EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	12 to 14 February 2025
Claimant:	Mr Armand Musaku		
Respondent:	DHL Services Limited		
Before:	Employment Judge Ramsden		
Representation:			
Claimant	In person		
Respondent	Mr J Arnold, Counsel		

RESERVED JUDGMENT

1. The Respondent's name is amended by consent to DHL Services Limited.
2. The Respondent has conceded that the Claimant was disabled for the purposes of the Equality Act 2010 (the **2010 Act**) in the period 11 October 2022 to 20 February 2023 (which is the period to which his depression-related disability discrimination complaints in this matter relate) by reason of depression.
3. The Tribunal finds that the Claimant was not disabled for the purposes of the Equality Act 2010 (the **2010 Act**) in the period 19 August 2022 to 20 February 2023 (which is the period to which his stress and anxiety-related disability discrimination complaints in this matter relate) by reason of stress and anxiety.
4. The Claimant's complaints of:
   a) Unfair dismissal;
   b) Direct disability discrimination;
   c) Discrimination arising from disability; and
   d) Failure to comply with the duty to make reasonable adjustments,

   do not succeed and are dismissed.

Background

5. The Claimant worked for the Respondent, a global logistics services provider, from 22 May 2002 until 20 February 2023, latterly as a Warehouse First Line Manager, out of the Respondent's Allington site.

6. The Claimant was dismissed with effect from 20 February 2023.

7. Following a period of ACAS Early Conciliation which began on 9 May and ended on 20 June, both of 2023, the Claimant presented a claim to the Employment Tribunal on 18 July 2023.

The Claimant's complaints

8. The Claimant's complaints, as defined in a Preliminary Hearing for Case Management before Employment Judge Rice-Burchell on 12 March 2024, and as modified by Employment Judge T Perry (to remove the reference to victimisation) on 24 June 2024, are that:

    a) He was unfairly dismissed, as described in section 98 of the Employment Rights Act 1996 (the **1996 Act**) (**Complaint 1**);

    b) He was treated less favourably because of disability (and he relies on stress and anxiety as the relevant disability here), in accordance with section 13 of the 2010 Act, when the Respondent:

        (i) Subjected him to disciplinary action (it was clarified in this hearing that this was a reference to disciplinary action taken against him in the period 19 August 2022 to 5 January 2023) (**Complaint 2**); and

        (ii) Changed the Claimant's shift pattern without consultation and with one week's notice (which the Claimant clarified in this hearing occurred on 11 October 2022) (**Complaint 3**);

    c) He was discriminated against because of something arising in consequence of his disability (namely, his inability to work certain shifts, which he says arise from both (i) his depression and (ii) his stress and anxiety) when the Respondent dismissed him on 20 February 2023, contrary to section 15 of the 2010 Act (**Complaint 4**); and

    d) The Respondent failed to comply with its duty to make reasonable adjustments for him in relation to its criterion that he work a shift pattern other than a shift pattern with Mrs Motycznska (as set out in sections 20 and 21 of the 2010 Act) (which the Claimant clarified in this hearing occurred on 11 October 2022). The Claimant says that the disabilities he relies on for this complaint are both (i) his depression, and (ii) his stress and anxiety (**Complaint 5**).

9. The Respondent accepts that the Claimant was disabled at the relevant times by reason of his depression (but does not concede that it knew about it). The

Respondent it does not accept that he was disabled at the relevant times by reason of his stress and anxiety.

10. The list of issues produced by those hearings, as modified by clarification provided by the Claimant in this hearing (with those clarifications provided in this hearing denoted by underlined text), is appended to this judgment.

11. The Claimant wrote to the Tribunal asking for a Witness Order to be made compelling that evidence be provided by Mrs Motycznska on 7 January 2025.

12. EJ Heath replied to him on 24 January 2025, noting that the Claimant had not made an application for a Witness Order because he had failed to set out:

    a) The efforts he had made to secure the voluntary co-operation of Mrs Motycznska;

    b) The evidence she would be expected to give;

    c) Why that evidence would be relevant to the case; and

    d) Why an order is required to compel attendance.

    EJ Heath noted that the Claimant had provided none of that information.

13. The Claimant's brief response on 31 January 2025 did not provide any of that information, and so no such Order was made.

The hearing

<u>The hearing window</u>

14. At the Preliminary Hearing before EJ T Perry on 24 June 2024, the parties expressed concern that the three-day listing made for the Final Hearing of the case was insufficient. EJ T Perry agreed, and asked the parties to write to the Tribunal with their dates to avoid by 8 July 2024 so it could be relisted for a five day period. The parties did that, but regrettably, the Tribunal did not relist the hearing, and the matter remained listed for this three-day period.

