EMPLOYMENT TRIBUNAL

Claimant: Mr S Pirvu

Respondent: Amazon UK Services Limited

Heard at: In person **On:** 05.08.2024 to 09.08.2024 and 18.11.2024 to 20.11.2024

Before: Employment Judge Mensah
Mrs J Keane
Mrs I Fox

Location: West Midlands Employment Tribunal

Appearances

For the claimant/s: In person
For the respondent: Ms Bowen (Counsel)

JUDGMENT

1. The Tribunal orders:

(i) The Claimant's claims for Direct Age discrimination are not made out and are dismissed.

(ii) The Claimant's claims for Harassment are not made out and are dismissed.

(iii) The Claimant's claim for Victimisation is not made out and is dismissed.

Background

2. The last Case Management hearing in this case came before Judge Faulkner on the 19.07.2024. In the order covering that hearing the Judge addressed various applications made by the Claimant regarding amendments to his claim and a witness

order. By the end of the hearing the Judge had drawn up a List of issues which had taken at least three Case Management hearing to be crafted and finalised with the parties involved.

Interpreter

3. The Claimant was assisted throughout the hearing by a Romanian interpreter. From our observations the Claimant understood the Interpreters and only once questioned whether one of the Interpreters had accurately translated what he said and when we checked there had been an accurate translation.

4. The interpreter, a handful of occasions, sought permission to ask the Claimant to repeat himself but that was making sure he had heard what was said before he translated. Whilst the Claimant used an Interpreter, we noted he also understood a lot of English and at various times he would start to answer questions before the interpreter had translated them and had to be told to wait for the translation. Further, before he could be stopped, he sometimes answered the questions before it had been translated.

5. At times he also asked to be given time to read a document which was in English and confirmed he had read and understood the content. His witness statement was in English, and he confirmed he had created it in English.

6. Overall, we found the Claimant was able to understand the questions being put and engage in the process. We say this because his evidence took the best part of two days of Tribunal time. Questions had to be repeated and sometimes were repeated three or four times by Ms Bowen. We found through his evidence he understood the questions, but at times chose not to answer the question asked, at other times provided answers which went beyond the questions put and at other times simply chose to repeat his previous answer.

Witnesses and timetable

7. On day one Mr Pirvu confirmed he had two witnesses. Ms Julie Ene who speaks Romanian and Mrs Georgiana Vasiliu who also speaks Romanian. Ms Bowen told us she had understood Mrs Vasiliu said Italian is her first language. Later this was clarified and Mr Pirvu confirmed both his witnesses wanted a Romanian interpreter. However, on day three of the hearing, the Claimant informed us Julie Ene was not attending the hearing and so we took that statement as a hearsay statement and confirmed we would consider it and give it the appropriate weight.

8. Ms Bowen confirmed two of her witnesses, Mr Hayden Ball and Claire Wiltshire were not being called to give evidence as they no longer work for the Respondent and were not able to give evidence this week. Ms Bowen relied upon their statements as hearsay statements. In terms of her other witnesses, she confirmed the order was Mr Thomas Shorrock, Mr Conner Bickley, Mr Adam Gilroy and Ms Kieran Yates. In fact, we heard from Mr Yates first because we did not get to

the Respondent's evidence until the last day of the hearing, and this also happened to be the last day of his employment.

9. With more witnesses than envisaged when the case was listed for five days by the previous Judge in a case management hearing, it was agreed from the outset we would concentrate on liability only. I explained, if we managed to get through the evidence and submissions, we would likely have to set another day for the Tribunal to deliberate and have the parties return for oral judgment on the second day.

10. We agreed to interpose Mr Kirby as he was due to go on holiday and leave the Respondent business. We agreed this on day one and gave the Claimant notice he would therefore be required to cross-examine Mr Kirby the next day and if he had not already prepared his questions, he should make sure he is ready. We interposed him on day two of the first five days. The Claimant's evidence took much longer than first suggested to us. Therefore, his cross-examination was not completed until the end of day four. We heard evidence from Mrs Vasiliu on the morning of Day five and the Claimant completed his cross-examination of Mr Yates and so we also completed any questions from the panel and re-examination. We discussed the timetable, and it was agreed we would return for another three days to complete the remaining three Respondent witnesses, submissions, deliberations and oral judgment.

11. The parties agreed this would be enough time. We again reiterated the role of the Claimant to prepare for his questions of those witnesses and his submissions. Miss Bowen confirmed the Respondent had sent to the Claimant their authorities already. It was agreed to prevent the Claimant needing further time during the next hearing to read the Respondent's written submission, Miss Bowen indicated she would be willing to disclose that to him before the next hearing, so he had ample time to read it in advance and we ordered the same. We were grateful to Counsel for this flexible approach which we felt was within the spirit of the overriding objective.

12. We fixed the return dates. By the time we reconvened, the Claimant had applied for the Tribunal to recuse itself. We address this below. This took the whole of the first reconvened day to hear from the parties and we indicated the parties we would give our decision the morning of the second reconvened day. As it transpired the Claimant did not attend on the second reconvened day and instead indicated he would not return unless we recused ourselves. We have detailed all that happened and our decisions below.

Documents

13. Most of the first day of the hearing and the first fifty minutes of the second day were taken dealing with various preliminary matters including further documents exchanged between the parties, which included in a supplemental bundle and further documents emerging during the hearing.

14. In each event we had the parties address us on the relevance and timing of the production and any prejudice. We agreed the supplemental bundle and a

disciplinary policy could be admitted as they appeared relevant, any prejudice was resolved by giving the parties time at the hearing, and particularly the Claimant who required additional time he requested to prepare.

15. The other documents the Claimant sought to adduce, we did not admit predominately because they had no discernible relevance to the proceedings, some prejudice to the Respondent as they would be required to carry investigations into the source of the documents given no originals were provided by the Claimant and there was no proper explanation for the delay. We have a full record of each document and what was said and of course the hearing was recorded but we have summarised the same below.

Documents

16. Ms Bowen indicated she had served on the Claimant copies of *"Letters of concern*" sent to other staff and containing the same prohibition on changing department as featured in the Claimant's list of issues and could provide the raw data to him for the comparators. In the supplemental bundle the Respondent had filed a template of the letter used by management to create such letters and which contained the same standard wording. If these documents were going to be admitted the Respondent would need to anonymised personal details, consent would be required from the individuals and some of the individuals no longer worked for the business. As it turned out, we did not need to see these documents and so did not have to decide any application, and none was made by either side. We therefore considered the main bundle, the supplemental bundle and a disciplinary policy. We also had the various witness statements adopted by the witnesses as standing as hearsay statements.

17. Turning to the supplemental bundle. Mr Pirvu said he noticed the papers in the supplemental bundle were "*high*" which we took to mean large. He said he works nights and didn't have sufficient time to prepare. He told the Tribunal he had only seen the supplemental bundle the morning of the hearing, but Ms Bowen confirmed the bundle had been sent to him on Friday by email and had been created in response to the amendments granted on the 19 July 2024 before Judge Faulkner and as part of the ongoing duty on the Respondent to disclose.

18. Miss Bowen explained the first 38 pages were in fact a Tribunal judgment of an employment claim brought by Ms Vasiliu, who the Claimant was seeking to call as a witness. Her statement had only been served on the Respondent on the Friday before the hearing and in that statement, she makes assertions which contradict the findings of the Tribunal in her employment claim. Ms Bowen argued the statement is an abuse of process and so asked the Tribunal not to read it and would be objecting to the evidence. Ms Bowen argued the judgment was relevant for three reasons:

(a) Mrs Vasiliu gives evidence that was rejected by the Employment Tribunal in definitive terms. The Tribunal was made up of an Employment Judge and full panel.

(b) The Tribunal made findings against the credibility, or lack of, against Ms Vasiliu and significantly so in the judgment.

(c) The Tribunal made findings about the Claimant's credibility and lack of credibility as a witness in those proceedings.

19. Therefore, Ms Bowen argued, the judgment is a direct response to the witness evidence the Claimant seeks to rely upon. Given the timing of the submission of the witness statement of Mrs Vasiliu by the Claimant, the relevance of the judgment in the victimisation claim he brings and the ability to balance any prejudice by giving the Claimant time to read the judgment if he had not read it before he tendered Mrs Vasiliu as a witness, we admitted the judgment. We return to this again in the Claimant's later application for recusal of the Tribunal.

20. Turning to the rest of the Supplemental bundle some of the documents were already attached to the Claimant's witness statement and pages 39, 40 and 41 were already in the bundle. The rest were as follows:

(i) Comparator data at page 42 which are prints out of the three comparators the Claimant seeks to rely upon identified by him as. Vilia, Theo and Mandy. The evidence is not complicated and runs to 21 pages. It has been produced to show where they worked and to the specific issues pleaded by the Claimant.

21. Ms Bowen argued it was right to have them, and the Claimant can read them before cross-examination commences.

(ii) PIT data at page 63 could be cross-referenced to page 320 in the main bundle and is relevant to 2.2.1 of the list of issues. The driving of machinery relates to the PIT data. Following the last hearing on the 19 July 2024, the Employment Judge permitted the Claimant to amend his case to add in the List, paragraph 2.2.9 about double stackers, so the Respondent looked at when the Claimant worked on the double stacker because his case is he didn't work on it at all. The evidence is a printout of the PIT work of which double stacking is one aspect, and the document identifies the equipment type used at page 63. It shows when he worked on the double stackers.

22. Ms Bowen confirmed Mr Gilroy's witness statement deals with this albeit it was exchanged before the bundle was prepared given the timeline in the case.

(iii) Pages 68 to 91 is all the same documents. It is called "*function data*" in the index. In the main bundle there is a short version of how much "*problem solving*" work the Claimant did. This goes to paragraph 2.2.5 of the list of issues to show when he worked on problem solving. This is part of the Respondent's ongoing duty of disclosure but also the Respondent seeks to rely upon it. Ms Bowen argued this

evidence and in the main bundle show he did take on this task, which Ms Bowen says contradicts his allegation he never did.

23. Ms Bowen pointed to an example at page 344 showing the figures for the problem solving and the new data showing the date when he did it. So, in the "*SB*" the columns at page 72 at top the list and fourth column say process see "*IB problem solve*". All the other processes are there, but that is why It has been provided it.

(iv) Pages 92-94 are the Claimant's sick notes already in the bundle, but clearer copies are provided in the Supplemental bundle.

(v) Page 95 is already in bundle at page 56 and so is a duplicate.

(vi) Page 96-97 is a template letter used for formal health reviews.

24. Ms Bowen confirmed there is no claim about a formal health review but paragraph 2.2.6 of the list of issues confused the Respondent and it didn't understand the complaint as the Claimant didn't apply to change departments. The Respondent therefore assumed this refusal to change departments allegation is in fact is a reference to a letter of concern sent from Mr Kirby to the Claimant, as a result of the formal health review. This is because it included a limitation on the ability to transfer to another role and promotions. Ms Bowen pointed out this allegation is not mentioned in the Claimant's witness statement, but the template shows that the wording is a standard response and generally in the Respondent letters so not Mr Shorrock trying to refuse any changes of departments because of the Claimant's age, as alleged.

25. Ms Bowen pointed out the Respondent does have other letters for other employees to show the wording is standard and the comparator identified as Mandy didn't have one so is not appropriate comparator.

26. There were two other documents on top of the supplemental bundle.

i. Respondent's Disciplinary policy.
ii. Occupational Health referral outcome document of 2 pages

27. Ms Bowen argued the policy comes up in a narrow point about "*Idle time*". It has been provided to illustrate it can be a disciplinary issue to take too much *"idle time*". There is reference to the disciplinary policy in one of Respondent's witness statements. Further there is repetition in the main bundle, but the Claimant wanted everything adding. The Occupational Health referral document is only produced to complete the picture.

28. Given the complete explanation of Ms Bowen as to the relevance of the evidence and the way it came to be disclosed and the Claimant only raising time as a prejudice, we sought to understand how long the Claimant was suggesting he

would need to consider the supplemental bundle if we admitted it. After three attempts he finally confirmed he would need about two hours. We therefore admitted the document and granted the Claimant the additional time he says he would need to read the documents and prepare for the hearing.

