, I do infer that assumptions – correct or otherwise - could be made about the Claimant's race based on his name; however, no facts have been proven to show that the Claimant's race (or name) caused Thames Water's staff to treat the Claimant differently in comparison to the way they treated the Respondent's other customer coordinators.

191. Furthermore, I am not satisfied that Mr Matadi was more reluctant to chase up this type of issue when the Claimant was the person who raised it than when another customer coordinator raised it. The very fact that there was a particular procedure to be followed in relation to perceived delays at Thames Water's end is a reflection of the fact that this was not an uncommon occurrence. Even without hearing from Mr Matadi, I am satisfied that it is common sense that it would be a matter for the Respondent's manager's individual skill and judgement to decide whether to contact Thames Water or to wait a bit longer for the reply to come through.

192. In around June 2022, Mr Matadi had a discussion with Mr Gill. Mr Matadi informed Mr Gill that - based on his own experience and based on the information received from Mr Gill about the Claimant's performance on Mr Gill's team - it was Mr Matadi's opinion that the Claimant's employment should be terminated.

193. Mr Matadi's decision to dismiss was made later than the review dates which had been discussed at the extension of probation meeting.

194. A meeting with the Claimant to inform him of the decision did not actually take place until 4 July 2022. In part this was Mr Gill's non-availability on certain dates,

and, in part it was because the Claimant had caught Covid for a second time, and had a short absence from work.

195. The Claimant was absent from work from 28 June to 3 July 2022, and returned on 4 July. A return to work meeting took place between the Claimant and Mr Matadi. The Claimant did not sign the form [Bundle 148-149]. Within the form, Mr Matadi answered "*no*" to the question "*Does the employee have any kind of disability*?"

196. The same day as the Claimant's return from absence, 4 July 2022, a meeting took place at which he was told that he dismissed. He was dismissed with immediate effect (from 4 July 2022) and given a week's payment in lieu of notice.

197. Mr Matadi's decision to dismiss the Claimant was made in advance of the meeting. He asked Mr Gill to attend the meeting, and that was (at least) partly because a dismissal decision was to be communicated to the Claimant. Even though the decision to dismiss was made in advance of the meeting, the meeting itself lasted quite a long time. The Claimant's recollection it that it was around 2 hours.

198. The meeting notes start at [Bundle 144]. The Claimant's job title is given as "customer coordinator".

198.1 The Claimant's own part of the meeting notes (Section 1 of the form) had been prepared in readiness on 20 June. I am satisfied that the Claimant was aware in advance of the meeting that there were concerns over his performance

198.2 In Section 1, the Claimant expressed the opinion that written material rather than verbal communication was a better training method. He did not say that the reason for this was specific to him, nor link it to any disability or health issue of his. He suggested that most employees agreed with him

198.3 Neither in the written preparation for the meeting nor in the meeting itself did the Claimant raise health issues that were allegedly affecting his performance.

199. The format of the meeting notes was that the "6 month probationary review" pro forma was used. Again, the third page of the document [Bundle 146] contained ratings in the form of a table. The Claimant was given the second highest rating ("Meeting expectations") for "productivity" and for some other areas. He was given the second lowest rating for "communication skills" and "quality of work" and "knowledge of job". The bottom row ("Competency in Role - general overview of employee's ability in the role") was also given the second lowest rating ("Improvement required").

200. I accept that the typed part of the documents, including what is written on [Bundle 147] represents Mr Matadi's genuine opinions.

200.1 Amongst other things, Mr Matadi referred to the additional training which had been provided for the Claimant. It is clear from the document as a whole that Mr Matadi had reached the opinion that further training would not bring about the necessary improvements.

200.2 There is no reference to having considered potential health issues at all: either those which had expressly been declared by the Claimant or the possibility of there being any other health issues – not yet mentioned expressly by the Claimant - which might need to be further investigated.

201. Following the dismissal meeting (and before receiving written confirmation), the Claimant sent two lengthy emails. This was intended as a single communication, but broken into two parts: part one was the email timed at 2.08 on 5 July 2022 [Bundle 150-160]; part two was the email timed at 7.19 on 5 July 2022 [Bundle 162-164]. Both the emails were sent to the same two recipients, HR staff Sharon Randall and Cathy Dyos.

202. The Claimant's lengthy emails made clear that the Claimant understood what he been told in the dismissal meeting, albeit he disagreed with it. He supplied his comments on some of the examples which had been given to him which had – according to Mr Matadi - led to the decision that his performance was not satisfactory.

202.1 At paragraph 2 of the first email, the Claimant suggested that he regarded the dismissal decision as final, but he wanted human resources to be aware of what had happened, and of his version of what had happened in relation to the allegedly unsatisfactory performance.

202.2 In the first email, he went through the criticisms that had been made and said why he did not agree with the criticisms. He mentioned various things that he had done as an employee which he thought merited praise and/or which he thought showed that the criticism were ill-founded.

202.3 He did not state that there were health issues which ought to have been taken into account but which had not been.

202.4 At paragraph 8, he referred to the laptop issue and costs of software. He named "Central South team reactive staff Alison Bush" as having been given a laptop in November 2021. (The difference in treatment being that she was given a laptop and he was not, rather than that she was reimbursed for additional software on her personal device and he was not.) He did not suggest that the reason for this alleged difference in treatment was any protected characteristic.

202.5 At paragraph 15 he referred to his team mates and said that they all liked him. He singled out Ms Jutla for praise said that Ms Jutla would vouch for him.

202.6 He summarised by saying:

> My entire 8 months working experience was joyful, and supported by various people around me. But I think Nobert, my manager, had failed me as a manager in the Central South region. I totally like this guy but I hated his way of teaching, find your own answers and be very vague on what task to do.
>
> I know that there is nothing much to say here and the human resources department will think that I am a nuisance, I am just here to voice my opinion with my manager's comments for my performance in Lanes. I hope you will read my email thoroughly and reply to me. Even if you [do not] reply to me, I have made my peace in mind.

203. In the second email, the Claimant made further comments. He made various criticisms of Mr Matadi's alleged failure to provide/arrange proper training for the Claimant, but made no suggestion that this was connected to the Claimant's race, or to any disability or health issue of the Claimant's.

203.1 The Claimant said that different team leaders and Ms Jutla had given helpful information (by implication, being information that the Claimant thought should have been provided by Mr Matadi, and sooner than he did get it).