15. The Respondent enquired of the Tribunal on 5 November 2024 as to whether the matter would be relisted, noting that it understood there would be four or five witnesses who would give evidence. Again, the Tribunal regrettably did not respond.

16. Consequently, upon receiving the papers, EJ Ramsden considered that the matter could not be heard in the three-day hearing window provided for, and so released the non-legal members so as to save public expense, anticipating that the remaining dispute about disability status could be heard and determined but that the full merits hearing would need to be relisted.

17. The parties had assumed the full merits hearing would be proceeding, and the Respondent had streamlined its questions for cross-examination carefully, so as to look to complete its questions for the Claimant in two hours. The Claimant had also prepared questions for all four of the Respondent witnesses, and anticipated

that evidence with those witnesses could be completed within a day, leaving the third day for submissions and possible oral judgment. The parties agreed that it would be sensible to restrict this hearing to liability only, with *Polkey*/*Chagger* and contribution issues also being dealt with (i.e., issues 3.6.4, 3.6.5, 3.6.9, 3.8 and 9.7 from the List of Issues).

18. The Employment Judge nonetheless gave the parties the option of proceeding as they had envisaged, or relisting the matter for five days in June 2026 (the next available five-day hearing window). Both parties expressed the wish to proceed with the final hearing now, and so the Employment Judge determined it was in the interests of justice to do so on the terms suggested (liability only, with principles such as *Polkey*/*Chagger* and contribution determined).

Other matters

19. Each party consented to the Employment Judge sitting alone (in accordance with section 4(9) of the Employment Tribunals Act 1996).

20. The Respondent was represented in the hearing by Mr Arnold, Counsel. The Claimant presented his own case.

21. The Respondent had prepared an agreed hearing bundle of 581 pages, and assembled the Claimant's medical evidence into a separate 386 page bundle. The Respondent had prepared a chronology and cast list, which documents the Claimant confirmed were agreed.

22. The Tribunal made it plain to the parties that they could only rely on the Tribunal reading and considering those documents in the bundles to which it was taken by written or oral witness evidence or submissions, and that the parties should not assume that the Tribunal would otherwise read any contents of the bundles which neither party was relying on.

23. The Claimant gave evidence on his own behalf, and the following individuals gave evidence on behalf of the Respondent:

    a) Stella Mackway-Jones, the Respondent's HR Business Partner. Ms Mackway-Jones provided HR support in relation to:

        (i) A grievance brought by Richard Parkes, Shift Operations Manager, pertaining to the Claimant; and

        (ii) A complaint brought by Mrs Motyczynska, Shift Operations Manager, against the Claimant;

    b) Paul Osborne, the Respondent's Transport Manager, who heard the Claimant's appeal against the outcome of the disciplinary process relating to him;

    c) Mark William David Stevens, the Respondent's Day Shift Operations Manager, who was appointed by the Respondent to consider the Claimant's return to work after his medical suspension; and

d) Michael David Ansell, the Respondent's Operations Development Director, who heard and determined the Claimant's appeal against Mr Stevens' decision to dismiss him.

24. Each of the Respondent and the Claimant made submissions in support of their respective positions.

25. At the outset of the hearing, the Employment Judge asked the parties if either side needed any adjustments to the usual conduct of the hearing. The Claimant said that he may need extra breaks, and confirmed that he would ask for them if needed. The hearing timetable was intense, but each party confirmed their readiness to continue after each break.

Facts

Facts generally, excluding disputed disability status relating to the Claimant's stress and anxiety

26. The Claimant commenced employment with the Respondent on 20 May 2002, and had worked at its Allington site for a number of years before his dismissal.

Structure of work on the Late Shift at the Allington site

27. The Respondent operates out of numerous sites - Allington is one of them. During the time when the Claimant worked at the Allington site, the site was providing logistics services to two significant clients: Morrisons and Hugo Boss. The Claimant worked on the Morrisons account, which involved numerous individuals at Allington, working 24 hours a day, 363 days of the year. There are various key performance indicators (**KPIs**) in the Morrisons contract, and the management personnel working on it were required to manage the people below them in the hierarchy to meet those KPIs.