29. Further, the Claimant had handed some documents to Ms Bowen at around 11am on day one. Ms Bowen argued she could not follow what they are, and the Respondent was not happy for these documents to be included because it didn't understand what they were.

30. Mr Pirvu told us the documents show the time he worked and were from credible sources showing task and on task. He argued they show the documents at page 63,67,72 and 91 of the bundle are not correct. He told us the sources of the documents are from his learning and development manager and some from his line manager at the time. He confirmed they were relevant to paragraph 2.2.1 of the list of issues. Ms Bowen asked for the Claimant to provide the originals of the documents he was now seeking to have admitted as he had provided limited screenshots which did not show all the details. The Claimant agreed to this, and we indicated if he wanted this evidence considered he must send the original emails to the Respondent overnight. We then informed the parties we would revisit this in the morning if it was still an issue.

31. There was a discussion about an email dated 9 May 2023 which the Claimant repeatedly asked to see. It became clear to the Tribunal, after much time was taken, it was in fact an issue that was historical. The Claimant alleges the Respondent sent to the Tribunal an amended response on the 9 May 2023 and it was not sent to him at the same time. He appeared to want to see the email of the Respondent sending in the amended response to the Tribunal as he did not believe it had been filed. In terms of the amended response, he has had the document sent to him on multiple occasions and it has been included in a bundle for the Tribunal in at least two separate Case Management hearings and was part of the consideration by Judge Faulkner when the parties agreed the list of issues. The Tribunal noted there is an email sent to the Claimant before the hearing providing him with a copy of the email showing the Respondent had filed the amended response when they say they did.

32. Therefore, we asked the Claimant to now concentrate on the tasks at hand as he appeared overly fixated on this despite having seen the evidence from the Tribunal, and it was now starting to erode Tribunal time. We return to this again in his later application for recusal of the Tribunal.

33. The Tribunal went to some length to explain to the Claimant his role in the proceedings and what was expected of him. He would be expected to be ready to give his evidence and at 1pm to be able to cross-examine Mr Kirby. His other witnesses would then be considered and then he would be expected to put his case to all the Respondent's witnesses and refer them to the relevant documents in the bundle. Finally, if he was going to make a submission at the end of the hearing, he

needed to make sure he had prepared that too. It was now nearly 2pm and the Tribunal had not yet had a break. We agreed to release the parties and revisit the Claimant's documents in the morning when the Respondent had seen the originals. This would also give the Claimant the time he needed to read the supplemental bundle. We indicated to the parties we were applying the overriding objective, and this meant we wanted a proportionate approach to the case and the evidence and expected the documents issue to be dealt with in that way by the parties. The priority must be to progress the hearing on day two.

34. On day two, Ms Bowen referred us to two emails from Claimant overnight. The first email was sent last night and contained a new document and not copies of the documents he sought to file yesterday. The second email this morning also did not relate to the documents discussed yesterday. The Claimant had not provided the originals emails as discussed and he nor did he explain the same. We again sought to apply flexibility to the proceedings and given the Claimant was a litigant in person we decided to still hear from him about the documents he had produced to try and understand what relevance they had, the timing of the production and the prejudice.

(i) The first pack of documents was described as evidence about events which are not in the scope of the claims before us so not relevant and appear to be emails dated around October 2023.

(ii) The second pack of documents contains evidence regarding Ms Vasiliu working as a "*problem solver*" and as she is not a comparator and we would not be rehearing her claims before a different Tribunal, and they were not for age discrimination, we found it was again not relevant.

(iii) The third pack of documents was described as about "*problem solving*" but in fact this proved to be irrelevant because the Claimant claim is he did not undertake any "*problem solving*." We did wish to clarify one document, and he told us it was a screenshot, and it shows how many "*off task hours*" he had done. It showed off task hours doing "*problem solving*" and he says the date at the top is the 07.02.2024 and it is backdated 6 months. This was outside the material time we were considering and was not relevant to the issues.

(iv) The Claimant had training records in the form of three certificate for training for electric pallet truck expiring 21.03.2026, low level order picker 11.05.2024 and double stacker expiring 15.06.2024. It appears the Claimant had the same training qualification as Theo. There is no dispute the Claimant undertook further training for using machinery and so this was not a disputed fact the Tribunal needed the documents to decide and so we could just accept the same.

35. Considering the detailed discussions about the documents we did not admit any of the documents the Claimant has produced for the reasons given above. The documents were not relevant to the issues, the Respondent would be prejudice in trying to identify the extracts when the originals had not been produced and the

Claimant was unable to explain the reason for the delay. Whilst we wished to be as flexible as possible, we wanted to ensure the documents were relevant and parties focused on the issues before us.

36. Miss Bowen confirmed the Claimant had been sent the raw data regarding the *"letters of concern*" for other staff at 6.30pm yesterday and a break down for each comparator and showing when Theo did work on the double stacker. No application was made to admit these documents by either side and so they were not produced.

Correction

37. Finally, Ms Bowen asked us to rectify in our judgment an error in the previous Case Management orders. The Claimant had sought an amendment to include an Unfair Dismissal claim on the sole basis a manager had refused to reconsider potentially discriminatory statements made by Mr Shorrock. We accept Ms Bowen's amendment is correct and Mr Pirvu confirmed he took redundancy after he made his claim and following closure of the site. The previous Judge had already allowed the complaint, but in the context of the discrimination claim, as it is pleaded before us. Given the very restricted nature of the complaint and what the previous Judge had recorded, it was in our view correctly allowed in the discrimination claim, we agree the correction did not require us to revisit the amendment as the Judge's reasoning overall was *Meek* compliant and nor did the parties suggest otherwise.

Application for recusal

38. The Claimant had applied for a recusal after five days of hearing and before we reconvened. Although specifically aimed at the Judge, we took the view the allegations would implicate the panel because effectively no panel member would have been able to maintain their role in the proceedings and support the Judge being involved if the allegations were made out. The Respondent informed us by email dated 11 November 2024 they had no previous notice of the application which was dated 25 August 2024 until after the Tribunal had written back to the Claimant on the 11 November 2024 asking him to ensure he has complied with the requirement to copy in the Respondents otherwise his application may not be dealt with.

39. It appears the Claimant may have sent the 25 August 2024 application to the wrong email address despite his previous correspondence being sent directly to the named solicitor at the Respondent's lawyer's firm. They object to the Tribunal dealing with the application on the basis the Claimant has failed to comply with Rules 92 and 30(2) of the Employment Tribunal Rules of Procedure 2013 but Miss Bowen agreed during the hearing we should hear the application.

40. The Claimant confirmed he understood the procedure after we explained we would first hear from the parties. He told us he had sent two further emails, but it took several questions to identify the emails as:

i. First email 17 November 2024 at 5.03pm

ii. Second email 18 November 2024 at 10.48pm.
iii. Third email 18 November 2024 at around 7am

41. We checked if they were relevant to the application. He wanted us to read them before we dealt with submissions on whether to deal with the recusal application. Ms Bowen identified another email date stamped 7.05am today 18 November 2024. We asked the parties to leave so we could read the emails. We invited the parties back in. The emails in the main repeat the recusal application and address the written submissions filed by the Respondent for the end of the hearing and the additional disclosure they are seeking to adduce. The Claimant threatened to walk out of the hearing if the recusal application did not go his way. We were surprised by his conduct.

42. As the Claimant had threatened to walk out if the recusal application didn't go his way, when we invited him back in, I explained his threat to abandon the proceedings' part way through could have no bearing on whether we recuse or not. We will decide firstly whether to hear his recusal application and then if we decide we should hear it, we will then decide the application itself. If the application is successful, we will recuse. If the application is unsuccessful, we will proceed. If he then leaves the hearing, we will proceed in his absence. He told me he understood the procedure.

43. We then heard the parties' submissions on whether we should even deal with the recusal application. Miss Bowen still maintained the failure of the Claimant to copy the Respondent into correspondence with the Tribunal but as he had now confirmed his application grounds were contained within the 25 August 2024 email and the three emails identified above, she accepted the Tribunal should probably hear the recusal application.

44. The Claimant maintained what he had said in his emails and argued again he wanted a recusal and when asked to address the issue of failure to copy in the Respondent he argued this was a retrospective condition he had not been made aware of before.

45. We have addressed the recusal application below. By the time we were ready to give our decision on recusal on the morning of day two of the reconvened hearing the Claimant has sent in further emails stating he would not attend and in summary refusing to attend until the recusal was dealt with by another panel or in his favour. He also then added in an adjournment application.

46. We waited until 10.40am but he stood by his decision to not attend and so we considered Rule 47 and the overriding objective. The Claimant sent another email which we took time to read and, in our view, confirmed he was not going to attend but incorporated his further grounds into our consideration and decision. We emailed the Claimant back to confirm we had reconvened. We heard from Ms Bowen, and we considered it was necessary to proceed in the absence of the Claimant and to

decide about his two outstanding applications if this case was to progress any further.

47. Ms Bowen relied upon her skeleton argument, authorities and oral submissions. We have recorded them in our record and the hearing was recorded. Ms Bowen argued there were no grounds for adjournment or recusal and the allegations were baseless. We address the adjourned application and the recusal applications below.

Adjournment application

48. The Claimant has filed two further emails by the time we completed hearing the submissions on the recusal and were ready to give our decision. He asked for an adjournment on the following basis as far as we could ascertain:

(i) The Judge had threatened to proceed without him if his recusal application was unsuccessful.
(ii) He felt pressured and intimidated by the process.
(iii) He felt undue pressure and his rights were being ignored.

49. The fact the Judge informed the Claimant that his threat to abandon the hearing if his recusal application did not go his way meant the hearing going ahead in his absence was not a threat. The Claimant was informed by the Judge if his recusal application was successful the panel would recuse but if it failed the hearing would go ahead. The Claimant has failed to identify or particularise anything which could be categorized as intimidation and pressure or anything that would warrant an adjournment. We could not understand his conduct in this regard. It appears the only outcome the Claimant will accept is if we recuse without considering the merit or agree to recuse. We do not consider this stance reasonable.

50. We address his claim to be facing undue pressure and his rights being ignored below in the recusal decision, but the Respondent is entitled and in fact the Tribunal ordered the parties to file any written argument on the recusal if they wished to rely upon them. The authorities filed by both parties are in fact relied upon by both parties and the Tribunal must have regard to important legal principles whether or not the parties raise the same.

51. The adjournment of a hearing may be for anything from a few days to several months. Fragmented hearings are unsatisfactory for all concerned, and, as has been observed, may lead to evidence being forgotten, recollections becoming blurred, and a general feeling in the unsuccessful party that they have not had a fair and just hearing (***see Barnes v BPC (Business Forms) Ltd [1976] 1 All ER 237, [1975] ICR 390, QBD).***

52. We were clear in our view the Claimant had not provided a basis for an adjournment on day six of the hearing with two days left to go. His refusal to attend

to deal with his written application for an adjournment is conduct we consider unreasonable. We refused the adjournment request. The Claimant was not present during our hearing of this application and our oral judgment on this application as he has refused to attend the hearing on day six.

The Law on recusal and case management

53. The application for recusal covers complaints about case management decisions. Tribunals have wide case management powers and may exercise those powers at any stage of the proceedings, either on the tribunal's own initiative or on an application (Rule 29).

54. Powers of case management must be exercised in accordance with the overriding objective. The overriding objective is to deal with cases fairly and justly. The 2004 Rules contained a list of the orders that may be made.

“In general, it has been stated that *'the tribunals themselves are the best judges of the case management decisions which crop up every day as they perform the function … of trying to do justice with the maximum of flexibility and the minimum of formality*',

55. It will only be in rare cases that their decisions will be interfered with on appeal ***(X v Z Ltd [1998] ICR 43 at 54, per Waite LJ).***

56. An important element of case management is ensuring a sufficient, but not excessive, number of tribunal days – known as the listing – are allotted for the claim to be heard. The length of hearing will be based on the likely duration needed for the tribunal to read into the case prior to hearing oral evidence, the time needed for that oral evidence, submissions, deliberation and judgment. The Tribunal time also includes reading time and time for deliberations for the panel.

57. If the case does not finish within the allotted time, it will not continue on the following day but will be adjourned, part heard, until the next date convenient to all members of the tribunal, the parties, their witnesses and representatives.