203.2 He also referred to alleged delays from Thames Water and gave examples.

203.3 He commented on his June bout of Covid, and on the fact that he had been dismissed immediately on his return.

203.4 In paragraph 12, he suggested that there should be an appeal and that he should be reinstated to a team with a different manager:

> As I am almost finished with my last sentence, to be dismissed for my job due to my bad performance was not justified. I hope an appeal with different people excluding Nobert would be beneficial as I think he was unfit to become my team manager, nothing held against him.

204. At 9.40 on 5 July 2022, the Respondent sent the following email to the Claimant:

> Thank you for sending your email, I acknowledge part 1 and part 2. In regards to an appeal request, we are not bound by our disciplinary policy so therefore there will be no appeal

205. As mentioned earlier, that email was sent by Momnah Ashfaque, Assoc CIPD - HR Advisor, who has not been a witness. She sent it about an hour after the Claimant's second email was forwarded to her by Sharon Randall (and she had clearly seen both). I do not know what discussions – if any – Ms Ashfaque had with any person before sending her email.

206. On 6 July 2022, Ms Ashfaque sent a letter on behalf of the Respondent [Bundle 165] confirming the dismissal information that had been given to the Claimant

orally on 4 July. Mr Gill had not seen the Claimant's 5 July emails or Ms Ashfaque's reply until after this litigation had commenced.

207. Since his dismissal by the Respondent, the Claimant has found new work. He believes that both his new employer and the employer that he had prior to working for the Respondent (from which he was made redundant because of a downturn in work caused by the pandemic) appreciated his dedication to clients and his work ethic; his opinion is that this demonstrates that Mr Matadi's opinion of the Claimant was wrong (and, on the Claimant's case, influenced by the Claimant's race and/or disabilities).

Analysis and conclusions - liability

208. I have dealt with Section 2 of the list of issues already. Turning now to Section 3 from the list of issues.

3.1 Did the respondent do the following things:

3.1.1 failing to provide the Claimant with a laptop in May 2021 (race discrimination only)

209. "May 2021" precedes the start date of the Claimant's employment. As set out in the findings of fact, it is factually accurate that the Respondent did not provide the Claimant with a work laptop (one which he could take home, and use to work at home) at all during his employment, from October 2021 to July 2022.

210. I have to decide if there are facts from which I could conclude that non-provision of a laptop was at least partially because of race, whether consciously or unconsciously.

211. It is the Claimant's honest opinion that he was the only person of his national origins (the national origins being as stated in the hearing), and the only person of his ethnicity (the ethnicity being as stated in the hearing). Mr Gill had no evidence to demonstrate the Claimant's opinion was inaccurate. I accept that there were very few (and possibly no other) people who shared the Claimant's national origins / ethnicity amongst those employees who interacted with the Claimant and Mr Gill, and that there were no other people who shared the Claimant's national origins / ethnicity amongst the employees on Mr Matadi's team.

212. I have accepted Mr Gill's evidence that there was not an unlimited supply of laptops. It was not possible to provide every employee with one. They had to be rationed. As stated by Mr Gill, they were provided on a priority basis, with the Respondent deciding which job roles had priority, as set out in the findings of fact.

213. There were some individuals who began to work for the Respondent (whether as employees or agency workers has not been proven by either side) after the

Claimant started work, and who were provided with laptops before the Claimant was (as I have said, the Claimant was not provided with one at all). However, the mere fact alone that those individuals were a different race to the Claimant is not sufficient to shift the burden of proof. In particular, I have not been satisfied that there was "no material difference" between their circumstances and the Claimant's (see section 23 EQA) in terms of job role and ability to work at home (prior to February 2022).

214. My analysis is that the Claimant's period of employment should be broken down as follows, when considering the laptop issue.

214.1 Initially, the reason that he was not provided with a work laptop (to use at home) was that he was not permitted to work from home, because he was a new employee, who was learning from more experienced colleagues while he, and they, were in the office.

214.2 Later, that situation had ceased, and he potentially was allowed to work from home.

214.3 Later still, from around May 2022 onwards, the Respondent ceased working from home arrangements and all staff (or all customer coordinators, at least) had to resume the pre-pandemic practice of working all of their shifts from the office.

215. For the first and third of these periods, I am satisfied that the Respondent has shown that the reason the Claimant was not provided with a work laptop (for use at home) in those periods had nothing whatsoever to do with race (and was because he was not required / permitted to work from home in those periods).

216. My analysis for the middle period is as follows.

216.1 I accept the Claimant's account that he was told (by Mr Matadi) that from February 2022, he could potentially work from home. That is, it had been decided that the training / experience he had had so far was sufficient that he was not required to be in the office for every shift and could – because of the temporary Covid arrangements – do some shifts from home (while, like the other customer coordinators. doing the majority in the office). .

216.2 However, he was not provided with a work laptop.

216.3 The claimant therefore either had the option of working at home with his own device (for a limited number of shifts) or of coming into the office (for every shift).

216.4 I have accepted Mr Gill's account that this was not unique. There were other customer coordinators in exactly the same situation. That is, because there were not enough laptops for everybody, some employees were faced with the

choice of either using their own device to work from home, or of not working from home at all. Further, not every personal device was suitable. It needed to meet certain criteria / be fitted with certain software, in order for the employee to be able to carry out the required duties.

216.5 The fact that, later than October 2021, and earlier than February 2022, some workers (who possibly joined later than the Claimant) were given laptops does not make them actual comparators. There was – by definition – an available laptop to issue to them in that period. However, it does not follow that there was an available laptop to issue to the Claimant between February and May 2022.

217. The burden of proof does not shift in relation to this period, from February 2022 to May 2022.

217.1 As per paragraph 57 of Madarassy v Nomura International [2007] EWCA Civ 33, "could decide" in section 136(2) EQA is equivalent to: a reasonable tribunal could properly decide from all the evidence before it.

217.2 In this case, as discussed in more detail above, while some workers had laptops, others did not. The reason that not everyone had one is that the Respondent did not own enough. At least part of the reason that it did not own enough laptops is that it had only started providing them (to customer coordinators) to enable home working was because of the pandemic. It was not a regular practice that was in place in "business as usual" periods.

217.3 There are no facts from which I could conclude that Mr Matadi's failure to provide the Claimant with a laptop was motivated – consciously or unconsciously – by the Claimant's race (and, more generally, no facts from which I could conclude that the Respondent's decisions about which employees should receive laptops was based on race).

218. Therefore, the race discrimination allegation based on paragraph 3.1.1 of the list of issues fails.

3.1.2 failing to respond to the Claimant's emails promptly (race discrimination only)

219. This fails on the facts. The Claimant has not shown that the Respondent (Mr Matadi, presumably, though the list of issues does not specify) failed to respond to the Claimant's emails promptly.