28. At the Allington site at the time, the work to be performed pursuant to the Morrisons' contract was organised as follows:

a) Warehouse Operatives would unload large volumes of goods delivered to site, and would then pick and load them onto pallets to be taken by delivery vehicles for delivery to Morrisons stores, etc. Those Warehouse Operatives worked on one of three shift patterns: 6am to 2pm (known as the "day shift"), 2pm to 10pm (known as the "late shift"), and 10pm to 6am (known as the "night shift");

b) Warehouse First Line Managers (or **Warehouse FLMs**) were senior to Warehouse Operatives, and performed a management role. They were responsible for overseeing the work performed by the Warehouse Operatives, and for forward-planning staffing levels for warehouse operations as well as driving performance, productivity and operational standards;

c) Shift Operations Managers (**SOMs**) directed the Warehouse FLMs. This was referred to as “running the plan” for the day;

d) The SOMs reported into the Operations Manager for the contract; and

e) The site’s General Manager sat over the whole structure.

29. At the time with which this Claim is concerned, Richard Parkes performed the function of Operations Manager.

30. When there was no SOM present, one of the Warehouse FLMs would “step up” and “run the plan” for that shift.

31. Because the terms of the contract between the Respondent and Morrisons, Morrisons had full visibility of the management of the logistics operation at Allington. Mr Stevens gave unchallenged evidence that if the Respondent wanted to change the management structure on the contract, that would need Morrisons’ approval.

Grievances: Mr Parkes and the Claimant, 2021/2022

32. The Claimant had previously performed the role of SOM in the period May 2018 to July 2020, but had stepped down from that position.

33. The Claimant raised a grievance, which was heard in January and March 2022, complaining that since he had stepped down from the SOM role he was treated poorly by the management team, who wanted him “out”, naming Mr Parkes and another individual as the managers involved. This resulted in mediation between the Claimant and Mr Parkes on 30 May 2022.

34. Mr Parkes wrote to Mrs Mackay-Jones on 19 June 2022, complaining that the Claimant had breached a term of their mediation which provided that that process would be kept confidential. When subsequently interviewed about his grievance, Mr Parkes said that he considered the Claimant’s so serious that he thought it to be a matter of gross misconduct matter.

The incident involving the Claimant and Mrs Motyczńska, 28 June 2022

35. In June 2022:

a) (At least prior to 28 June) Both the Claimant and Mrs Motyczńska were performing roles as Warehouse FLMs;

b) The Respondent had a vacancy for a SOM; and

c) The Claimant applied for that vacancy, and unbeknownst to him, so had Mrs Motyczńska.

36. The Claimant says that:

a) In the lead up to the 28 June 2022 incident, he had been encouraging Mrs Motyczńska to apply for the SOM role;

b) When, on 28 June 2022, Mrs Motycznska told him that she would be running the plan that day, he did not say anything;

c) Mrs Motycznska then said to him: "*What? Shouldn't I do it?*";

d) In response, the Claimant referred to the conversations they had had previously, where he had encouraged her to apply for the SOM vacancy, and she had said she did not think she would be good enough. The Claimant asked what had made her change her mind; and

e) Mrs Motycznska then walked away from him, saying that she had to work on the handover from the day SOM.

37. It transpired that Mrs Motycznska had already been appointed into the SOM vacancy, but had been asked by Mr Parkes not to tell people that until it had been announced. This explained why she was running the plan that day, but Mrs Motycznska's promotion only became known to the Claimant and others later that day.

38. Mrs Motycznska was not a witness in the Tribunal proceedings.

39. The following day, Mrs Motycznska made a complaint to the Respondent about the Claimant's behaviour during the rest of that shift on 28 June 2022 and after it ended (described in more detail below), saying he was aggressive towards her, undermined and humiliated her, and was offensive towards her.

40. It is accepted that, on 28 June 2022, Mrs Motycznska called the Claimant an offensive name, and the Respondent upheld a grievance raised by the Claimant about that matter on 30 June 2022.

The immediate aftermath of the incident

41. On 29 June 2022 Mrs Motycznska made a complaint to the Respondent about what had occurred between her and the Claimant the day before, in a meeting with Mr Parkes and Mrs Mackway-Jones. The notes, signed by her, record her as having said that the Claimant had shouted at her, refused to attend a meeting she had called, accused her of lying about what a colleague had said to her, was trying to unsettle her, picked on her in front of colleagues, and sent her a WhatsApp message after work ended that:

a) Referred to her as a simple/stupid woman;

b) Implied that Mr Parkes would expect her to perform sexual favours in return for the promotion; and

c) Suggested that Mrs Motycznska was using her looks to 'curry favour' with Mr Parkes.