"at any stage of the proceedings, on its own initiative or on an application, make a case management order … A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier Order did not have a reasonable opportunity to make representations before it was made."

58. We have treated the Claimant as applying for a recusal on the grounds of judicial partiality falling within the category of there being a real possibility of bias as originally formulated in ***R v Gough [1993] AC 646*** **at 670**, but has since been modified by the Court of Appeal in ***In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700*** at 726–727, and by the House of Lords in ***Porter v Magill [2002] UKHL 67*****,** ***[2002] 2 AC 357*****,** ***[2002] 1 All ER 465*****,** so as to bring it into line with the decisions of the European Court of Human Rights when construing art 6

of the Human Rights Convention. In *Porter v Magill* Lord Hope of Craighead set out the test (at [103]):

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

59. In ***Lawal v Northern Spirit Ltd [2003] UKHL 35, [2003] IRLR 538, [2003] ICR 856,*** Lord Steyn stated that the key to the test is public perception of the possibility of unconscious bias (at [14]; see further para [1613.01] below). Therefore, where it is found that there is or was a real possibility of bias, then, as in the other two categories, the judge (or in tribunal cases, judge or lay members) will be disqualified from sitting and/or the decision (if any) will be set aside. Therefore, the decision regarding recusal is one we take as a panel.

60. In ***Ansar v Lloyds TSB Bank plc [2006] EWCA Civ 1462, [2007] IRLR 211***. There, the court approved the following summary of the principles to be applied which Burton J had articulated in the EAT in the same case (paragraphs relevant to principles are included in the quotation below, paragraphs providing examples of conduct which may or may not require recusal have been omitted and are instead considered below at para [914]):

"1. The test to be applied as stated by Lord Hope in Porter v Magill [2002] AC 357, at paragraph 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at paragraph 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

2. If an objection of bias is made, it will be the duty of the chairman [employment judge] to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: Locabail at paragraph 21.

3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL ex parte CJL (1986) 161 CLR 342 at 352, per Mason J, High Court of Australia recited in Locabail at paragraph 22.

4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd [1991] VSCA 35 recited in Locabail at paragraph 24.

5. The EAT should test the employment tribunal's decision as to recusal and also consider the proceedings before the tribunal as a whole and decide whether a perception of bias had arisen: Pill LJ in Lodwick, at paragraph 18.

6. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in Bennett at paragraph 19.

7. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal employment tribunal hearings, of the dialogue which frequently takes place between the judge or tribunal and a party or representative. No doubt should be cast on the right of the tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in Peter Simper & Co Ltd v Cooke [1986] IRLR 19 EAT at paragraph 17.

8. Obiter Dicta: Save in extraordinary circumstances, it cannot be right for a litigant, unhappy with what he believes to be the indications from the Tribunal as to how the case is progressing, to apply, in the middle of the case, for a re-hearing before another Tribunal. It is undesirable that the Tribunal accused of giving the opinion of bias should be asked itself to adjudicate on that matter. The dissatisfied litigant should ordinarily await the decision and then, if he thinks it appropriate, he should make his dissatisfaction with the conduct of the case by the Tribunal a ground of appeal.

9. *In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: Locabail at paragraph 25*."

10. Also in ***Dorman and Others v Clinton Devon Farms partnership [2019] EWHC 2998 (QB)***, where it was said,

"P*roactive case management is expected of judges. One must guard against too readily characterising a judge's conduct of case management hearings as indicating apparent bias. Being robust is not to be equated with apparent bias, and merely deciding certain procedural matters against a party cannot properly (in and of itself) suggest an appearance of bias or actual bias. Proactive case management will often leave one party (and sometimes both parties) unhappy with the outcome. That may particularly be the case where a judge considers parties have agreed a series of directions which the judge decides do not reflect responsible case management*."

Reasons on recusal

As the case law before us and in particular, the obiter dicta in *Simpler* above, there may be extraordinary circumstances in which it would be desirable for the recusal to be dealt with by a different decision maker, but there must be some clear and extraordinary basis made out, given the clear recourse is for the party who seeks the recusal, to take the application to the Employment Appeal Tribunal. Miss Bowen

referred the Tribunal to two cases in addition to the above. Those cases are ***Dorman and Others v Clinton Devon Farms partnership [2019] EWHC 2998*** **(QB)** and ***El-Farargy v El-Farargy and others [2007] EWCA Civ 1149*****.**

61. We considered the cases and those we have already quoted above, and we were satisfied the appropriate recourse to any decision made is for the dissatisfied party to take the issues to the Employment Appeal Tribunal. On that basis we decided it was appropriate in accordance with ***Porter v Magill [2002] AC 357, Ansar v Lloyds TSB Bank plc [2006] EWCA Civ 1462, [2007] IRLR 211 and Re JRL ex parte CJL (1986) 161 CLR 342*** that we proceed to make a decision on the recusal application.

Substantive grounds for recusal and reasoning

62. The applications are over four applications which are broadly similar and repeat some of the same matters with either expansion or reduction. We have sought to address the overall allegations as far as we can ascertain and after giving the Claimant a final opportunity in the hearing to clarify what he was alleging in his application and emails spanning a period of three months. We expect the Claimant to be able to clearly state what his grounds for recusal where. Many of his grounds were absent particulars and when I asked him to address them, he told us what *he thought* he meant by them. We have therefore addressed them as best as we can understand them.

Failure to Address Discrepancies in Evidence

"During the final hearing, I notified the judge that the bundle provided contained incorrect dates for key events relevant to the case. Despite bringing this to the judge's attention, the issue was ignored, which potentially compromised the fairness of the proceedings, contrary to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, specifically Rule 2, which mandates that cases be handled justly and fairly."

63. None of the panel could find any reference to this in our notes of five days of hearing. We were satisfied if there is any dispute on a relevant date it is for the parties to put this in evidence in their witness statements, cross-examination and documentary evidence. Mr Pirvu still has three Respondent witnesses to cross-examine and so if he disputes a date, he should put that to them.

Inadequate Allocation of Time for Witnesses

"The judge determined that the hearing would last for five days and allocated only one day and two hours for the testimony of six witnesses from the respondent's side. This allocation of time is unreasonable and insufficient, particularly given the complexity and importance of the testimonies to the case, in violation of Rule 41 of the Employment Tribunals Rules of Procedure 2013, which requires the tribunal to allocate sufficient time to hear the evidence properly."

64. The five days were not allocated by this Tribunal but by a previous Judge in a case management hearings with both sides being given ample time to write in if the five days were insufficient. The parties had therefore already agreed they would be

able to present their cases within that time and the timetable was carefully crafted in the order to make it very clear what was expected.

65. The concerns we had about insufficient time developed over the course of the hearing. Our initial concern came about because there were more witnesses being put forward then had been originally indicated. Right at the outset of the hearing we discussed the timetable with the parties. It was agreed to try and accommodate the parties' evidence we would hold a liability only hearing. The number of applications and the Claimant's evidence took far more time than the parties had indicated.

66. The Claimant was in fact only required to complete one of the Respondent witnesses by the end of the five days. These are case management decisions we were entitled to take and entirely within our remit and power to manage. Ultimately, despite our best efforts, we organised another three days to accommodate the Claimant's cross-examination of the last three Respondent witnesses, submissions, deliberations and judgment. Of which we have now spent another full day and part of a second day on preliminary matters which imposes on the time the Claimant has to complete his cross-examination of the three Respondent witnesses and our deliberations and submissions, even if we reserve judgment.

Misunderstanding of Fundamental Employment Regulations

"On the first day of the hearing, I referenced the necessity of adhering to the Advisory, Conciliation and Arbitration Service (ACAS) regulations by the respondent. The judge displayed a lack of understanding of who ACAS is and dismissed information sourced from the ACAS website as unreliable. This demonstrates a lack of familiarity with key employment guidelines, as ACAS plays a critical role in the resolution of employment disputes as recognized by Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992."

67. The Judge's knowledge of ACAS is irrelevant to the proceedings albeit the Claimant has not understood or has misrepresented what the Judge said. This is recorded and in the notes of the panel. The Judge did not seek information from the Claimant to help the Judge in any way. The Judge did however seek to ascertain what the Claimant understood of ACAS to try and identify the particulars of his allegation about the same. The Judge recognised the Claimant as a litigant in person and whilst not entering the arena, tried to help the Claimant to narrow the complaint he makes about the Respondent "*failing to follow the ACAS regulations*" to a question the Respondent witness could answer, rather than the wider general proposition.

68. The Claimant told the Tribunal he had read about ACAS on their website but beyond this he hasn't so far identified any particular provision he wanted to put to the Respondent's witness. He has three more Respondent witnesses to cross-examine at the point of the recusal decision, and we would hope he will refine his questions for them. The ground is misconceived.

Disregard for Procedural Fairness

"After being questioned for four and a half days, leaving only half a day for the respondent's three witnesses and one from claimer [sic]*, I raised concerns about the lack of time to properly examine these witnesses. The judge responded by blaming me for not answering questions more quickly and for having difficulty understanding them, rather than recognizing the need for a fair distribution of time. This approach breaches the overriding objective of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly."*

69. It is inaccurate to refer to four days of his evidence. We all have a record of his evidence, and it was just over two days of Claimant evidence. The Judge did not blame the Claimant for not answering the questions. The way he answered the questions is a feature the panel will consider in any final judgment, and we have addressed our view of his understanding herein. The timing of the evidence and the slippage in the timetable is a matter already addressed above. The allegation is not made out and is completely baseless.

Inappropriate Conduct During Witness Examination

"During the cross-examination of one of the respondent's witnesses, I inquired whether the company adhered to the Employment Rights Act 1996, the Equality Act 2010, and ACAS regulations. The judge interrupted and prevented the witness from answering, stating that it was unreasonable to expect an employer to know such regulations, justifying this by comparing the situation to his own experience of taking eight years to learn these laws as a judge. This comparison was inappropriate and appeared to unduly favour the respondent, potentially violating the principle of impartiality as required by the common law doctrine of natural justice and Article 6 of the European Convention on Human Rights (ECHR), which guarantees a fair trial."

70. The Claimant has misrepresented what the Judge has said. We note he has not taken any notes of the evidence throughout the hearing. We checked our record, and the Judge did not refer to eight years, nor does this make any sense, and is a female judge not a male Judge. The Judge's interventions were to effectively apply the overriding objective to focus the parties on the relevant issues and pose questions capable of being answered. Mr Yates is the only Respondent witness to have given evidence so far and the "*ACAS Regulations*" aspect is already addressed above. The Claimant has three Respondent witnesses to cross-examination yet and should put his case and try to focus on a specific allegations rather than general and sweeping references to an entire statute. This ground is not an accurate record of what happened.

Unwillingness to Ensure Equal Treatment

"After I sent an email highlighting the lack of equality in the court and requesting that I be given the same opportunities as the respondent, the judge, obliged by the situation, agreed to grant an additional three days. However, the judge conditioned this extension on me presenting my final statement on the same day as the final witness examination, denying me the opportunity to reflect on and reference the testimonies of the witnesses. Meanwhile, the respondent has two months to prepare their final statement. This differential treatment undermines the principle of equality

of arms, as enshrined in Article 6 of the ECHR and the overriding objective of the Employment Tribunals Rules of Procedure 2013."

71. We do not understand what email the Claimant is referring us to and we made our decision as a case management decision. The Panel agreed to relist the matter for another three days at the close of play on the fifth day and after several conversations throughout the hearing about the timetable as already addressed herein. The Claimant only completed one of the four Respondent witnesses by the end of day five. We therefore agreed to return for a further three days to complete the Respondent witnesses. The ground is misconceived.

72. The reference to a *final statement* is what we believe a wrongly labelled *written submission* the Respondent seeks to rely upon at the end of the hearing. At the previous hearing, after discussion with the Respondent's Counsel, the Tribunal requested Miss Bowen to let the Claimant have the Respondent's written submissions prior to the end of the hearing so the Claimant could prepare his response and, on the caveat, she be able to vary them after the Respondent's evidence. This was a case management decision to prevent further delay at the reconvened. It appears the Claimant has failed to recognise the advantage or benefit he has been given in receiving the opposing sides written submission and authorities far earlier than is required or necessary and before the reconvened hearing. Instead, he has raised this advantage as a ground for recusal. There is no merit in this ground.