220. Even on the Claimant's case, the individuals who allegedly failed to the Claimant's emails promptly were not employees of the Respondent's but were employees of the Thames Water. As such, they were not agents of the Respondent. On the contrary, Thames Water was the Respondent's customer; it provided its services to Thames Water.

221. An allegation that (because of race), the Respondent failed to deal with the Claimant's concerns about (alleged) delays on the part of Thames Water to respond to the Claimant's queries would be a different allegation to the one actually set out in list of issues. I am not dealing with such a complaint. For completeness, I comment that – during employment – the Claimant did not allege to the Respondent that Thames Water staff were being slow to reply to him because of race (or because of their perception of his race, based on the name shown in his email signature). Furthermore, I am satisfied, as set out in the findings of fact, that, when assessing the Claimant's performance, the Respondent properly took into account that a customer coordinator's ability to undertake certain tasks depended on having received certain information from Thames Water.

3.1.3 consistently marking the Claimant's performance down; (race and disability)

(i) Race

222. It is true, as per the findings of fact, that the Respondent (through Mr Matadi) did things which met the description "*marking the Claimant's performance down".* That happened at each of the 3 month probation review, and the 6 month probation review, as well as at the final meeting at which he was dismissed. There were also comments about the Claimant's performance in the 121 meeting records that are in the bundle.

223. It is fair to say that the documents also included praise for the Claimant as well as comments about why he was being "marked down" in some categories.

224. The mere fact alone that the Claimant was the only person within particular racial groups does not imply that the reason that he was marked down was because he was in those racial groups.

224.1 Furthermore, the Claimant's evidence to the Tribunal does also accept that there were some areas of poor performance. Indeed, his "discrimination arising from disability" claim relies on an argument that potentially his work performance was affected by the matters listed in paragraph 4.2.1 of the list of issues and that those things were a cause of (for example) the marking down and the dismissal.

224.2 The Claimant says that he was extremely upset by his mother's death (which is entirely understandable, of course) and found it difficult to concentrate as a result.

224.3 He also says that low testosterone affected him.

224.4 In the contemporaneous documents, he writes himself about the need for extra training. I do not accept that the only (or main) reason for those comments was a desire to avoid a dispute with Mr Matadi (for example, with the Claimant

asserting that he was doing well, and Mr Matadi asserting that he was doing badly). At least in part, at the time, the Claimant was conscious of the fact that he was not performing all aspects of the job to a high standard.

224.5 In this hearing, the Claimant has also complained that the Respondent failed to supply him with written documentation which he believes that he needed in order to be able to do the job effectively.

225. For all of those reasons, there is evidence before me to suggest that Mr Matadi did genuinely believe that the Claimant's performance was an issue that he, the Claimant, needed to be told about. There is also evidence that – while the Claimant did not necessarily agree fully – he partially agreed that there were aspects of his performance which needed to improve. Taking the evidence as a whole, including what the Claimant wrote at the time, his criticisms of Mr Matadi were largely a combination of:

225.1 Mr Matadi did not give enough praise for the good stuff, to go alongside the comments about the bad stuff.

225.2 The Claimant was new to the job, and was learning. If errors occurred, then it might partly be because all new employees might make some errors, and partly because the training was not sufficient.

225.3 In particular, according to the Claimant, Mr Matadi's own instructions about how to do the job were insufficient and unclear.

225.4 Mr Matadi failed to make allowance for the fact that some problems were not the Claimant's fault, but other people's.

226. The evidence as a whole (and especially the contemporaneous evidence) does not support the view that the Claimant believed that Mr Matadi had simply made criticisms which had no basis in fact.

227. These facts do not cause the burden of proof to shift. There are not facts from which the Tribunal could reasonably conclude that a hypothetical comparator of a different race might not have been "marked down".

228. Although I am sure that there were some actual employees who were in different racial groups to the Claimant who did not get marked down, there are no facts from which I could conclude that there is an actual comparator; that is, I do not find that there was another employee (of a different race) whose circumstances were not materially different to the Claimant's – so similar performance to the Claimant's – but who was treated more favourably than the Claimant when receiving feedback during their probation.

229. The race discrimination allegation fails.

(ii) Disability

230. To succeed in showing there was direct discrimination because of disability, the correct comparison is between the treatment which the Claimant received, and the treatment which another person (whether actual or hypothetical) did receive or would have received.

231. The comparator has to have similar attributes to the Claimant (other than disability). Amongst other things, the comparator's work performance would have to be sufficiently similar to the Claimant's.

232. The facts about the Claimant's performance (and Mr Matadi's opinion about it) are the same as have already been discussed when analysing the race discrimination allegation. For similar reasons to those stated above, the burden of proof does not shift in relation to direct disability discrimination.

233. For the avoidance of doubt, a direct disability discrimination complaint does not succeed based on an argument that, because of disability, Mr Matadi should have made adjustments or allowances for the Claimant.

234. The direct disability discrimination complaint also fails.

3.1.4 dismissing the Claimant on 4 July 2022;

235. This is alleged to be direct race discrimination and direct disability discrimination.

236. I will discuss the dismissal in more detail below when commenting on the allegation that the dismissal was disability discrimination within the definition in section 15 EQA. I will therefore only make some brief comments in this section, but I have taken full account of the matters discussed in the analysis below when considering the direct discrimination allegations.

237. There are no facts from which I could reasonably conclude that anything about the Claimant's race was one of the factors (even an unconscious one) that led Mr Matadi to his decision that the Claimant should be dismissed, or to Mr Gill's decision to support Mr Matadi's decision. The same is true for the protected characteristic of disability.

238. There is nothing inherently surprising or suspicious about terminating the employment of an employee during the probation period, rather than confirming them in post. The whole point of having a probation period mentioned in the contract and the policies is that the Respondent intends to proactively assess performance during the probation period, with one possible outcome being termination of the contract.

239. There is no suspicious inconsistency in the information given to the Claimant. He complains about being "marked down", which is the allegation that I have just dealt

with. However, a decision to terminate the employment (for failed probation) of an employee who has been consistently "marked down" (and told that they have been) does not cry out for further explanation.

240. The Claimant was not dismissed suspiciously quickly, or without being given a chance to improve. His probation was extended, and he was given extra training by Ms Jutla (at extra expense to the Respondent, which had to pay overtime). Ms Jutla's comments about the Claimant's performance (and the Claimant does not allege that she was motivated by race or disability) are not at odds with Mr Matadi's.