42. When asked by Mr Parkes how all of this made her feel, Mrs Motycznska is recorded as having said: "*I feel humiliated and the worst thing is the sexual comments he's made, that is the most offensive… I work hard in my job*". In response to a question asked by Mrs Mackway-Jones about what she wanted to

happen as a result of the complaint, Mrs Motycznska replied: "*It is really hard to work with someone who offends you and humiliates you all the time.*"

43. The Claimant denies that Mrs Motycznska's complaint was well-founded, and avers that Mrs Motycznska was pressured into making this complaint, firstly, by her husband, who also worked at the Allington site for the Respondent (and worked on the day shift for the Morrisons contract), and by Mr Parkes (who the Claimant says bore a grudge against him).

44. Mr Parkes has since left the Respondent's employment. Mrs Mackway-Jones gave evidence to the Tribunal that she did not know what preceded Mrs Motycznska's complaint – i.e., whether it was prompted by pressure from her husband and/or Mr Parkes - but that she (Mrs Mackway-Jones) witnessed Mrs Motycznska's significant distress in the meeting, saying that she was tearful and not capable of writing a witness statement.

45. Because of the Claimant's claim that Mr Parkes pressured Mrs Motycznska into making that statement, Mrs Motycznska was asked about that subsequently by Mr Ansell on 27 March 2023, when Mrs Motycznska denied that was the case. Instead, she said that the Claimant would have said that because he and Mr Parkes did not like each other.

46. The Claimant repeatedly told the Tribunal that Mrs Motycznska told him that Mr Parkes *did* apply that pressure, and the Claimant maintains that if Mrs Motycznska had genuinely felt as was described in the 29 June meeting, she would not have been on friendly terms with the Claimant thereafter, which he avers she was and still is.

47. The Claimant was suspended from work on 29 June 2022 so that the Respondent could investigate allegations that he had:

    a) Breached confidentiality relating to a mediation (i.e., Mr Parkes' complaint); and

    b) Displayed inappropriate behaviour towards a colleague (i.e., based on what Mrs Motycznska had complained of).

The investigation of the complaints made by Mr Parkes and Mrs Motycznska, 1 July to 19 August 2022

48. Mark Macaulay, an Operations Manager, was appointed as the Investigations Manager for the misconduct allegations against the Claimant, and he interviewed:

    a) Mrs Motycznska, on 1 July 2022 and 14 August 2022;

    b) The Claimant, on 5 July 2022 and 16 August 2022;

    c) A colleague of the Claimant's and Mrs Motycznska's, Adil Daiche, who was working with them on 28 June 2022. Mr Daiche when asked on 7 July 2022 if he witnessed any conflict between the Claimant and Mrs Motycznska on

28 June, replied "*Not really, no, a little bit of conversation, but nothing*"; and

d) Another of their colleagues, Dagmara Kot, on 7 July 2022, who described the Claimant as being "*challenging*" on 28 June 2022, but said that Mrs Motycznska "*was fine*". She recalled that when the Claimant was questioning Mrs Motycznska's email later in the day, "*Someone asked why are you picking on her? And he said to me do you think I am picking on her and I said yes I do. Then he stormed off across the car park… As we walked across [the car park] he was on the phone in his car and he started shouting Veronika, Veronika but she said come on I don't want to talk to him now, let's go home and that was it*".

49. In his interview with Mark Macauley on 5 July 2022 the Claimant admitted:

a) That he and Mrs Motycznska had a bit of a dispute and that he had challenged an operational decision of hers;

b) That he "*might have raised his voice*", but said that being loud is in his nature;

c) That he challenged something Mrs Motycznska had said in an email that day; and

d) That he and Mrs Motycznska had each thought the other was responsible for upsetting a colleague, Adil, and that he had called across the car park for her when Adil called the Claimant.

50. Mr Macauley determined that there was a disciplinary case to answer in respect of the two allegations against the Claimant on 19 August 2022, and the Claimant was required to attend a disciplinary hearing.

51. By Complaint 2 the Claimant avers that the reason he was subjected to disciplinary action in the period 19 August 2022 to 5 January 2023 was because of his stress and anxiety (which he says was and is a disability for 2010 Act purposes). However, in the course of his evidence he said he was not subjected to *disciplinary action* because of his disability, but rather what he described as being a "punitive sanction" of *changing his shift pattern* was done by the Respondent because it knew of his personal issues and his health issues, and was done to effectively force the termination of his employment. Mr Arnold pointed out to the Claimant that by that evidence he was effectively conceding Complaint 2, and the Claimant repeated that he was not subjected to disciplinary action because of his disability. This was explained to the Claimant by the Employment Judge as an effective withdrawal of Complaint 2 - and the Claimant emphatically repeated that it was the changing of his shift pattern that was done (he says) because of his stress and anxiety (i.e., Complaint 3), not the act of subjecting him to disciplinary action.