Permitting harassment through repetitive questioning

73. The Claimant has failed to give any particulars of this allegation. We asked if he was able to say what question was repeated and harassed him. He said he knew the answer but would like to be "*100% sure*." The Judge asked if he was able to say. He said the answer was in *"2.2 and 2.4."* The Judge asked what the question was. He told us he didn't have the complaint to be able to look at it and he could not remember what it was.

74. The Claimant was unable to identify the question he says was repeated throughout the hearing and caused harassment. Even after both the Judge and one of the panel members asked him about it. He firstly suggested he needed to see his statement, then we ascertained he was saying he meant the claim form, then we identified he meant the List of Issues. By the time we got the list of Issues in front of him he could do no more than refer us again to paragraphs 2.2 and 2.4. As this is not evidence of any question being put to him, he failed to particularise this allegation. We noted he has had three months since the last hearing to identify what was said and we are at a loss as to how he could make such an allegation when he has not made any notes of the evidence throughout the entire case. He has told us repeatedly he was accessing the papers on his phone and understood the case and was able to access the evidence. He did not write down anything said during the hearing. This ground is not made out.

Judge blaming C for procedural delays

75. The Claimant has failed to give any particulars of this allegation. We asked him to tell me what procedural delays and he told us on the penultimate day "*the Judge said it was four days since questioned and during his case he only had two witnesses and when he requested more time, and he realised he needed more days the Judge answered the situation was what it was, because I replied with difficulty and too slow.*"

76. Not only is this inaccurate but it is a complaint about case management. The Judge relies upon the parties to meet the timetable as they have agreed to it and throughout the hearing sought to manage the time effectively. The timetable issues are already set out herein in detail.

Allowed me to be stigmatised

77. The Claimant has failed to give any particulars of this allegation. We sought to clarify this with him, and he told us, *"In the first two days of the trial the Respondent said a different Judge from a different case said I was not trustworthy and used this way of stigmatizing in this case without having any connection to the case but also mentioned by witnesses and that I wasn't trustworthy."*

78. When the Judge clarified this ground, it became clear the Claimant was referring to Miss Bowen's reference to the Tribunal judgment in the case of Mrs Vasiliu. The Claimant brings in Mrs Vasiliu's employment claim in his victimisation claim. His claim is he was victimised because he was a witness in her claim against the Respondent. He called Mrs Vasiliu as a witness in these proceedings. The tribunal decision in her case found both Mrs Vasiliu and the Claimant unreliable witnesses. The Claimant was not being stigmatised by Mrs Bowen. She was properly arguing the relevant of the judgment on an application to have it admitted. The Respondent is allowed to ask questions in cross-examination of him about his evidence in Mrs Vasiliu's case. As already covered, it is the Claimant that put in a victimisation claim based upon alleged detriment because he was a witness in Mrs Vasiliu Tribunal hearing and so the Respondent is entitled to question him about it. The Claimant has misrepresented what was said and misunderstood the procedure and role of Counsel. There is no merit in this ground.

Discriminatory remarks by Judge about Mrs Vasiliu.

79. Once again, the Claimant failed to provide any particulars, and we believe this is a repeat about Ms Bowen's reference to the previous employment judgment in Mrs Vasiliu's case. This is completely mispresenting the position and the record stands to show the same. We can only assume this is again a possible reference to the Judgment in Mrs Vasiliu's employment claim which was discussed in the hearing as part of the Respondent's application to have it admitted. No decision had yet been made on the relevance or credibility of Mrs Vasiliu in this case because the Claimant

has made a recusal application certainly before we had decided his case and given judgment. In fact, even before he has completed cross-examination of the Respondents key witnesses.

Allowing the Respondent to breach deadline?

80. The Claimant has failed to give any particulars of this allegation. When the Judge sought to clarify this ground he told us, "*At the beginning of the trial the Respondent didn't respect the order of Judge Kelly and didn't put the resistance ground required for the order in the bundle for September but because the trail was adjourned the Respondent took the right to put it in the bundle for the hearing in August saying that the grounds were in front of the Judge who dealt with the hearing. This was against the order of Judge Kelly which gave them a specific deadline to put in the bundle. I brought this to the attention of the Judge on the first day and he didn't check my statement or what I said happened. They considered the action were sufficient for validating that action."*

81. On clarification this relates back to a previous case management hearing and has nothing to do with the hearing before this panel. The last case management hearing was before Judge Faulkner and standard orders were given then to produce the final hearing bundle which has been complied with. The previous case management hearing was not an adjourned trial. It was a case management hearing only. Therefore, this ground is completely misconceived.

Unilateral submission of documents and bundle

82. We have a full record of the various applications for documents and reasons given for admission or otherwise. This is in the judgment. This appears to be a reference to the admission or refusal to admit documents as set out herein. There is no merit in the application.

Ignoring Claimants request for application of the procedure Rules

83. This appears repetitive and we have already addressed the procedural complaints herein.

Intimidating environment created by the Judge

84. The Claimant has failed to give any particulars of this allegation. When the Judge sought to clarify this allegation, he told us "*I haven't been offered the right to answer even though I requested it. I was told repeatedly that I didn't understand and that I don't give the correct or right answers which from my point of view it was the correct answer.*"

85. The Claimant has failed to provide any clear particulars of intimidatory behaviour by the Judge. The direction of the Judge through the proceedings is case

management and there is nothing before us to show it created an intimidating environment or a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of the same. This is again misconceived.

Time management leniency to the Respondent

86. We have a full record of the hearing, and it was recorded. We are satisfied the Judge used her power to seek to manage the parties to stay on track and make effective use of the time without leniency to the Respondent. In fact, the Claimant's evidence was given the most time in the first five days, for which he complains.

The Respondent was allowed to repeatedly ask the Claimant questions

87. The Claimant has failed to provide any clear particulars. It is the role of Counsel to put to the Claimant the Respondent case by way of questions. We were unable to ascertain and nor did we observe any harassing or stigmatising questioning.

The Respondent was allowed to amend the grounds of defence.

88. This is an historic case management decision made by and before a different Judge and so cannot found a recusal ground against this panel.

Applying a retrospective obligation on the Claimant to copy the Respondent into correspondence with the Tribunal.

89. This has already been addressed but we repeat, there were clear orders in place in both case management orders regarding compliance with Rules to copy in the Respondent when corresponding with the Tribunal. The Claimant himself complained historically of a failure of the Respondent to copy him in. The Judge also ordered compliance again on the 11 November 2024 and the Claimant breached that order. This isn't a retrospective obligation it is required under the Tribunal procedure rules and as ordered by the various judges involved in case management. This ground has no merit. The other matters raised are repetition of the above in one form or another and under varying labels, as far as we far as can reasonably ascertain. We were unanimous in our view a fair-minded and informed observer, having considered the facts, would conclude that there was no real possibility that the Tribunal was biased. We have given our reasoning for each of the allegations in so far as we were able to understand them. The Claimant has referred to his human rights and a fair hearing, but we have not found he has in fact demonstrated any of the grounds establish any breaches. We gave this decision orally at the hearing. The Claimant was not present.

Completed the evidence

90. As we had decided there was no basis for a recusal, we decided to give the Claimant an opportunity to attend. However, before we took the break, we noticed the Claimant had sent another email at 11.35am. It was not clear to us if the email was suggesting he might attend and participate and so we decided to apply the overriding objective and again give him the benefit of extra time to confirm whether he intended to participate or not. We therefore emailed the Claimant and informed him we intended to reconvene at 2pm and he should tell us if he intended to participate.

91. We took a break until 2pm. We checked at 2.05pm and the Claimant had not attended the hearing and nor did he reply to the email we sent to him which was sent at 12.34pm. Miss Bowen confirmed she had had no communication from the Claimant, and she checked again with her instructing solicitor, and they confirmed the Claimant had made no contact.

92. We again applied Rule 47. Despite the Claimant's refusal to attend and lack of engagement we decided it was in all the circumstances appropriate to proceed with the hearing in his absence. We decided it would not be right to simply dismiss his claim at this late stage of the proceedings, albeit this was a live consideration given his engagement to date. However, this would leave the merit of the substantive case unaddressed and for both parties leave matters incomplete.

93. We proceeded to hear the rest of the Respondent's evidence and oral submissions from the Respondent for the rest of the second day. We reserved judgment and used the third reconvened day for deliberations.

Post hearing note

94. The morning of our day of deliberations the Claimant contacted the Tribunal by telephone and the clerk referred him to the email we had sent the morning of the second reconvened day, inviting him to let us know by 2pm if he intended to attend and that he had not responded. The Claimant sent further emails on the day of our deliberations, and we replied to the parties letting them know we had received his emails, and judgment was reserved, and the written judgment would follow when completed. Since this time the Claimant has correspondence with the Tribunal with further complaint about wanting a judgment. As we had decided to reserve so the parties receive a written judgment, he and the Respondent were not required to attend a further hearing for oral judgment. We felt this was the most appropriate way to give judgment given the Claimant's conduct in these proceedings.

THE SUBSTANTIVE CASE

The issues and the law in the substantive case

Time limits:

11. In ***Hendricks v Commissioner of Police for the Metropolis*** **[2003] IRLR 96**, the Court of Appeal held that '*an act extending over a period*' can comprise a

'*continuing state of affairs'* as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions, especially if different people are involved. This often means that a series of discriminatory actions can be in time provided the claim was presented within three months of the most recent action (i.e. the most recent action which is ultimately found to be discrimination). Time-limits for omissions are set out in s123(4). In the absence of evidence to the contrary, someone is taken to decide on failure to do something:

1.1. When they do an action which is inconsistent with doing it; or

1.2. If they don't do anything inconsistent, on the expiry of a period in which they might reasonably have been expected to do it.

12. A series of failures could amount to a continuing discriminatory situation. The Claimant brings claims for direct discrimination, harassment and victimisation. The Equality Act prohibits discrimination against employees, Section 39(2) states,

Employers must not discriminate:

i.in the terms of employment;

ii.in the provision of opportunities for promotion, training, or other benefits;

iii.by dismissing the employee;

iv.*by subjecting the employee to any other detriment*.

13. "*Detriment*" must be a detriment in the employment field: ***Tiplady v. City of Bradford [2019] EWCA Civ 2180.***

14. The tribunal must look at the alleged detriment from the employee's point of view. Did the employee reasonably understand that they had been disadvantaged? This is a low threshold, but it nonetheless needs to be crossed. An unjustified sense of grievance is not sufficient: ***Shamoon v. Royal Ulster Constabulary [2003] UKHL 11.***

Comparators

15. The circumstances of a comparator must be the same as those of the claimant, or not materially different: see section 23 of EqA. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: ***Hewage v Grampian Health Board [2012] UKSC 37*** **.**

16. The important thing to note about comparators (whether actual or hypothetical) is that they are a means to an end. The crucial question in every direct discrimination case is: What is the reason why the claimant was treated as he/she was? Was it because of the protected characteristic? Or was it wholly for other reasons? It is often simpler to go straight to that question without getting bogged down in debates over who the correct hypothetical comparator should be: *Shamoon.*

Burden of proof

17. Appellate courts have endorsed the practice of making positive findings of fact. See, for example, this observation in ***Hewage v Grampian Health Board [2012] UKSC 37*** **:**

"…*it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

The two stages

18. Section 136 prescribes two stages to the burden of proof: Stage one (primary facts) and Stage two (employer's explanation). These are analytical stages rather than stages of the hearing (see ***Efobi v. Royal Mail Group Ltd [2021] UKSC 33*** . Unless the circumstances are truly exceptional, the tribunal should hear all the evidence and submissions from both parties before finding the facts.

Stage one – primary facts

19. At Stage one, there must be primary facts from which the tribunal could decide – in the absence of any other explanation - that discrimination took place. All that is needed at this stage are facts from which an inference of discrimination is possible. As it was put in ***Madarassy v Nomura International Plc [2007] EWCA Civ 33 ,*** primary facts are sufficient to shift the burden if 'a reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination.