241. The claims of direct discrimination based on paragraphs 3.1.4 of the list of issues both fail.

3.1.5 on 5 July 2022, refusing to consider the claimant's appeal.

242. It troubled me that the Respondent had failed to disclose any full written policy/procedure for probation. Given the policies that it did have and given the numerous references to probation that were in the documents in the bundle, and given that it seemed to have specific pro forma stationery for probation meetings, I found it surprising, before Mr Gill's evidence, that the Respondent's position appeared to be that it had no such written policy. As discussed in the findings of fact, during oral evidence, Mr Gill said that he thought he did remember having been supplied with such a policy at some stage during his employment, though (i) he was not 100% sure and (ii) could not remember where he might have kept it.

243. I was invited by the Respondent to (i) rely on taking judicial notice to infer what the Respondent's (written) probation policy (if any) stated and (ii) by taking judicial notice, to conclude that probation policies generally do not contain a right of appeal against dismissal, and (iii) that therefore it was likely that the Respondent's policy (if any) either expressly stated that there was no right of appeal, or else made it implicitly clear that there was no right of appeal.

244. I do not think that this is the type of matter about which I ought to take judicial notice. However, that is potentially academic in the circumstances, because I not agree with the assertion that all, or almost all, probation policies state that there is no right to appeal the decision to dismiss. It is certainly true that the aim of the probation policy is to ensure that the employer does not have to go through the type of full blown disciplinary or capability process that might generally apply to employees who have passed probation (and especially those who have been there long enough to have acquired the right not to be unfairly dismissed). However, some probation policies contain an unfettered right to appeal, and some probation policies contain a limited right to appeal (for example, to restrict appeals to where the ground of appeal is that the termination breached the employer's whistleblowing policy, or equal opportunities policy, say). The right of appeal might

be to a different decision-maker, and/or less formal or onerous, than the appeal available under that employer's full blown disciplinary or capability procedures, but is not necessarily non-existent.

245. I do not disagree with the submission that some employers might well have writen probation policies which expressly say that a decision that the employee has failed probation (and is dismissed for that reason) is final, with no right of appeal. However, that state of affairs, in itself, would be insufficient for me to conclude that the written document which Mr Gill remembered receiving at some point during his employment actually expressly stated that the Respondent's policy was that there was no right of appeal against termination decisions.

246. That being said, even taking account of the fact that Momnah Ashfaque has not given evidence, there are no facts from which I could reasonably conclude that the motivation (even partly, and even unconsciously) for the employer's decision (communicated to the Claimant by way of Momnah Ashfaque's 5 July 2022 email) that the Respondent would not follow any appeal process was race or disability.

247. I say that on the assumption that Momnah Ashfaque was aware of the Claimant's race and of the information he had supplied to the Respondent about his health conditions (i) during the recruitment / onboarding process and (ii) to Mr Matadi. (I am not persuaded that she had access to the confidential information which the Claimant had shared with Kelly Hansford.) The fact that the Claimant's 5 July emails did not make any assertions that the dismissal was connected to race or disability is not fatal to his argument that it was direct discrimination not to progress the appeal. However, other than his reliance on the fact that he possesses the protected characteristics in question (and that, there were few, if any, employees of similar national origins and/or ethnicity) the Claimant simply makes a bare assertion that the decision was direct discrimination, without providing any evidence that anyone else was treated differently.

248. I have taken into account all the evidence which I heard about all of the proposed comparators mentioned in the list of issues but it has not been shown that any of them failed probation, and were granted the right to appeal against the decision.

249. The direct discrimination complaints based on the act/omission described in paragraph 3.1.5 of the list of issues, both fail.

250. I turn next to section 4 of the list of issues. For ease of exposition, I will deal with section 4.2 (the things alleged to arise in consequence of disability) first, before going on to discuss the alleged unfavourable treatment.

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

4.2.1 fatigue and lethargy, poor concentration and memory, always feeling sleepy and tired?

251. I am satisfied that each of the things in paragraph 4.2.1 were things which arose in consequence of the Claimant's disability. More specifically:

251.1 I am satisfied that all of the items listed arose in consequence of PTSD and also in consequence of depression.

251.2 I am also satisfied that fatigue and lethargy and feeling tired and sleepy were direct consequences of low testosterone and that the tiredness in turn led to poor concentration and memory.

4.1 Did the respondent treat the claimant unfavourably by:

4.1.1 as listed in 3.1.3 – 3.1.5 above

252. I will deal with item 3.1.5 first:

on 5 July 2022, refusing to consider the claimant's appeal.

253. It is a cause for concern that the Respondent failed to provide any witness evidence from Momnah Ashfaque, the author of the relevant email, to say what caused her to write it. In the absence of her evidence, I do not know if she was communicating a decision which she had made all by herself, or a decision which she had made in consultation with others, or a decision which had been made by another person or persons.

254. I, therefore, have no direct evidence of what motivated the particular decision-maker.

255. At the same time, I have no positive evidence that the comment,

> In regards to an appeal request, we are not bound by our disciplinary policy so therefore there will be no appeal,

did not represent her genuine opinion. Furthermore, there is no inconsistency between that email and the documents which I do have available (the contract, offer letter, etc, as discussed in the findings of fact).

256. The Claimant's own 5 July emails (which Ms Ashfaque was acknowledging, and to which her email was a reply) did not mention that there were things arising in consequence of disability. Although it is not decisive, I do think that it is relevant that the Claimant's two 5 July emails did not refer to any of "fatigue and lethargy, poor concentration and memory, always feeling sleepy and tired". Likewise, these were not things mentioned to Mr Gill and Mr Matadi at the 4 July meeting.

257. Potentially, a long chain of causation between the "something arising" and the treating "unfavourably" is sufficient to establish that there has been discrimination within the definition in section 15 EQA. However, on the evidence presented to

me, and even taking into account the requirements of section 136 EQA, I do not infer that any of the matters mentioned in paragraph 4.2.1 of the list of issues were the cause of, or the motivation for, the decision to inform the Claimant that there would be no appeal process.

258. The allegation of discrimination because of something arising from disability, based on the alleged act/omission at paragraph 3.1.5 of the list of issues fails.

259. The other allegations of being treated unfavourably because of something arising in consequence of the Claimant's disability are:

3.1.3 consistently marking the Claimant's performance down;

3.1.4 dismissing the Claimant on 4 July 2022;

260. For these alleged acts, I am satisfied that the burden of proof shifts.

260.1 One of the reasons that the Claimant was marked down, and later dismissed, was his inability to retain information; one of the things which arose in consequence of his disability was poor concentration and memory

260.2 There are facts from which I could conclude that he was treated unfavourably because of something arising in consequence of his disability.