Beyond the immediate aftermath of the incident: the relationship between the Claimant and Mrs Motycznska

52. The Claimant says that he and Mrs Motycznska had a forthright relationship, where they were honest with each other, but that there was very good communication between him and Mrs Motycznska from 30 June, and that they are still friends.

53. The Respondent says:

    a) Mr Ansell met with Mrs Motycznska on 27 March 2023, in which meeting he put to Mrs Motycznska that the Claimant's view was that they had on-going friendly relations. In reply, Mrs Motycznska said that "*I felt guilty for him and his family*". When asked by Mr Ansell if she could work with the Claimant again, Mrs Motycznska said "*It would be very hard for me. I can't imagine it – not sure I could manage it*".

    b) In any event, because Mr Ansell considered there was a possibility that the working relationship could be mended, he encouraged Mrs Motycznska to agree to mediation with the Claimant, which she did. That mediation (which took place on 3 May 2023, and is referred to below) was unsuccessful, which shows that beyond the immediate aftermath of the 28 June 2022 incident the relationship between Mrs Motycznska and the Claimant was not salvageable, and it was not reasonable to expect Mrs Motycznska to have to work with the Claimant.

54. The Tribunal notes that:

    a) When the Claimant was interviewed on 4 July 2022 (nearly a week after the incident) about his grievance against Mrs Motycznska (pertaining to her calling him an offensive name on 28 June 2022), the Claimant was asked about the outcome he sought from the grievance. The notes he signed to confirm their accuracy record him as having said: "*An apology would be nice, either via mediation or via an email or a shake of hands, but I request an apology*", and "*coaching for the person in appropriate behaviours and how they should conduct themselves. Let is be a learning curve, because of my goodness I don't want anyone to lose their job over this, but I cannot accept being told such things*";

    b) When the Claimant was interviewed about the allegations against him on 5 July 2022 he described his relationship with Mrs Motycznska as one of friendship. He also said: "*If I am going to be honest, if you ask Veronika [Mrs Motycznska] if she wants to work with me now she would say no and if you ask her why she will say it's because of how I challenge… But yes we have a very good relationship*";

    c) The Claimant asked Mr Macauley, in their meeting of 5 July 2022, whether Mrs Motycznska was still of the same state of mind as she was when she made a complaint about the Claimant;

d) Mr Macauley asked the Claimant on 16 August 2022: "*Do you know why [Mrs Motycznska] would have deleted you from Social Media after [the 28 June incident]*", and the Claimant replied "*I don't know, I can't comment on that*"; and

e) Mrs Motycznska's explanation to Mr Ansell on 27 March 2023 for why there was still personal correspondence between her and the Claimant when Mrs Motycznska was telling Mr Ansell that she did not wish to work with the Claimant was that she felt guilty about what was happening to the Claimant, and therefore to his family, as a result of the complaint she had made about his behaviour. Mrs Motycznska stated in that meeting that:

(i) The Claimant was trying to put the blame for the situation on her; and

(ii) She could not envisage working with the Claimant again.

The disciplinary hearing, 21 September 2022 and 10 October 2022

55. John Clark, the Respondent's Warehouse Shift Manager, was appointed by the Respondent as the Disciplinary Manager. He met with the Claimant and his trade union representative, Ray Field, along with a note-taker, initially on 21 September 2022.

56. The allegations put to the Claimant were that:

a) He had breached confidentiality between 30 May and 14 June 2022, by repeating comments made in a confidential mediation by Mr Parkes to Mrs Motycznska; and

b) He had displayed inappropriate behaviour towards Mrs Motycznska on 29 June 2022.

57. That hearing was adjourned and resumed on 10 October 2022.

58. The first allegation was found not to be made out, but the second was, and the Claimant was issued with a final written warning (to apply for a 12 month period) as a result. The Claimant was informed of those conclusions in the meeting, and was told that the Respondent now "*need[s] to figure out how we support [the Claimant's return to work]*". The Claimant's trade union representative asked that a letter be written to him, setting out the ground rules for the future. Mr Clark replied that "*we will work with site to make sure transition is smooth*".

59. A letter setting out the outcome of the disciplinary hearing was sent to the Claimant on 11 October 2022. That confirmed that, as regards the second allegation pertaining to the 28 June incident, the Claimant was found to have:

a) Questioned Mrs Motycznska and her decisions;

b) Shouted at Mrs Motycznska across the car park after the shift had finished;

c) Sent a lewd and inappropriate message to Mrs Motycznska after that day of work;

d) Made Mrs Motycznska feel humiliated and very offended;

e) Prior to that day made underhand comments to Mrs Motycznska for an extended period of time, criticising her ability and questioning her decisions;

f) Made Mrs Motycznska feel that she is not good enough for the role,

which was found to be harassment and bullying, breaching the Respondent's Diversity & Respect at Work Policy.