20. At Stage one, the burden of proof is on the claimant ***Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913*** ***Royal Mail Group Ltd v Efobi [2021] UKSC 22***

21. At this stage of the test, the employer's explanation is disregarded. It is therefore impermissible to use an inadequate explanation from the respondent as a primary fact: ***Hewage v Grampian Health Board [2012] UKSC 37*** . (See below for the relevance of explanations that are worse than inadequate.) There is nothing wrong, however, with taking into account respondent's *arguments* at Stage one. Such arguments might include whether comparators are truly comparable, or whether the claimant really was treated differently from others.

Stage 2 – the employer's explanation

22. If the burden shifts to the employer, move to Stage two and consider the employer's explanation. Has the employer proved on the balance of probabilities that the treatment was not for the proscribed reason? The *Igen* guidance makes two points in particular about Stage two:

1.1. The employer must prove that the less favourable treatment was "*in no sense whatsoever"* because of the protected characteristic. (This is the converse of the test at paragraph **Error! Reference source not found.** – direct discrimination is made out if the protected characteristic significantly influenced the decision.)

1.2. Because the evidence in support of the explanation will usually be in the

possession of the employer, tribunals should expect "cogent evidence" for the employer's burden to be discharged.

23. There is no need for the employer to show that they acted fairly or reasonably. Indeed, sometimes the employer relies on what has been termed, *"the bastard defence*": it treated everyone equally badly. See ***Law Society v. Bahl [2004] EWCA Civ 1070*** and IDS Handbook 4 at paragraphs 34.11-34.23 for further discussion of this defence.

24. It can be an easy defence for an employer just to hold its hands up and say it was, e.g., disorganised, inefficient, unfair. A tribunal must be careful to test such explanations. ***(See Komeng v Sandwell MBC UKEAT/0592/10.)***

Direct age discrimination (Equality Act 2010 section 13)

25. The Employment Statutory Code of Practice, helpfully explains,

"*Direct discrimination is unlawful, no matter what the employer's motive or intention, and regardless of whether the less favourable treatment of the worker is conscious or unconscious. Employers may have prejudices that they do not even admit to themselves or may act out of good intentions – or simply be unaware that they are treating the worker differently because of a protected characteristic."*

26. A well-meaning employer may still directly discriminate. See, for example, the stark facts of ***Amnesty International v. Ahmed UKEAT 0447/08*.**

27. Discrimination may be sub-conscious – people rarely admit discrimination, even to themselves. The point was put powerfully in *Nagajaran:*

"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. ……. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination."

28. Significant influence – The protected characteristic need not be the *only* reason for the less favourable treatment. It may not even be the main reason. Provided that the decision in question was significantly (that is, more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic.

29. Decision-maker - It is important to identify with care the person who is alleged to have acted with the discriminatory motivation. This is because of the principle in ***CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439,*** designed to protect innocent decision-makers from liability.

Harassment related to age (Equality Act 2010 section 26)

30. Harassment is not a detriment see Section 212 Equality Act 2010. Often the same conduct is alleged to be both discrimination and harassment. It cannot be both at once. In such cases, it usually makes sense to consider the harassment first, because if the harassment complaint succeeds, the discrimination complaint must fail in relation to that conduct.

31. Under section 212, harassment is not a detriment. This means that a tribunal cannot find that the same conduct was both harassment and victimisation (or both harassment and discrimination).

32. We must decide if the Claimant suffered harassment first. If it is, then cannot be direct or victimisation if the same allegations are pleaded. The claim can only then succeed on harassment as per section 212 of the Equality Act as harassment is not a detriment and require a detriment for both direct and victimisation.

33. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: ***Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.**

34. Section 26 Equality Act 2010:

(1) "A person (A) harasses another (B) if-

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

(b) The conduct has the purpose or effect of-

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive

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

(a) the perception of B;

(b) the other circumstances of the case; whether it is reasonable for the conduct to have that effect. "

35. Section 26 has been interpreted as creating a two-step test for determining whether conduct had such an effect, see **(Pemberton v Inwood [2018] EWCA Civ 564).**The steps are:

(i) Did the claimant genuinely perceive the conduct as having that effect?

(ii) In all the circumstances, was that perception reasonable?

The List of Issues

36. The List of Issues as set out in the case management orders give the following summary,

"*The issues the Tribunal will decide at the Final Hearing are set out below, adopting the list prepared by Employment Judge Kelly after a Case Management Hearing on 28 March 2023 and adding in the matters discussed before me [*Judge Faulkner*] on 8 July 2024 and today*."

37. We set out those issues below using the same paragraphs as in the list for ease of reference.

"Time limits

1.1 Given the date the Claim Form was presented and the dates of ACAS Early Conciliation, any complaint about something that happened before 30 August 2022 may not have been brought in time. The Respondent may also seek to raise time limit issues in relation to complaints set out in the Claimant's correspondence of 9 April 2023 which the Tribunal determines are new and for which permission to amend the Claim is or has been granted. To the extent that is the case, any such complaint will be deemed to have been presented on 9 April 2023.

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

1.2.1 Was each complaint made to the Tribunal within three months (plus ACAS Early Conciliation extension) of the act to which the complaint relates?

1.2.2 To the extent not, was there conduct extending over a period?

1.2.3 If so, was the complaint about the last act in that period made to the Tribunal within three months (plus ACAS Early Conciliation extension) of the end of that period?

1.2.4 To the extent not, was the complaint made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why was the complaint 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. Direct age discrimination (Equality Act 2010 section 13)

2.1 The Claimant identifies himself as being in the age group of being middle aged, between 40 and 59.

2.2 Did the Respondent do the following things:

2.2.1 After the Claimant returned from sick leave on 6 November 2022, by the claimant's manager, Thomas Shorrock, not allow the Claimant to drive machinery because he said the Claimant was too slow.

2.2.2 On 6 November 2022, by Mr Shorrock, say that the Claimant was too slow and needed too much time to go to the toilet and to drink water and that he was having too much 'idle' time, i.e., non-working time.

2.2.3 On 14 November 2022, by Mr Shorrock, say that the cause of the Claimant's medical problems was that he was old and/or refuse to retract or modify that comment following the Claimant's email to him of 17 November 2022.

2.2.4 By Mr Shorrock, write to the Claimant after an informal meeting on 14 November 2022 on his return from sick leave and say that the Claimant's problems were due to his age.

2.2.5 After his return from sick leave, not give the Claimant a chance to be a Problem Solver, a role he had undertaken prior to his absence.

2.2.6 After his return from sick leave on 6 November 2022, not permit the Claimant to change department.

2.2.7 By Mr Shorrock, fail to conduct a Welcome Back meeting after the Claimant's return from sick leave on 6 November 2022.

2.2.8 By Mr Shorrock, fail to conduct a risk assessment after the Claimant's return from sick leave on 6 November 2022.

2.2.9 After his return from sick leave, refuse the Claimant the opportunity to work on/operate a Double Stacker (machinery for carrying very heavy objects).

2.2.10 On 7 December 2022, by Daniel Kirby, refuse to withdraw the statement made by Mr Shorrock that the cause of the Claimant's medical problems was that he was old.

2.3 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 the following:

2.3.1 In relation to the complaints at paragraphs 2.2.5, 2.2.7 and 2.2.8 above, Vilia [surname not specified] who is 6 years younger than the Claimant, and (in relation to the complaints at paragraph 2.2.5 and 2.2.9) Theo [surname not specified] who is about the same age as the Claimant.

2.3.2 In relation to the complaint at paragraph 2.2.6 above, Mandy [surname not

specified] who was aged between 48 and 51 and was allowed to change department.

2.3.3 Otherwise, a hypothetical comparator.

2.4 If so, was it because of age?

2.5 The Respondent does not seek to argue that the treatment was a proportionate means of achieving a legitimate aim.

3. Harassment related to age (Equality Act 2010 section 26)

3.1 Did the Respondent do the things at paragraphs 2.2.1 to 2.2.10 above?

3.2 If so, was that unwanted conduct?

3.3 Did it relate to age?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Victimisation (Equality Act 2010 section 27)

4.1 Did the Claimant do a protected act as follows:

4.1.1 Being a witness for a colleague, Georgiana Ramona Vasiliu, in an employment tribunal claim (130026/2022), which he says the Respondent found out about when that colleague informed the Tribunal who her witnesses were in Summer 2022?

4.2 Alternatively, did the Respondent believe that the Claimant had done or might do a protected act by being a witness in that claim?

4.3 Did the Respondent do the following things:

4.3.1 Not allow the Claimant to drive machinery.

4.3.2 Not give the Claimant the chance to be a Problem Solver.

4.3.3 Not allow the Claimant to transfer to a different department.

4.3.4 By Mr Shorrock, on 6 November 2022 and again in December 2022, informally warn the Claimant that he should not support his colleagues, "even in court".

4.4 By doing so, did it subject the Claimant to a detriment?

4.5 If so, was it because the Claimant did a protected act?

4.6 Alternatively, was it because the Respondent believed the Claimant had done, or might do, a protected act?"

Findings of Fact

38. The Respondent is a UK subsidiary of a global online commerce business that sells a range of goods and services to consumers, enterprise and content creators. The Claimant commenced his employment with the Respondent on 10 January 2016. The Claimant was employed at the Respondent's BHX1 site in Rugeley as a full-time warehouse worker.

39. Mr Bickley explained to the Tribunal how the centre and department is set up. He explained the Claimant worked in a Level 1 fulfilment centre and his tasks fell within direct tasks such as stowing and packing and indirect tasks such as problem solving, PIT driving and training other associates. He confirmed the allocation of direct tasks fell to the line manager. In this case the Claimant's line manager was Mr Thomas Shorrock. He therefore told us the decisions about the indirect tasks were not taken by Mr Shorrock but were allocated by an internal rota tool called "*Candyland*" which considered a number of factors including whether the associate was trained to undertake the task. The Claimant did not offer any reasonable alternative to this evidence or put any alternative to Mr Bickley. We accept this evidence and find decisions taken about allocation of problem solving and PIT driving were not taken by Mr Shorrock but by the rota tool called "*Candyland*."

40. The Claimant says he was on sick leave for lower back and leg pain from 20 September 2022 – 6 November 2022. We have seen the fit notes which signed the Claimant off for lower back pain. He was off for a period of 47 days.

41. The Claimant asked us to accept that without any formal introduction and having never met Mr Shorrock who was a new manager to him, he met Mr Shorrock for the first time on the 6 November 2022 and the only thing he said to him is "*you should not get involved in the disputes and even if it is in the Tribunals*."

42. We do not accept this is the truth. We do not accept these would have been the only words used in this first meeting and if they had been, we agree the Claimant would have complained at the time and he did not. We find he has fabricated these words and attributed them to Mr Shorrock to try and bolster his claim before us.

43. During the hearing the Claimant's evidence was Mr Shorrock met with the Claimant. He first told us *"The only thing I discussed was on the 6th when I came back and then he asked me to stand back and not help my colleagues with their disputes or allegations against Amazon and even in the Tribunal and that's the only discussion I had*."

44. When we sought to clarify the words used, he said, the only thing he said was ""*you should not get involved in the disputes and even if it is in the Tribunals*."

45. It was put to him that it was highly unlikely this was all that was said but he refused to accept anything else was said and initially was certain these were the words used. It was only after Ms Bowen put to the Claimant that this account of what was said differed from his pleaded case did, he change his evidence. In his pleaded case he had said he was told not to support his colleagues in "*court*" and certainly there was no reference to being asked to stand back. He told us "*At the time he mentioned the word tribunal and I put it down as court and to be it has the same meaning from my perspective and virtually the same thing.*"

46. It was then put to him in his second witness statement there is also a different version as he had said "*told me to mind my own business and not get involved in associate disputes in Amazon especially in court."* He replied **"***I have always stated this thing before, but I cannot be precise as I cannot say word for word what has been said. It's been years already*." He then told us he couldn't remember word for word what was said. It was put to him he was lying about this, and he denied the same.

47. The Claimant admitted he had nothing to suggest Mr Shorrock was in any way involved in any of those matters in Ms Vasiliu's claim or that he was named or involved. The Tribunal had a copy of the judgment, and it is trite Mr Shorrock is not identified as being relevant to those proceedings. We noted despite having given the Claimant extra time to read the judgment overnight and given Ms Vasiliu was his witness, he refused to say Mr Shorrock was not in any way involved. There was in our view of pattern of the Claimant being unwilling to accept even the most obvious and uncontroversial facts.