261. The Respondent has not shown that the unfavourable treatment was in no way whatsoever caused by the matters listed at 4.2.1. The answer to the question at 4.3 of the list of issues is “yes” for the treatment mentioned in paragraphs 3.1.3 and 3.1.4.

262. I therefore have to think about the two defences in section 15. There is no discrimination (within the definition in that section) if either:

262.1 The Respondent can show that the treatment is a proportionate means of achieving a legitimate aim and/or

262.2 The Respondent can show that it (and more specifically, the persons responsible for the treatment complained of) did not know, and could not reasonably have been expected to know, that the Claimant had the disability in question: that is the disability which caused the “something arising”. This is the question raised by paragraph 2.1.6 of the list of issues (labelled paragraph 1.1.6) on [Bundle 78].

263. For the first of these, the list of issues (paragraph 4.4.1) cross-referenced the amended response. EJ Klimov originally drafted the list of issues before the amended response and I am satisfied that the alleged aims stated in paragraph 25 [Bundle 61 to 62] of the 17 August 2023 amended Grounds of Resistance are therefore incorporated into the list of issues.

264. The alleged aims are therefore the matters which I have put in bold in the following sub-paragraphs:

> 25.1 marking the Claimant's performance down, having provided him with areas of improvement, was a proportionate means of **improving the Claimant's performance**;
>
> 25.2 dismissing the Claimant, having provided him with targets and the Claimant failing to meet those targets, was a proportionate means of **ensuring employee efficacy**; and
>
> 25.3 not offering the right to appeal to probationary employees was a proportionate means of **managing the HR team's limited resources**

265. I accept that the Respondent did have each one of those aims. I accept that each of them was part of the reason for the respective treatment identified in the relevant sub-paragraph. I accept that each aim is a legitimate one.

266. I therefore have to conduct a balancing exercise to assess proportionality.

267. One suggested reason for lack of proportionality was lack of written notes about what the Claimant was required to do as a customer coordinator. My comments on that suggestion are:

267.1 I am not satisfied that the things mentioned in paragraph 4.2.1 prevented the Claimant from making his own written notes of what he was told when aspects of the job were explained to him (whether by Mr Matadi, or by anyone else).

267.2 Nor am I satisfied that any of the things mentioned in paragraph 4.2.1 were the reason that the employer (or Mr Matadi, in particular) failed to provide the Claimant with written notes.

267.3 Further, if the Claimant had been provided with written notes by the employer, then it is a matter of speculation as to whether that would have meant that he was not “marked down” and/or not “dismissed”. It might have made a significant difference, or it might not; I do not know and nor – in my opinion – does the Claimant. It is at least conceivable that, because of the things mentioned in paragraph 4.2.1 of the list of issues, he would not have been able to absorb, and act upon the written information. However, it is too hypothetical, because it would depend on how well-written, and how easy to follow, the hypothetical written instructions would have been.

267.4 On the facts, I was not persuaded that others were (generally) given written notes and so it is not a case of my looking at that material and deciding whether it would have been helpful to the Claimant (though, of course, failing to supply the Claimant with training material given to others would be a weighty factor counting against the proportionality of marking the Claimant down and dismissing him).

267.5 The Claimant was provided with additional training from Ms Jutla, which was in addition to the "standard" approach which the Respondent adopted that is described more fully in the findings of fact (which might be loosely referred to as on the job training).

267.6 Since occupational health reports were not obtained, and since the Claimant's medical situation in general does not seem to have been discussed with him in the April, July, meetings, it is not possible to know whether occupational health would have suggested any particular adjustments that might be made to the training regime, including whether or not written material could be provided.

268. For the treatment described as "marking down", the Respondent has persuaded me that it was proportionate.

268.1 I am satisfied that the Respondent's (Mr Matadi's, in particular) motivation for telling the Claimant (in the probation review meetings/documents, in particular, but also in the 121 meetings) about matters which were said to be poor performance, was to alert him to things which the Respondent was claiming needed to improve.

268.2 There is some discriminatory effect from receiving negative feedback. It is criticism of the performance and might cause some degree of upset or displeasure, especially if the employee believes that they have been putting in a lot of effort.

268.3 However, that has to be weighed against the fact that the Respondent did genuinely want its employees to perform well. In particular, it wanted the employee to perform well enough to pass probation. Where there were areas of less than adequate performance, the employer needed to know if the employee was able to improve, and it could only properly decide that if it knew that the employee had been told that there was a need to try to improve.

268.4 Further, from the employee's point of view, the discriminatory effect of "marking down" during probation meetings has to be measured against the alternatives. Dismissal without having been told about areas of poor performance would not be a better alternative.

269. Thus the allegation of discrimination because of something arising from disability, based on the act at paragraph 3.1.3 of the list of issues fails, because the defence in section 15(1)(b) succeeds.

270. In terms of knowledge of disability:

270.1 Mr Matadi knew about the effects of the low testosterone because some of those were expressly mentioned to him. He made no follow-up enquiries. He could

have, but did not, make a referral to occupational health. He could have, but did not, expressly ask the Claimant for updates, or further information.

270.2 In terms of PTSD and depression, Mr Matadi, knew that the claimant had seen the well-being counsellor. He did not have knowledge about the reasons for that. It is true that not every employee who sees the counsellor has a disability. However, the knowledge that someone is seeing a counsellor put Mr Matadi on notice that it was possible that the Claimant might have a disability. He also knew about the sleeping problems which the Claimant had described to him on 27 January 2022. To the extent that Mr Matadi did not know about the PTSD / depression, he ought reasonably to have known, because had he made the reasonable enquiries that would be expected of a line manager, within an organisation of the Respondent's size and resources, he would have received relevant information about those disabilities, for example, by way of an Occupational Health report.

270.3 By themselves, the performance issues would not have put Mr Matadi on notice that he ought to make further enquiries as to whether the Claimant had any disability. However, the performance issues were not by themselves; Mr Matadi also had other information available (as mentioned in the preceding sub-paragraphs) about the Claimant's health.

270.4 The pre-employment questionnaire states that the Claimant had depression (though only that was circled; "PTSD" was not). The corporate employer itself therefore had a specific reason to be on notice that the Claimant might have that disability, and, for that disability, the defence based on paragraph 20 of Schedule 8 would not have succeeded, even if I had not decided that Mr Matadi personally could reasonably be expected to know about that disability.