The Claimant was informed of the decision to change his shift pattern, 11 October 2022

60. In the email attaching that letter, Mr Clark informed the Claimant that:

"*the site… feel it would be better if you came back on either night shift, for which you would get a 20% shift premium for, or a day shift, for which there would be no premium. The change in shift is to try and minimise the opportunity for further difficulties between all parties involved in both these grievances.*

As you're required a weeks' notice for a change in shift pattern, you return date would be 18th October 2022 either at the start of the day or night shift, depending on your decision."

61. The Claimant wrote to Mr Clark the next day to complain that the shift change had not been discussed during the disciplinary hearing, and saying that he could not work any other shifts "*due to personal circumstances and health reasons*". He also said that "*shift change notice is one month from the day that consultation has been complete[d] and so it has to be fair and considerate to colleagues needs*". He asked that this issue be considered as part of his appeal against the disciplinary outcome.

62. The Claimant says that the Respondent decided to change his shift pattern so as to force him to resign, as the Respondent knew that because of both:

a) His stress and anxiety (which the Claimant says amounted to a disability for 2010 Act purposes); and

b) His son's health, and his caring responsibilities in respect of his son as a result,

the Claimant was not able to work any other shift pattern besides the late shift. The Claimant therefore says that the Respondent's decision to change his shift pattern:

(i) Was an act of direct disability discrimination (Complaint 3); and

(ii) Was a failure on the Respondent's part to comply with its duties to make reasonable adjustments in respect of him (Complaint 5).

63. The Respondent says that:

    a) The reason the Respondent determined that the Claimant could not return to work the late shift pattern was how the Claimant had treated Mrs Motycznska, and the irreparable nature of the damage done to that relationship by the Claimant's actions.

    b) The reason for this decision was not either:

        (i) The Claimant's health (the Respondent does not concede that the Claimant's stress and anxiety amounted to a disability for 2010 Act purposes); or

        (ii) The Claimant's caring responsibilities for his son (and the Respondent notes that the Claimant's application to amend his claim to include complaints of associative discrimination and victimisation pertaining to his son's disabilities was rejected by the Tribunal and so does not form part of his claim).

64. The Tribunal needs to determine the answer to whether disability was a significant influence in the Respondent's decision, but will do so at a later stage, as subsequent events in the chronology are relevant to the answer.

The Claimant appealed the outcome of the disciplinary process

65. The Claimant sent an appeal to Farley Scutts, the General Manager of the Respondent's Allington site, on 13 October 2022, saying that his reasons for appealing were:

    a) How the investigation and disciplinary hearing were handled;

    b) That he was not allowed to present all the evidence he had collected; and

    c) That the outcome was very unfair and unjust considering the poor investigation.

66. The Claimant commenced a period of sickness absence on 25 October 2022, and the statement of fitness for work of that date gave the reason for his absence as "*work related stress*".

67. Mr Osborne was appointed as the Appeal Hearing Manager, and he wrote to the Claimant to make arrangements for the Appeal Hearing on 10 November 2022.

68. The Claimant was assessed as not fit for work on 15 November 2022 by reason of "*stress at work*" until 29 November 2022.

69. The appeal hearing went ahead on 30 November 2022, with Ms Mackway-Jones present as note-taker, and Mr Field as the Claimant's trade union representative. The Claimant raised 46 concerns with the decisions and processes that had been followed regarding the investigation of the allegation concerning the 28 June incident. He also expressed his significant concerns with the Respondent's decision to change his shift pattern, and Mr Osborne said that that issue was not

part of the appeal, he said he would look into it. It was observed that if the Claimant were to work another shift, he and Mrs Motycznska would see each other at shift handover, but not otherwise. The meeting was adjourned for Mr Osborne to look into the points raised.

Medical suspension, 30 November 2022

70. Ms Mackway-Jones wrote to the Claimant on 30 November 2022, suspending him on full pay with immediate effect, on medical grounds, to allow the Respondent to gain additional medical advice regarding his then-current fitness to perform his duties.

71. Following that referral, Occupational Health produced a report, on 9 December 2022. The Consultant Occupational Physician who assessed the Claimant recorded that:

    a) The Claimant told them that he finds considerable difficulties in dealing with the patterns of being asleep and awake if he were to work either the Day Shift or the Night Shift;

    b) The Claimant felt the changes would have an adverse psychological impact on him;

    c) The Claimant felt that the shift changes would make it difficult for him to play as active a part in the care for his son (who has Autism and Epilepsy); and

    d) The Physician considered the Claimant fit for work.