48. We also noted at the hearing when being asked about this he told us several times he didn't want to discuss Mrs Vasiliu's case. The difficulty with this belated position is he sought to adduce her as a witness, and she seeks to go over what she alleges happened in her case in her witness statement. He seeks to rely upon her account in support of his own claim. We took the view he was unwilling to engage in this issue because the evidence in Ms Vasiliu's his case, undermines any suggestion that Mr Shorrock and Mr Kirby acted in the way he alleges because he was a witness. This is central to what he claims Mr Shorrock said to him at their first meeting. We find the weight of the evidence shows the Claimant has lied about what was said.

49. We also observed the Claimant's oral evidence was not as unequivocal about what he alleges was said when it was put to him earlier in day one of the hearing. Ms Bowen put that Mr Shorrock said he had no knowledge of Mrs Vasiliu's employment claim, and the Claimant replied, "*If he didn't have any knowledge, it was the things he said that made me suspect what was going on."*

50. Even accounting for variations in language, we found this answer inconsistent with his later evidence, as to being clear what was said. It does not make sense he would "*suspect*" Mr Shorrock had knowledge he was going to be a witness in employment Tribunal proceedings for a colleague against Amazon, if he had explicitly referred to Tribunal proceedings in his alleged conversation with the Appellant.

51. Mr Shorrock told the Tribunal, he first he learnt the Claimant was a witness in Tribunal proceedings for another employee when he read the same in this Claimant's proceedings. He told us he did have a welcome meeting with the Claimant on the 6th November 2022 but the discussion was around introducing himself as the new line manager and checking the Claimant was now fit to return back to his job. He denied any comments about any court or tribunal claims were made or could have been inferred from that conversation.

52. The Tribunal were faced with two very different accounts of the first meeting between the Claimant and Mr Shorrock. Ms Bowen gave the Claimant the opportunity to accept the potential for an incorrect recollection of what he claims was said but the Claimant was adamant he was right. This left the Tribunal to decide who it believed. Mr Shorrock has been consistent and clear in his account of the welcome back meeting. He has supported the same with his workplace records showing he had a welcome back meeting with the Claimant on the 6 November 2022.

53. We accept he was not involved in the employment proceedings brought by Ms Vasiliu and there is no reason advanced for him to have involved himself in the same. On the other hand, the Claimant's account changed over time, and he could not give the Tribunal a consistent account of the words alleged to have been used by Mr Shorrock.

54. We did not find his account credible that a new manager to the Claimant and in their first meeting after the Claimant had returned from a period of sick leave, there would be, as claimed by the Claimant, no discussion beyond Mr Shorrock issuing the Claimant with the alleged warning.

55. We prefer the evidence of Mr Shorrock and find he did not use any words that might have been reasonably construed by the Claimant as a warning not to support a colleague in court or Tribunal proceedings. We accept he had a welcome meeting (see this also addressed elsewhere). Given the Claimant was adamant there is no room for error or misunderstanding, we find he has lied to this Tribunal about that allegation.

56. On this basis we find the Claimant was not subject to this detriment because he had acted as a witness in Tribunal proceedings as alleged.

57. Mr Shorrock told us he spoke to the Claimant on the 6 November 2022 and had a five-minute informal conversation where he asked the Claimant how he was feeling following his absence and if there was anything he could help him with to support his return. He told us the Claimant appeared reluctant to talk about the reasons for his absence and confirmed he was fit to work. He confirmed he was later instructed by Human Resources to hold an informal health review.

58. When the Claimant returned to work and said he had no welcome back meeting. He had at that point never met Mr Thomas Shorrock who was his new line manager and expected a meeting with him to discuss his health and any adjustments to get back into work. We have seen the Welcome back document at page 346 of the bundle. That meeting is basically an informal chat with a line manager on return to work "*engaging with them on a personal level and acting as an informal check-in.*"

59. We have also seen the step-by-step guidance for managers holding an informal health review. This says it is a one-to-one meeting to discuss the reasons for the absence and any contributing factors. The Manager then has three options. To escalate the matter to a formal health review, to refer the individual for a medical or to take no further steps. This is a management decision based upon the information they receive during the informal meeting.

60. We prefer and accept the evidence of Mr Shorrock. We found his account consistent with the documents and credible. We find Mr Shorrock did have the welcome back meeting as he described, and it did accord to the Respondents guidance.

61. The Claimant also alleges that on 6 November 2022 Mr Shorrock, said that the Claimant was too slow and needed too much time to go to the toilet and to drink water and that he was having too much '*idle'* time, i.e., non-working time.

62. At the hearing the Claimant did retract this allegation and repeatedly confirmed he was not suggesting this was because of age. Mr Shorrock denied the same. In any event we did not find this allegation credible. The 6 November was the Claimant's first day back at work and the first time he had met Mr Shorrock.

63. The Respondent's Health Policy (hereinafter "HRP") states: *'each time an associate has a period of sickness absence, we will review that period of absence against the thresholds defined in the Health Review Process.'* The Respondent's HRP states that *'if an associate meets the threshold of a total amount of sickness of 80 hours for a full-time employee (equivalent to 8 x 10 hour shifts) or a pro-rata amount for a part-time employee'*, the Review Process will begin shortly after an associate's return to work, normally within four days.

64. As per the Respondent's policy, the Claimant's sickness absence met the threshold for the HRP and an Informal Health Review meeting was held with the

Claimant on 14 November 2022. In cross-examination the Claimant accepted he had triggered the threshold.

65. The process stipulates,

"*Each time an associate has a period of sickness absence, we will review that period of absence against the thresholds defined in the Health Review Process. The purpose of the Review Process is to allow Amazon to discuss with an associate any concerns it may have about their attendance and consider ways in which Amazon can support them in their employment*."

66. In cross-examination and in contrast to earlier allegations the Claimant told us he met with Mr Shorrock on his return to work. He admitted he asked about a meeting and an informal health review meeting and was told it would take place on the 14 November 2022. He admitted the same in cross-examination, but he refused to accept he had a return-to-work discussion at all.

67. There is a record of the informal health review in a document at page 193 which took place on the same date. There is no record of the return-to-work chat which Mr Shorrock told us took place on the 6th November as above, because it was informal.

68. The informal health review records in neutral terms the Claimant said he had returned to working feeling well after an absence for lower back and leg pain. It confirmed the Claimant had no further medical appointments in the future and records the Claimant is to be referred to Occupational health.

69. The document records the Claimant explained to Mr Shorrock "*age may be a reason behind the pain*."

70. This is a fact in dispute, and we return to it later. This is central to the Claimant's claims for age discrimination as it is on his account the basis for his view of the reasons for Mr Shorrock's alleged decisions.

71. In his witness statement he alleges he told Mr Shorrock his pain was due to repetitive working movements but alleges Mr Shorrock identified the cause of his health as age and this limited his work speed and disqualified him from critical roles within in-bound transfer/transhipstow. He claims he verbally challenged the statements and asked Mr Shorrock to retract them as they were offensive.

72. We were referred to page 56 of the main bundle which is an email written by the Claimant on the 16 November 2022 (inserted in a document liked by Human Resources) to Mr Shorrock. In this email the Claimant says, "*furthermore I have also referred to the fact age plays a fundamental role both ion* [sic] *the period of healing and in the period of illness, because the older the age, the longer the period of healing."*

73. This is the Claimant referring to the discussion he had with Mr Shorrock on the 14 November 2022. This was put to him in cross-examination as demonstrating it was the Claimant who raised age in that meeting. When put, the Claimant could not give the Tribunal any reasonable explanation for the consistency between the email he sent and the record in the informal health review to age.

74. However, he accepted the words were his and sent by him in an email. We find this email is entirely supportive of the account given by Mr Shorrock of the Claimant being the one who raised age in that meeting and as recorded in the Informal health review document. We reject the Claimant's inconsistent version of event which is not bourn out by his email which clearly admits he raised age in the meeting.

75. The informal Health review is signed by Mr Shorrock, and he confirmed it was a summary of the informal health review. We accept this is a reliable document and records what Mr Shorrock's had been told by the Claimant. It is consistent with his evidence, is a contemporaneous document and appears to us fairly representing the discussion. We return to this below.

76. Mr Shorrock confirmed he was informed by Claire Wiltshire in an email dated 16 November 2022 the Claimant had refused to sign the notes, but he was told it was not a matter of concern as associates often did not sign the notes. We accept this is what he was told and that the absence of a signature did not undermine the evidence for the reasons already given above.

77. On 20 November 2022, the Claimant raised a grievance as to why a HRP had been commenced, alleging that it was due to his age. The Respondent held a meeting with the Claimant on 21 November 2022 where the Claimant's concerns were discussed in detail. The Respondent explained to the Claimant that the sole reason for the HRP being commenced was due to the Claimant's absence, meeting the applicable threshold under the Health Policy. We accept the Claimant was given this very clear explanation at this time and could be under no illusion as to why he was subject to the HRP.

78. A Formal Health Review meeting was scheduled on 27 November 2022, but the Claimant did not attend. The meeting was rescheduled and took place with the Claimant in attendance on 7 December 2022, following which a First Letter of Concern was issued, dated 7 December 2022. The letter provided reasons for the decision and support options to facilitate a return to work.

79. Mr Kirby held that meeting. We have covered this elsewhere. Despite the Claimant being taken to the very clear document trail about this procedure in the hearing, he refused to accept this was a procedure the Respondent triggered because of his absence.

80. In our view he appeared to be conflating the welcome back meeting with the HRP and insisted the Respondent did not perform a welcome back meeting and instead acted punitively against him. We noted in the hearing the Claimant said he was off for this period because his doctor signed him off. The Respondent does not dispute he was signed off by his doctor. There is no allegation he was not signed off. The Respondent has filed his fit notes for the period.

81. Throughout the hearing the Claimant kept alleging the Respondent's health review procedure was a breach of "*ACAS Regulations."* There is no allegation before us of a breach of the *ACAS Code of Practice* and his constant reference to "*Regulations*" was confusing. When we clarified what he meant he told us he had been onto the ACAS website and read when employees return from sickness absence the Employer should show support and not take any punitive measures.

82. We take it to mean he had read on the ACAS website guidance when an employee is on sick leave and returns, they should have an opportunity to have a meeting with their employer to check he is well enough to work and if he needs any support. This is no more than what happened in his case on the 6 November 2022. It is clear the Claimant has unreasonably read into the ACAS guidance a requirement that is simply not there. He has not been able to articulate any other breach and instead preferred to limit his complaint to a breach of "*ACAS Regulations*" without more. Whilst not pleaded before us, for the sake of completeness, there is no breach of the ACAS Code of Practice made out.

83. The Claimant returned to work after a period of being signed off by his GP for lower back pain. Mr Shorrock organised the Claimant to be seen by Occupational health following his return on the 6 November 2022 and the Claimant had the meeting on the 29 November 2022. The report is in the bundle (page 120) and refers to a short period of back pain (three months) which the General Practitioner advised would benefit from exercise. No treatment was offered. The Occupational health report confirmed no reasonable adjustments were required but recommended the Claimant undertake exercise, weight loss and micro breaks of 1-2 minutes every 1-2 hours.

84. There was therefore no need for a risk assessment to enable the Claimant to return to his role. The Claimant raises no complaint about the view of Occupational health either to the Respondent at the time, or before this Tribunal.

85. The Claimant has not proffered any other basis for the Respondent to have undertaken a risk assessment. Following the report from Occupational Health the Claimant must have understood there was no suggestion he was going to be risk assessed. The Claimant did not raise any basis for a risk assessment with the Respondent, did not raise any complaint or grievance at the time. We find the failure to conduct a risk assessment is not made out. We do not find on the evidence Mr Shorrock failed to carry out a risk assessment because of the Claimant's protected characteristic of age.

86. There is an Occupational Health report dated 3 January 2023 (page 127) which maintains the position as set out in the November report with regard to his back but at this stage the Claimant raises ‘’*stress*” as a new issue because he says he needed to use the toilet and not able to do this because was aggravating his back pain.

87. The Occupational health in the 3 January 2023 then did advise a risk assessment may be carried out, but found the Claimant was fit for his work and did not recommend any adjustments.