271. As well as knowledge of each of the disabilities low testosterone, depression and PTSD, I consider that Mr Matadi ought reasonably to have been aware that they affected the claimant's concentration and memory.

272. In terms of the proportionality of dismissal, I do consider that the aim in paragraph 25.2 of Grounds of Resistance is legitimate. It is legitimate for any employer to want their employees to perform well.

273. Dismissal is a different matter to telling an employee at meetings, and in notes of meetings, that their performance is not satisfactory and needs to improve. The weight to be given to the discriminatory effect of a dismissal (paragraph 3.1.4 of the list of issues) is significantly greater than the weight to be given to the discriminatory effect of "marking down" during employment.

274. The specific decision to terminate this claimant's employment was taken after approximately eight or nine months. His probation period had already been extended. The decision of Mr Matadi was that, rather than give the Claimant a

further opportunity to improve, he had reached the stage where dismissal was appropriate. At the time, the Claimant was a long way short of achieving two years' continuous employment. There was no danger that the Claimant would acquire unfair dismissal rights if the dismissal decision was deferred slightly, to allow – for example – time for an Occupational Health referral made, and to consider whether Occupational Health had recommendations (for any adjustments at all, but, in particular) for adjustments that might need to be made to improve the Claimant's performance, or his ability to follow training. One possible alternative to dismissal was to make those further enquiries, and act on any recommendations.

275. Giving the Claimant a few more weeks, perhaps a few more months, to see whether he would improve, and whether there were any adjustments that might help overcome the claimant's difficulties with memory and concentration would not have come at zero cost to the employer. It would have meant that they were continuing to pay salary to an employee whom they believed was not up to the job. It might also have come at an extra cost to provide training (the extra training provided by Ms Jutla had come at a cost). It might also have required extra supervision / monitoring of the Claimant's work, both to provide instructions to the Claimant if he made mistakes, but also to protect the relationship with the important client, Thames Water.

276. It is a balancing exercise, as described in the legal section above. In my assessment, the discriminatory effect on the claimant of dismissing him on 4 July 2022 outweighs the importance to the respondent's attempts to achieve its legitimate aim of dismissing the claimant on 4 July 2022; there were less discriminatory alternatives that could have been pursued prior to dismissal. It would have been most appropriate to have pursued the alternatives (referral to Occupational Health and consideration of reasonable adjustments) sooner, such as at the 3 month probation review, or at the 6 month meeting which extended probation. However, since those steps had not been taken earlier, they should have been taken in July, rather than moving to dismissal on that date.

277. Thus the allegation that the dismissal was disability discrimination, within the definition in section 15 EQA, succeeds. There was a contravention of section 39(2)(c) EQA.

278. That particular complaint is the only claim that is successful.

REMEDY REASONS

279. After I gave my liability decision, we took a 35 minute break and then commenced remedy phase of hearing.

280. The Claimant was not seeking anything for loss of earnings. His schedule of loss was in the bundle at [Bundle 207-208]. His witness statement had made some

comments relevant to the compensation that he was seeking, and the Respondent's representative declined the opportunity to cross-examine the Claimant further.

281. As per the list of issues [Bundle 80], section 5 deals with remedy. I reminded the Claimant that I would take into account, among other things, the presidential guidance on injury to feelings awards. I explained to the Claimant that I would have to decide which one of three bands his injury to feelings fell into, and gave an explanation about what each one of those bands was.

282. The Claimant's submissions included reference, as stated in his schedule of loss to worsening suicidal thoughts, worsening pre-existing health condition (being PTSD, depression and asthma) and injury to feelings caused by lifestyle changes; in each case, the Claimant attributed these to the dismissal and his opinion that there had been exploitation by the Respondent.

283. I also heard submissions from the Respondent. Amongst other things, the Respondent pointed out (correctly) that only one claim succeeded, and it was in relation to the dismissal. It was therefore important to make sure not to compensate the Claimant for any injury to feelings caused by either Mr Matadi's "marking down" of the Claimant, or the Respondent's refusal to have an appeal stage. Likewise, there should be no compensation for injury to feelings caused by the Respondent not giving the Claimant a work laptop or by any perception which the Claimant had that his emails were not receiving prompt responses.

Law - Remedy

284. The purpose of compensation is to provide proper compensation for the wrong which the Tribunal found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

285. Section 124 of the Equality Act 2010 ("EQA") states, in part:

> 124 Remedies: general
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court … under section 119.

286. Section 119 of EQA states, in part

(2) The county court has power to grant any remedy which could be granted by the High Court—

(a) in proceedings in tort;

(b) on a claim for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

(6) The county court … must not make an award of damages unless it first considers whether to make any other disposal.

287. For injury to feelings, the Tribunal must not simply assume that injury to feelings inevitably flows from each and every unlawful act of discrimination. In each case it is a question of considering the facts carefully to determine whether the loss has been sustained. Some persons may feel deeply hurt and others may consider it a matter of little consequence and suffer little, if any, distress.

288. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] EWCA Civ 1871*, *[2003] IRLR 102*, *[2003] ICR 318, CA*, and taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

288.1 The top band was (at the time) between £15,000 and £25,000. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.

288.2 The middle band was, initially, £5,000 and £15,000. It is to be used for serious cases, which do not merit an award in the highest band.

288.3 The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

289. In Da'Bell v NSPCC (2009) UKEAT/0227/09, [the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in Simmons v Castle, the Court of Appeal declared that - with effect from 1 April 2013

- the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift provided for in Simmons v Castle should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.

290. There is presidential guidance which takes account of the above, and which is updated from time to time. This claim is one which was issued in July 2022. The relevant guidance applicable to this claim is the second addendum which states:

> In respect of claims presented on or after 6 April 2022, the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300..

291. The ACAS Code of Practice on disciplinary and grievance procedures must be taken into account by the employment tribunal if it is relevant to a question arsing during the proceedings.

292. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides

> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

293. So, a failure to complain with a Code has to be an unreasonable failure for this provision to have effect. Some failures might not be unreasonable, and so that is one of the decisions the Tribunal has to make.

294. In Wardle v. Crédit Agricole Corporate Bank [2011] ICR 1290, a case decided under the previous litigation, but which contains guidance which is still applicable under the current legislation, the court of appeal addressed the need for proportionality when awarding an uplift.

295. So the correct approach is to first consider if there was an applicable code, and if so, decide if the party (in this case, the Respondent) had obligations under the code, and, if so, if it breached them. Then decide if that breach was unreasonable.