The disciplinary appeal hearing resumed on 20 December 2022

72. At the resumption of the disciplinary appeal meeting Mr Osborne read out a pre-prepared statement responding to the 46 points the Claimant raised in the previous part of the appeal hearing. None of the complaints made by the Claimant were upheld by Mr Osborne, and the disciplinary sanction imposed by Mr Clark was confirmed. Mr Osborne's summary of his thoughts (which formed part of the pre-prepared statement he read out) was that the vast majority of the Claimant's appeal points did not actually relate to how he behaved towards Mrs Motycznska on 28 June, but rather related to how the Claimant felt Mr Parkes behaved towards him. Mr Osborne concluded that that did not justify how the Claimant acted towards Mrs Motycznska. Mr Osborne concluded that he "*did not feel that the sanction was unfair or unjust"*, and so he dismissed the Claimant's appeal and upheld the sanction imposed by Mr Clark.

73. That outcome was confirmed to the Claimant in writing on 5 January 2023.

The Claimant pursued the question of who took the decision that he was not to be permitted to return to Late Shifts, December 2022/January 2023

74. The Claimant noted that:

a) The disciplinary outcome delivered orally in the disciplinary hearing by Mr Clark did not refer to shift change as a sanction flowing from that process;

b) Nor did the letter recording the outcome of that process; and

c) Mr Clark referred to it in the email to which the disciplinary outcome letter was attached, and the reference seemed to suggest that the decision to change the Claimant's shift pattern did not come from him ("*the site… feel it would be better if you came back on either night shift*").

75. The Claimant therefore sought to establish who had taken the decision that he could not return to the late shift by asking Mr Clark on 22 and 23 December 2022. In the latter email, the Claimant stated:

"*This has affected my health and my life to extreme and I am hoping that you would understand the grieve and distress I am going through.*"

76. The Respondent's Lead HR Business Partner wrote to the Claimant on 9 January 2023 to confirm that the decision had been taken by "*the senior management team… as a duty of care towards Veronica as, having considered the possibility of your return, it was not deemed tenable for you to return to the late shift as your relationship with Veronica has irretrievably broken down and it is not possible for you to work together going forward.*"

77. On the same day (9 January 2023), the Claimant asked the Lead HR Business Partner to also consider the impact on his wellbeing, as well as Mrs Motycznska's, and he noted that no attempt to restore their relationship, e.g., through mediation, had been attempted by the Respondent.

Health review meetings

78. The 9 December 2022 Occupational Health Report was discussed by the Claimant with Mr Stevens on 11 January 2023, and Mr Stevens wrote to the Claimant the next day to confirm what had been discussed. Given the report advised the Claimant was fit to return to work, part of their discussion centred upon which roles were available to the Claimant to consider in light of the Respondent's decision that he should not be permitted to return to Late Shifts on the Morrisons' contract (i.e., redeployment options). The Claimant remained on medical suspension.

Redeployment discussions

79. The Claimant and Mr Stevens discussed redeployment options further on 27 January 2023, and on 10 February 2023, before meeting on 20 February 2023 for a "health review meeting". Mr Stevens said that, as was the case when they discussed the issue at their previous two meetings:

a) The Respondent was not prepared to consider the Claimant returning to work on the Late Shifts at Allington;

b) There were no other vacancies available at Allington for the same shift pattern on a different client contract;

c) The Claimant was not prepared to return to Allington but working the Day Shift or the Night Shift;

d) There was a vacancy at the Respondent's Dartford site, but the Claimant had confirmed that he was not interested in that vacancy unless it came with a relocation package; and

e) The Respondent could not have the Claimant return to work on a 9am to 5pm shift pattern, because there was no such shift time at Allington. Mr Stevens acknowledged that the Respondent is obliged to make reasonable adjustments, but said that it is not obliged to create a role where none exists, and that it would not be operationally feasible to do so because it would impact the Warehouse FLMs working the other shift patterns (as there would be a gap prior to the Claimant's 9am start, and an overlap with the Late Shift, which would mean the Claimant working alongside Mrs Motycznska, which was not tenable to the Respondent).

80. Mr Stevens informed the Claimant on 20 February 2023 that he had decided to dismiss him for some other substantial reason, namely:

(i) That the Claimant was not permitted to work Late Shifts on the Morrisons' contract; and

(ii) There were no other suitable roles available that fit within the Claimant's parameters or that he would accept.

The Claimant stated that he was prepared to provide the proof that he and Mrs Motycznska were good friends, and so there was no reason for him not being permitted to return to work Late Shifts on the Morrisons' contract.