88. We note the employment claim before us is dated 10 January 2023 and so the Claimant had not returned to complete a full week of employment before he put in his employment claim. This second occupational health report therefore makes no sense as a basis for this claim for a failure to carry out a risk assessment and this was not pleaded or put by the Claimant to any of the Respondent witnesses. For the avoidance of doubt, we do not consider any alleged failure to carry out a risk assessment between the 4 January 2023 and the 10 January 2023 (5 working days) was anything to do with the Appellant’s age. Further we have addressed Mr Shorrock’s referral to Occupational health in the November and the fact no support was needed, and the Claimant was fit to return to his duties. Throughout the hearing the Claimant accepted he was fit to return to his duties on the 6 November 2022.

89. It is entirely lawful for an employer to have an attendance policy which addressed absences, and which ultimately can lead to termination of employment. The fact the individual was signed off by a doctor does not prevent this. The Claimant was not dismissed but was given a warning that his absence was a concern to the Respondent and would be subject to review if he had another absence. An employer is entitled to have the employee in work and working in exchange for the pay the Employee expects to receive. This is the irreducible minimum of an employment relationship. The Claimant expected to be paid, and the Respondent expected the Claimant to be in work.

90. There is no allegation before us that the HRP in this case was unlawful and we can ascertain no such basis. The Respondent was entitled to issue a letter of concern to the Claimant because he had triggered it by being absence for 49 days. Despite this being clearly set out in the procedure and in all dealings with the Claimant he persisted with his dogmatic refusal to accept this entitlement before us and we consider his behaviour unreasonable.

91. The reading of the Formal health Review minutes shows the Claimant was still unable or unwilling to accept the very clear reasoning being given for why he triggered the health review and insisted the Respondent shouldn’t take such action. Yet he did not appeal the outcome.

92. We can accept an employee might not understand the procedure until they have read the procedure documents and had matters explained by their employer. However, this clearly did happen in the Formal health review. The Claimant also had the documentation during disclosure. We fail to see why he would have persisted with this stance thereafter.

93. The Claimant complains he was not allowed to drive machinery. He had completely failed to address this allegation in his witness statement, and this did not assist him. Even accounting for being a litigant in person it is clear from the case management orders he was told to make sure his witness statement covered all his allegations. To make matters worse, when asked to give details of the circumstances surrounding the alleged conversation, he was vague and told us he couldn't recall the details because it was so long ago.

94. This was a theme to his allegations regarding things said by Mr Shorrock. Ms Bowen took the Clamant to work records. The Respondent says these are detailed work logs showing the types of machinery the Claimant used, the dates he used the machinery and even the exact times the machinery was used. When the Claimant was taken to the logs and it was shown that he had not worked on machinery since 2021, it was put to him that his allegation he wasn't allowed to work on machinery since he returned to work on the 6 November 2022 made no sense if he had not in fact worked on machinery since 2021 and done very little of it.

95. The Claimant's response was to allege the records were incorrect and intimate they had been fabricated. Ms Bowen explained on behalf of the Respondent, that the work records were taken from the Claimant's work log and had been no more than downloaded. I asked the Claimant on what basis he was making the intimation, and he told us he had worked on machinery in 2022 before he went off sick but had not worked on machinery after his return on the 6 November. He also later denied the same records which recorded he had worked on a double stacker in the May of 2023.

96. The Claimant asks us to find the Respondent has effectively filed false records regarding the work he did on machinery at the Respondent premises. These are serious allegations. He was however unable to support those serious allegations with any documentary evidence. This means he had adduced nothing about this in his witness statement and no documentary evidence. The belated nature of the allegation is in our view significant. Ms Bowen put to the Claimant that the reason he had sought to introduce the dates 12-14 December 2022 into this allegation is because he was in fact trying to expand his case to bring back in an allegation about the same dates which Judge Faulker has refused to allow as an amendment. We find we agree with that assertion given the circumstances and timing of it. To further support this we noted the Claimant tried at least three times to refer to the rejected amendment allegation in his evidence despite being clearly told the amendment had been refused.

97. We accept the evidence showing he had not he had not worked on machinery since 2021 and so his not working on machinery cannot have been because Mr Shorrock considered he was slow after meeting him on his return to work on 6 November 2022.

98. Mr Shorrock confirmed the term used for driving machinery is *"PIT Driving*" and is an indirect role. This covers powered pallets and low-level order pickers. He explained, if associate has not driven for 12 weeks, they need to complete a 10-hour refresher course and Mr Shorrock arranged this for the Claimant after he returned from an absence and he completed this on the 23 November 2022. He informed us there was an incident which meant a decision was made above his grade to remove PIT driving from all drivers. He told us because he was aware how much the Claimant wanted to drive, he asked Mr Ball to look into any opportunities that might arise in the Transfer-in team. He therefore denied telling the Claimant he was "*too slow*." Mr Shorrock told us "*double stackers*" are a type of machinery separate from PIT machinery and lifts pallets. He explained they are not typically used in the Stow department of which he was the manager of the Claimant. In fact, he confirmed no staff member in the stow department used a double stacker and so there was no difference in treatment.

99. Mr Kirby confirmed he had been contacted by Mr Haydon Ball who sought to check if the Claimant had up to date qualifications for machine driving. It appears the answer was he didn't at the point of contact and so it was arranged for the Claimant to undergo the required refresher training. He did this in February 2023. We accept that version.

100. Mr Shorrock explained "*problem solving*" was considered an indirect task. As such it was not within his remit. However, he relied upon the problem-solving data at page 345 of the bundle which shows the Claimant completed 56.71 hours of problem solving in November 2022 and 18.23 hours in December 2022. Therefore, the allegation the Claimant was not given the chance to problem solve is not borne out by the evidence.

101. In the hearing the Claimant put to Mr Kirby he had been sent a letter of concern in which it stated he was not able to apply for a transfer or for a promotion for the periods of 3 and 6 months given he had a letter of concern. Mr Kirby confirmed the policy wording is standard and referred the Tribunal to the template letter of concern at pages 97 and 98 of the supplemental bundle. The letter of concern sent to the Claimant is dated 7 December 2022. It is clear the Claimant understood at this stage he was not permitted to move department, albeit the Respondent refers to the ability of the Claimant to appeal the outcome and in fact he did not. We have accepted the wording in the letter was a standard template and nothing more.

102. At the hearing the Claimant confirmed his age group is identified as between 40 and 59, see paragraph 2.1 of the List of issues. He named three comparators. He

did not dispute he was aged 55 years in November 2022 when he alleges most of the things the Respondent did occur. Theo Wilson was said to be 57 years at the same time and so in fact older than the Claimant but within the same age band, Mary Powell was aged 48 years and so younger than the Claimant but again in the same age band and Vilia was aged 42 years and so younger but again in the same age band. This also meant two of those he had identified were younger and one was older. When this was put to him, he told us "*I wanted to show I was treated less favourably than people in my age group*" and admitted he could not point to any actual comparators treated better than himself who were not in his age group.

103. He also appeared unable to explain why he was pursuing a discrimination claim on the grounds of age if he was seeking to show those in his age group were treated better than himself. This would strongly suggest any difference in treatment was nothing to do with age.

104. Further, whilst we can understand the Claimant viewed those he worked with on the same shifts with as being in the same team, we accept the evidence of Mr Kilby, that the "*In-bound department*" was in fact split into three teams, each with their own line Manager and each with their own main roles, albeit at times they were called upon to help out in the different departments.

105. The Claimant did not maintain a consistent account of the differences between the teams. On day one of his evidence, he accepted he didn't work in the Transfer team as his main role indicated an implicit acceptance of more than one team in the department. On day two he said there were no teams, and it was all one department. This fluctuating evidence undermined his version, and we prefer Mr Kilby's evidence.

106. Given all three comparators worked in different teams from the Claimant and their tasks were different, we do not consider them appropriate comparators as their roles were materially different. The Claimant was unwilling to accept that his role was not predominately the same, but he has not adduced any clear evidence to counter anything the Respondent says about this in his own witness evidence, his witness's statement or any of the documents. We are satisfied the comparators he has named are not appropriate actual comparators for the purposes of the claim for Direct discrimination.

107. However, following the guidance we have set out herein, we took a step back and as a hypothetical comparator was in fact pleaded in the alternative, we decided to make findings of fact as to what happened and then concentrate on why it happened. If it was because of age, then it did not necessarily matter if this was based upon a hypothetical comparator. The Respondent does not seek to argue that the treatment was a proportionate means of achieving a legitimate aim.

108. Mr Kirby gave clear and credible evidence around this. He told us the Claimant had never asked him to withdraw any such allegation about age. He

referred us to the minutes of the Formal health Review where there is no record of such a request being made. He confirmed he had no such conversation with the Claimant.

109. We can see from the minutes of the 7 December 2022 the Claimant refused to sign the minutes. However, he did not thereafter seek to amend the minutes or suggest to the Respondent the minutes were not an accurate reflection of the meeting. He did not raise any grievance at the time. He was accompanied to the meeting by Julian Ene. The Claimant has filed a hearsay witness statement for Mr Ene. Mr Ene does not say the Claimant asked Mr Kirby to withdraw a statement made by Mr Shorrock about age and does not say the minutes of the meeting omitted this question.

110. We have been referred to the judgment of a claim brought by Mrs Vasiliu against the Respondent. This is a public document in any event. The Claimant is addressed in the judgment as a witness. The Tribunal dismissed all Mrs Vasiliu's claims and did not find her a reliable or truthful witness. Further, the Tribunal also found the Claimant was not a reliable or truthful witness and rejected his evidence.

111. Mr Kirby also says he had no knowledge of the Claimant's involvement in Tribunal proceedings, and we accept this evidence and nor was his decision to issue a letter of concern regarding the Claimant's absence from work influenced by any other individual. He made the decision himself and so this is not a case of an innocent manager being manipulated to issue a letter of concern.

112. Further, we note the Claimant had previous experience of the same or similar standard wording being used, because it appears in a previous warning letter sent to him dated as signed by him on the 6 July 2016 at page 111 and 112 of the bundle. In that warning he was told he could not change department for 6 months. As he does not allege this historical warning has anything to do with his age.

113. We accept the evidence of Mr Shorrock and Mr Kirby, they did not know about the employment proceedings of Ms Vasiliu until these proceedings.

114. Perhaps as an aside. We did not consider it a protected act to make a false allegation in bad faith. Given that Tribunal has found the evidence of the Claimant was untrue in Mrs Vasiliu's employment claims, we have some reservations his giving of that evidence can amount to a protected act as it would appear to us to fall into the category of giving false testimony in Tribunal proceedings and amounts to making intentionally false allegations. It is hard to detach the evidence given in those proceedings, from the fact he was a witness. If the protected act is that he was a witness only, and the content of what he said was not relevant it would make little sense. The protection must be that he is able to give evidence in connection with the rights under the Equality Act. However, is inevitably academic as we have found Mr Shorrock and Mr Kirby did not know about his role at the material times and so could not have acted on that basis.

115. Overall, we found the Claimant an unreliable and untruthful witness. He appeared willing to make entirely unfounded claims when faced with clear evidence to the contrary. He has resiled from some of his own allegations during the hearing and when faced with clear evidence of what he himself said, such as his own email where he raises age as the reason for his medical problems, he refused to answer the questions or alleged Counsel was not entitled to put the Respondent's case. We make it clear we are wholly satisfied he could understand and follow the hearing. He had the assistance of an interpreter throughout and yet often chose to answer in English. He told us he was reading the documents on his phone in English, when not in the witness stand where he had the use of the witness bundles.

116. We found the Respondent's witnesses truthful and reliable, and their evidence wholly supported by the contemporaneous and extensive documentary evidence.

Application of the law and the facts to the issues

Time limits

2.2.7 By Mr Shorrock, fail to conduct a Welcome Back meeting after the Claimant's return from sick leave on 6 November 2022.

117. This complaint was first mentioned by the Claimant on the 9 April 2023. He accepted in the hearing he expected the meeting on his return or within days thereafter. We are satisfied on his account he would have known there would be no such meeting by mid-November.

118. This claim is clearly out of time by a significant margin. The Claimant was able to file his original claim in January 2023. He has failed to give us any reason why he failed to make this allegation in that claim form. This was put to him and he simply kept repeating that he had not changed his claim. This is not correct. By not mentioning this allegation in his claim form he did seek to change his claim when he raised it on the 9 April 2023. We find this allegation is out of time.