If so, then decide if there should be an uplift, and fix the amount. The maximum is 25%, and that might be – but is not necessarily – appropriate in cases where there is a complete failure. However, taking into account whether there was partial compliance, and other relevant factors, including the Respondent's size and resources, and the reasons for the default, then the uplift (if any) can be fixed at any appropriate figure which does not exceed 25%.

296. After all that is done, the Tribunal the tribunal should apply a common sense and proportionality check. If the simple application of the percentage would result in a cash amount that seems to be too large a sum to compensate the claimant for the specific wrongdoing in question (that is, the specific failures to comply with the requirements of an applicable ACAS code), then the Tribunal must reduce the award to an amount which is proportionate, so as to ensure that, in the words of the statute, the award is actually "just and equitable".

Analysis and Conclusions - Remedy

297. I do not need to repeat expressly everything that I has been said already when dealing with liability. All those points are fresh in my mind, and have been taken into account.

298. It is appropriate for me to mention that, based on the Claimant's arguments (prior to the liability decision and reasons) and evidence, he suffered some injury to feelings because of his opinions that:

298.1 He was not issued with a laptop because of race

298.2 There was a failure to respond to emails promptly (and this was because of race)

299. Any information I have about the Claimant's injury to feelings, as a result of his perception of the Respondent's wrongdoing, has to take into account that the injury to feelings caused by each of the two things mentioned in the previous paragraph does not entitle the Claimant to an award of compensation in this case. Those claims each failed. (And, indeed, the alleged delays in replying to emails were delays on the part of Thames Water, not the Respondent.)

300. The Claimant also complained about each of (i) being marked down and (ii) being told that there would be no appeal process. Again, any injury to feelings because of each of those has to be disregarded by me when assessing compensation, because I am only awarding compensation for the one claim which was successful.

301. Finally, in relation to the dismissal itself, some of the injury to feelings caused by that is as a result of his opinion that the dismissal was direct race discrimination. However, that claim did not succeed and (therefore) there is no compensation for the dismissal being race discrimination.

302. The Claimant's opinion was that he was being singled out to be treated differently, and badly, because of his national origins and his ethnicity. The injury to feelings cause by that is not, in my assessment, negligible. However, I must attempt to quantify the contribution that made to his overall injury to feelings and discount it.

303. The injury to feelings which I must assess is that injury caused specifically by the fact that there were things which were caused by the Claimant's disability which contributed to the decision to dismiss, and that the dismissal was not proportionate (even though "employee efficacy" is a legitimate aim).

304. The effect on the Claimant of the overall conduct of the Respondent was very severe indeed. It caused him to make an attempt to end his life, which, fortunately, his partner was able to save him from.

305. He has not provided any documentary evidence of going to his GP, or being treated by a clinician, specifically because of those suicidal thoughts at that time. He was not prescribed any medication, or other treatment, specifically for that. I accept his witness evidence that he did discuss it in support groups.

306. It is to the Claimant's credit that he was able to look for work, and to get back to working, so quickly. I do not think that means that the injury to feelings had ceased by then. I am satisfied that the impact of the discriminatory dismissal on his emotional and mental well-being had not completely ceased by the time he started his new job. As the Claimant says, he had no choice in the matter; he had to work to pay the bills. So, in my assessment, the fact that the Claimant was able to work again within about two weeks (which is the Claimant's estimate) does not mean that the injury to feelings was negligible, or small. However, it is certainly a relevant factor to my assessment of how long the effects lasted.

307. Taking all the facts and submissions into account, and taking into account the overall severity of the Claimant's injury, but also that some of the injury was caused by things that were not a contravention of the Equality Act 2010, my decision is that an award in the lower Vento band is appropriate for injury to feelings in this case and that it should be an award towards the top of that range.

308. I take into consideration that, even if there had been no discrimination, then the Claimant might have been dismissed and – if so – there would have been some injury to the Claimant's feelings as a result of such a hypothetical dismissal. In other words, in deciding that the dismissal was not proportionate, I mentioned the things that the Respondent could have done, but failed to do, prior to deciding to dismiss. There is a non-zero chance that, if it had done all those things, the employer would still have decided that the Claimant's performance was not adequate, and it might have dismissed him, but in circumstances where that dismissal was proportionate. I do not think it is necessary or appropriate for me to seek to assess that as a percentage chance (that is, of a non-discriminatory

dismissal had it acted differently) and then reduce the award for injury to feelings from the amount that I would otherwise award. Rather, as part of my overall assessment of the appropriate award, I take into account that even a non-discriminatory dismissal would be very upsetting.

309. The lower Vento band (for claims presented in the relevant year) was a range of £990 to £9900. My judgment is that an award of £9000 is appropriate for injury to feelings in this case.

310. The introduction (paragraph 1) to the ACAS "Code of Practice on disciplinary and grievance procedures" (2015 version) includes:

> 1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.
>
> - Disciplinary situations include misconduct and/ or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.

311. The meaning of that extract was analysed by the EAT in Holmes v Qinetiq Limited UKEAT/0206/15/BA.

311.1 This was assessing the 2009 version of the code (quoted in paragraph 7 of the EAT decision).

311.2 The facts there were that there had been a dismissal based on a decision that the Claimant was no longer able to do the job for ill-health reasons, and absence levels.

311.3 The Tribunal had decided that the ACAS code did not apply to that dismissal (and, therefore, there was no uplift available, even if the guidance in the Code had not been followed). The EAT decision was that the Tribunal had taken the correct approach.

311.4 In paragraph 11 of the decision, in rejecting a particular argument made on employee's behalf, the EAT stated:

> In my judgment, the word "disciplinary" is an ordinary English word. A disciplinary situation is a situation where breaches of rules or codes of behaviour or discipline are corrected or punished.

311.5 Those sentences (in terms of what they mean for deciding the applicability of the Code to particular scenarios) have to be seen in light of the judgment as a whole, which included, among other things (my emphasis):

12. When an employee breaks rules or codes of behaviour, that is generally described as misconduct and gives rise to a disciplinary situation. Equally, an employer may have expectations about the way in which a job is to be performed and the minimum standards to be maintained. **Where those expectations or standards are not met, that also gives rise to a disciplinary situation in respect of the poor or inadequate performance that arises**. It is obviously correct … that the Code is silent on the question of whether capability dismissals are encompassed within it and makes no express reference to these as either included or excluded. **However, paragraph 1 in particular and the subsequent paragraphs of the Code demonstrate that it is intended to apply to any situation in which an employee faces a complaint or allegation that may lead to a disciplinary situation or to disciplinary action**. Disciplinary action is or ought only to be invoked where there is some sort of culpable conduct alleged against an employee. **If the employee faces an allegation of culpable conduct that may lead to disciplinary action, whether because of misconduct or poor performance or because of something else, the Code applies to the disciplinary procedure under which the allegation is investigated and determined**. In other words, the Code applies to all cases where an employee's alleged actions or omissions involve culpable conduct or performance on his part that requires correction or punishment. Where there is no conduct or performance on the part of an employee that requires correction or punishment giving rise to a disciplinary situation, and most obviously that will be where no culpability is involved, disciplinary action ought not to be invoked and would be unjustified if it were.