119. We have found as a fact he did have a welcome back meeting 6 November 2022 and so this allegation fails for that reason. Had we found it had not occurred we would have refused to extend time on a just and equitable basis because the Claimant has given us no explanation for the delay and refused to accept, he had not changed his account.

2.2.1 After the Claimant returned from sick leave on 6 November 2022, by the Claimant's manager, Thomas Shorrock, not allow the Claimant to drive machinery because he said the Claimant was too slow.

120. Mr Shorrock denies he ever told the Claimant he could not drive machinery because he was too slow. We have found as a fact he did drive machinery after the 6 November 2022 and the decision regarding his driving of machinery had nothing to do with Mr Shorrock. It was a task within the remit of Mr Ball. We do not accept Mr Shorrock said he was too slow and so this allegation fails for that reason. The allegation is set around the events on the

6th November 2022. This is potentially in time. However, we have found it did not occur as claimed.

2.2.5 After his return from sick leave, not give the Claimant a chance to be a Problem Solver, a role he had undertaken prior to his absence.

121. This is potentially in time. Mr Shorrock explained problem solving was considered an indirect task. As such it was not within his remit. However, he relied upon the problem-solving data at page 345 of the bundle which shows the Claimant completed 56.71 hours of problem solving in November 2022 and 18.23 hours in December 2022. Therefore, the allegation the Claimant was not given the chance to problem solve is not borne out by the evidence. We have found as a fact he did problem solve and so this allegation fails for that reason.

2.2.6 After his return from sick leave on 6 November 2022, not permit the Claimant to change department.

122. He lodged his claim on the 10 January 2023. This claim is in time but fails because not only it the evidence clearly part of the standard template for all staff but it was not a decision made by Mr Shorrock as alleged.

2.2.8 By Mr Shorrock, fail to conduct a risk assessment after the Claimant's return from sick leave on 6 November 2022.

123. Mr Shorrock confirmed he didn't carry out a risk assessment when the Claimant returned from sick leave as there was no requirement to do this whenever an associate returns from sick leave. He points to what he recorded in the Informal health review to show there was no basis presented for a risk assessment and the Claimant did not suggest he needed one at the time. This is in time but again fails on our findings.

2.2.9 After his return from sick leave, refuse the Claimant the opportunity to work on/operate a Double Stacker (machinery for carrying very heavy objects).

124. Mr Shorrock told us this type of machinery is separate from PIT machinery and lifts pallets. He explained they are not typically used in the Stow department of which he was the manager of the Claimant. In fact, he confirmed no staff member in the stow department used a double stacker and so there was no difference in treatment. Further he told us when he found out the Claimant was trained to use this machinery, he passed that information to Mr Ball in case he had any use for it. Most of the allegations gave dates after the 30 August 2022 for the purposes of those complaints that did not require an amendment. They are in time but fail on the substantive findings.

Substantive allegations

125. For all the reasons set out herein and applying stage one, there must be primary facts from which the tribunal could decide – in the absence of any other explanation - that discrimination took place. The Claimant has not made out those primary facts on the evidence. The Claimant has failed to provide reliable and

sufficient evidence from which '*a reasonable tribunal could properly conclude'* on the balance of probabilities that there was discrimination.

126. Furthermore, the Respondent has proved on the balance of probabilities that the treatment was not for the proscribed reason. We have set out below each of the allegations and applied our findings.

Did the Respondent do the following things:

2.2.1 After the Claimant returned from sick leave on 6 November 2022, by the Claimant's manager, Thomas Shorrock, not allow the Claimant to drive machinery because he said the Claimant was too slow.

127. During cross-examination the Claimant told us, after he returned from sick leave on the 6 November 2022, he was not allowed to drive machinery and, on the 12-14 December 2022. Given our findings above this claim is not made out.

Did the employee reasonably understand that they had been disadvantaged?

128. We find the Claimant could not have reasonably believed he had been disadvantaged as he would have known he had not driven machinery in 2021 and that he raised his age as being a possible cause for his back and leg problems and not Mr Shorrock.

2.2.2 On 6 November 2022, by Mr Shorrock, say that the Claimant was too slow and needed too much time to go to the toilet and to drink water and that he was having too much 'idle' time, i.e., non-working time.

129. At the hearing the Claimant retracted this allegation. Based upon our findings it is not made out. This was not said by Mr Shorrock.

130. We find the Claimant could not have reasonably believed he had been disadvantaged as he would have known that he raised his age as being a possible cause for his back and leg problems and not Mr Shorrock and Mr Shorrock had not alleged, he was having too much idle time or that it was because of age.

2.2.3 On 14 November 2022, by Mr Shorrock, say that the cause of the Claimant's medical problems was that he was old and/or refuse to retract or modify that comment following the Claimant's email to him of 17 November 2022.

131. In the light of out findings this claim is not made out. We found it was in fact the Claimant that attributed his medical problems to age and not Mr Shorrock.

132. We find the Claimant could not have reasonably believed he had been disadvantaged as he would have known that he raised his age as being a possible cause for his back and leg problems.

2.2.4 By Mr Shorrock, write to the Claimant after an informal meeting on 14 November 2022 on his return from sick leave and say that the Claimant's problems were due to his age.

133. The only document in which there is a reference to age being raised is at page 56 and it is the Claimant's email copied into a document by Human Resources showing it is the Claimant who raised age. This allegation is not made out.

134. We find the Claimant could not have reasonably believed he had been disadvantaged as he would have known that he raised his age as being a possible cause for his back and leg problems and there is nothing in writing from Mr Shorrock saying he thought the Claimant's problems were due to his age.

2.2.5 After his return from sick leave, not give the Claimant a chance to be a Problem Solver, a role he had undertaken prior to his absence.

135. He was a problem solver after he returned from sick leave on the 6 November 2022 and this claim is not made out.

136. The Claimant could not have reasonably believed he had been disadvantaged as he will have known he was a problem solver after he returned from sick leave.

2.2.6 After his return from sick leave on 6 November 2022, not permit the Claimant to change department.

137. We have found the reference to not being able to move departments is standard policy wording and not Mr Shorrock's attempt to disadvantage the Claimant because of his age. For reasons already given we find the Claimant could not have reasonably believed he was disadvantaged.

2.2.7 By Mr Shorrock, fail to conduct a Welcome Back meeting after the Claimant's return from sick leave on 6 November 2022.

138. We have found Mr Shorrock did hold a welcome back meeting. For the reasons already given we find the Claimant could not have reasonably believed he had not had a welcome back meeting.

2.2.8 By Mr Shorrock, fail to conduct a risk assessment after the Claimant's return from sick leave on 6 November 2022.

139. In light of our findings. Mr Shorrock did not fail to conduct a risk assessment after the Claimant returned to work on the 6 November 2022 and this had nothing to do with the Claimant's age. We find the Claimant could not have reasonably understood he had been so disadvantaged on the basis of our findings.

2.2.9 After his return from sick leave, refuse the Claimant the opportunity to work on/operate a Double Stacker (machinery for carrying very heavy objects).

140. In light of our findings, the Claimant was not refused the opportunity to operate a double stacker and the availability of this work had nothing to do with his age. We find the Claimant could not have reasonably understood he had been so disadvantaged on the basis of our findings.

2.2.10 On 7 December 2022, by Daniel Kirby, refuse to withdraw the statement made by Mr Shorrock that the cause of the Claimant's medical problems was that he was old.

141. In light of our findings this is not made out. Mr Kirby did not refuse. Mr Shorrock did not make the statement. We find the Claimant could not have reasonably understood he had been so disadvantaged on the basis of our findings.

Was that less favourable treatment?

142. The Claimant identifies himself as being in the age group of being middle aged, between 40 and 59. He has not shown he suffered less favourable treatment than his identified comparators or any hypothetical comparator. There are material differences in roles between the Claimant and his identified comparators and his comparators are in his age group, and he says were treated more favourably. The claims on the comparators were as follows:

(i) In relation to the complaints at paragraphs 2.2.5, 2.2.7 and 2.2.8 above, Vilia who is 6 years younger than the Claimant.
(ii) In relation to the complaints at paragraph 2.2.5 and 2.2.9) Theo who is about the same age as the Claimant. 2.3.2.
(iii) In relation to the complaint at paragraph 2.2.6 above, Mandy who was aged between 48 and 51 and was allowed to change department.

Otherwise, a hypothetical comparator.

143. We are satisfied the comparators he has named are not appropriate actual comparators for the purposes of the claim for Direct discrimination. However, following the guidance we have set out herein, we took a step back and as a hypothetical comparator was in fact pleaded in the alternative, we decided to make findings of fact as to what happened and then concentrate on why it happened. If it was because of age, then it did not necessarily matter if this was based upon a hypothetical comparator. The Respondent does not seek to argue that the treatment was a proportionate means of achieving a legitimate aim. Based on our findings the Claimant did not suffer any less favourable treatment on account of his age and so a hypothetical comparator does not advance his case.

Harassment related to age (Equality Act 2010 section 26)

Did the claimant genuinely perceive the conduct as having that effect?

144. For the reasons given herein in our findings we do not accept the Claimant genuinely perceived the alleged conduct as having that effect. For all the reasons given herein in our findings we do not accept the Claimant's perception was reasonable.

145. The Claimant repeats the same allegations at paragraphs 2.2.1 to 2.2.10 in this claim. For the reasons already given those allegations are not made out. Therefore, the claim those allegations amounted to unwanted conduct also fails.

Furthermore, based upon our findings none of the Respondent's actions related to age.

Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? 3.5 If not, did it have that effect?

146. The Claimant asked us to accept he perceived the conduct of the Respondent as having the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In light of our findings, we reject this claim. We do not accept he genuinely held this perception or that he could have genuinely held the same based upon the evidence. Given out findings it is not reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27)

147. In light of our findings the Claimant has not shown he either did a protected act by giving untruthful evidence in the employment proceedings of Ms Vasiliu and the Respondent did not do any of the alleged things set out at 4.3 of the List of Issues. We have addressed this allegation under the Direct discrimination claim. Given our findings, we can find no connection between the alleged protected act and the letter of concern sent to the Claimant. He found himself in the Formal health Review process because he had triggered it for his length of absence. The standard letters of concern contain the exclusions from promotion and transfer, and we accept Mr Kirby's evidence this was the reason they were included in the letter of concern for the Claimant. The Claimant was able to provide any mitigation he had in the meeting he had with Mr Kirby on the 7 December 2022 (we have read the minutes) and he did not. The Claimant was given a right to appeal the outcome and did not exercise the right.

4.3.4 By Mr Shorrock, on 6 November 2022 and again in December 2022, informally warn the Claimant that he should not support his colleagues, "even in court".

148. As we have set out in our findings above. The Tribunal were faced with two very different accounts of the first meeting between the Claimant and Mr Shorrock. Based on our findings, we find the Claimant was not subject to this detriment because he had acted as a witness in Tribunal proceedings as alleged.

149. The critical question will be: Why did the employer subject the employee to that detriment? Was it because they had done (or might do) the protected act? Or was it wholly for other reasons? (***see Chief Constable of West Yorkshire Police v. Khan [2001] ICR 1065)***. We have found the Claimant was not subject to any detriment because he had done or might do a protected act. Even if his giving of untruthful evidence in the proceedings of Ms Vasiliu could amount to a protected act,

we have found Mr Shorrock and Mr Kirby didn't know about it and have given a reliable account of what happened and why. We have accepted their evidence. They did not act because they believed the Claimant had done or might do a protected act.

Conclusion

150. In conclusion, all the claims brought by the Claimant are not made out. We have not found him to be a reliable or truthful witness. We prefer the evidence of the Respondent and have set out herein why we have preferred the evidence we have.

151. The Claimant has made multiple and unmeritorious applications throughout these proceedings, and we were surprised by his conduct as recorded herein. The volume of correspondence with the Tribunal and the repetitive assertions he has made are held on the Tribunal file. Those allegations also include allegations against this Tribunal and Counsel for the Respondent which we have set out here and we have found without merit. What was said in the hearing has been recorded by the Tribunal service. This has been a unanimous decision.

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Employment Judge Mensah

Date 24.01.2025

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