13. While misconduct obviously involves culpable conduct, poor performance is capable of involving both culpable and non-culpable conduct. Where, for example, the poor performance is a consequence of genuine illness or injury, it is difficult to see how culpability would be involved or disciplinary action justified. Where an employee is absent through illness or ill health leading to dismissal, disciplinary action cannot ordinarily be invoked, and without more, the Code does not apply. The position is different where the ill health leads to a failure to comply with sickness absence procedures or an allegation that the ill health is not genuine. In those cases, however, any disciplinary procedure invoked would be invoked to address the alleged culpable conduct on the employee's part rather than any lack of capability arising from ill health. That conclusion is supported by the unreported decision of the Employment Appeal Tribunal (Keith J) in Lund , which, as the Employment Tribunal observed, emphasised the presence or absence of culpability as central to the question of whether the Code applies.

14. [Appellant's counsel] relies on Bethnal Green & Shoreditch Education Trust v Dippenaar UKEAT/0064/15 and in particular paragraphs 54 and 55 to support his submission that the Code applies to dismissals on broader grounds than simply those involving culpability. I do not accept that Bethnal Green supports his case. In Bethnal Green **the employer** circumvented its own capability process and **used a procedure designed to address the employee's alleged inadequate or deficient performance**. **Since that was the process adopted**

> **by the employer and since the employer was held to have failed unreasonably to comply with the ACAS Code , an uplift applie**d. The fact that the Employment Tribunal rejected the employer's reason for dismissal ultimately did not rewrite history. **The alleged poor performance in that case was not as a consequence of ill health. To the contrary, the employer alleged culpable poor performance, and although that was disputed by the Claimant and ultimately not found to be genuine it was on that basis that the ACAS Code applied**. The decision does not otherwise engage with or address the questions raised on this appeal. In my judgment, if an employer chooses to proceed by reference to the ACAS Code on the basis that the situation with which it is concerned is a disciplinary situation, whether that is right or wrong, or if the employer ought to have treated the situation as a disciplinary situation, the Code of Practice concerning disciplinary and grievance procedures is engaged, and any failure to comply may be met with an uplift in compensation.

311.6 In other words, the EAT did not decide that a dismissal for poor performance was a dismissal to which the Code did not apply. Rather, it decided that the Tribunal had been correct (on the facts) to decide that the Code did not apply to ill-health capability, but (at least on some facts) potentially applied to poor performance dismissals.

311.7 Further, even if a tribunal later decides that the (alleged) poor performance was actually due to ill-health, that would not mean (in itself) that the Code had not been applicable to the employer's decision-making.

312. In this case, I am satisfied that the Code did apply to the situation where the Respondent (through the decisions of Mr Matadi) was contemplating, and did, terminate the Claimant's employment because of the opinion that his performance was inadequate.

313. The Code includes:

> 3. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.
>
> 4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:
>
> - Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
> - Employers and employees should act consistently.
> - Employers should carry out any necessary investigations, to establish the facts of the case.

- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

314. There are then specific paragraphs which deal with the bullet points in paragraph 4 in more detail.

315. In terms of paragraph 3, this is a fairly large employer, with many employees, and various sites. At least three different HR employees are included in the email correspondence within the bundle.

316. In terms of the six bullet points within paragraph 4 (and the more detailed paragraphs in the Code which explain/clarify the requirements), my decision is on the basis that there is no breach of the first five. I do not ignore the fact that I have not been provided with copies of invitation letters to all the relevant meetings. However, the discussions which led to the 4 July meeting are discussed in the findings of fact and, in particular, the 6 month review included details of particular areas of concern that led to the extension of probation, and information that there would be reviews (on the dates stated in the document, and 4 July was later than those dates).

317. For the sixth bullet point, the Code includes the following additional detail:

> **Provide employees with an opportunity to appeal**
>
> 26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.
>
> 27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.
>
> 28. Workers have a statutory right to be accompanied at appeal hearings.
>
> 29. Employees should be informed in writing of the results of the appeal hearing as soon as possible.

318. It is certainly true that the Respondent did not provide the Claimant with an opportunity to appeal. In fact, they expressly told him that his 5 July emails would not be treated as an appeal and that there was no mechanism by which he could appeal. The Code was not followed. However, that only leads to an uplift if I decide (i) that the failure was unreasonable and (ii) that it is just and equitable to apply an uplift.

319. The Claimant did know why he was dismissed, albeit he did not agree with the reasons. The Claimant did write to the employer giving his reasons for suggesting that action taken against his was wrong or unjust (albeit not referring to disability discrimination).

320. I do decide that it was an unreasonable failure to follow the Code. I take account of the fact that Mr Gill's involvement in the meeting might have made him an unsuitable person to decide on an appeal, and also of the fact that there had been some managerial departures. However, I am satisfied that it would have been practicable for the Respondent to have found someone more senior than Mr Matadi, who had not previously been involved, to conduct an appeal.

321. By denying the Claimant an appeal, the Claimant was denied the opportunity to proactively, of his own accord, raise things that he had not said in the 4 July meeting (or 6 month probation meeting). He had no opportunity to go before a different manager, who might have asked appropriate questions about the Claimant's health issues, and potentially decided to seek Occupational Health advice.

322. Given that the Respondent substantially complied with most of the requirements of the Code, it would not be appropriate to award anything close to the 25% maximum. However, an appeal might have made a difference as to whether there was a discriminatory dismissal or not (or any dismissal) and it is just and equitable to apply some uplift.

323. My assessment is that 10% is appropriate and proportionate.

324. This is an appropriate case in which I should award interest. There are 851 days from 4 July 2022 until today (1 November 2022). Interest is 8% per year.

324.1 The injury to feelings award of £9000, uplifted by 10% becomes £9900.

324.2 Interest is £9900 x 851/365 x 8/100 = £1846.56.

Employment Judge Quill

Approved By

Date: 27 January 2025

WRITTEN REASONS SENT TO THE PARTIES ON

.....28 January 2025

.....

FOR EMPLOYMENT TRIBUNALS