81. The Claimant avers that his dismissal was discrimination arising from disability, in that his inability to work Day Shifts or Night Shifts arose in consequence of his disabilities of:

a) Stress and anxiety; and

b) Depression,

each of which he says amounted to disabilities for 2010 Act purposes (Complaint 4). The Respondent denies this allegation, contending that:

(i) The Claimant's inability to work Day Shifts or Late Shifts was because of his sleep pattern, and his caring responsibilities for his son, not because of the Claimant's disability; and

(ii) The Respondent says that its dismissal of the Claimant was a proportionate means of achieving one or more legitimate aims, namely:

I. The need for the Respondent to have effective workforce planning, including but not limited to the need to ensure that its workforce is efficient and effective;

II. Operational needs;

III. The need to ensure that service delivery/operational targets/key performance indicators are met; and/or

IV. The requirement for the Respondent to manage its workforce in alignment with the operational requirements of its customer, Morrisons.

82. Mr Stevens wrote to the Claimant the following day (21 February 2023) to confirm what had been discussed and his decision. In that letter, Mr Stevens acknowledged that the Claimant had evidence he had wanted to be discussed that his relationship with Mrs Motycznska was good, but Mr Stevens said that there was other evidence that suggested it was broken beyond repair. Mr Stevens also noted the Claimant's request for flexible working by the creation of a 9am to 5pm shift for the Claimant. Mr Stevens said that the Respondent was aware of its obligations to make reasonable adjustments, but it was not a reasonable one to make as:

a) The management team was divided among the shifts to fit the profile of the operations clock, and moving one Warehouse FLM outside of these shift hours would impact every shift and necessitate moving other Warehouse FLMs to cover the gaps generated; and

b) Working until 5pm would overlap with the Late Shift, and would mean the Claimant working alongside Mrs Motycznska, which was not tenable in the circumstances.

Appeal against dismissal, 27 February 2023

83. The Claimant appealed Mr Stevens' decision to dismiss him on the same date as the written outcome letter was sent to him. The Claimant raised 19 grounds of appeal.

Meeting regarding appeal against dismissal, 23 March 2023

84. The Claimant's appeal was heard by Mr Ansell on 23 March 2023. The Claimant was accompanied by his trade union representative, and a note-taker was also present. At that meeting:

a) The Claimant read a pre-prepared statement;

b) Mr Ansell reviewed the evidence gathered by the Claimant that he was still friends with Mrs Motycznska, in the form of printed WhatsApp, Teams and Smart Connect messages. The Claimant confirmed that was all of the evidence he had on that issue;

85. Mr Ansell met with Mrs Motycznska on 27 March 2023. The notes of that meeting Mrs Motycznska as having said:

    a) That the Claimant had been contacting her and trying to put the blame on her;

    b) "*I don't want to work with him and can't imagine working with him again*";

    c) In response to the question of whether she had been subjected to any pressure from Mr Parkes to follow the grievance process, she said no; and

    d) "*It would be very hard for me [if I was to work with the Claimant again], I can't imagine it – not sure I could manage it*".

86. They met again on 13 April 2023, when Mr Ansell asked Mrs Motycznska about the possibility of her working with the Claimant again if they had had mediation beforehand. Mrs Motycznska confirmed that it was not outside the realms of possibility for them to work together again.

Mediation, 3 May 2023

87. With the support and direction of the Respondent, the Claimant and Mrs Motycznska attempted mediation on 3 May 2023. This was with one of the Respondent's Human Resources who was a trained mediator. The mediation was unsuccessful.

ACAS Early Conciliation, 9 May to 20 June 2023

88. The ACAS Early Conciliation period began on 9 May 2023 and ended on 20 June 2023.

Appeal outcome, 22 June 2023

89. Mr Ansell wrote to the Claimant on 22 June 2023 with the outcome of the Claimant's appeal against the decision to dismiss him – the appeal was unsuccessful and the Claimant's dismissal upheld. Mr Ansell, among other things:

    a) Acknowledged the Claimant's evidence regarding his relationship with Mrs Motycznska, but based on his two meetings with Mrs Motycznska, Mr Ansell expressed confidence that she did not want to work with the Claimant again, and could not see it happening in the future;

    b) Noted that mediation between the Claimant and Mrs Motycznska on 3 May 2023 had been unsuccessful. Mr Ansell stated that he believed that the Claimant and Mrs Motycznska working alongside each other again would not have been a viable option; and

    c) Stated that all available redeployment options had been explored.

The Claimant presented the Claim Form, 18 July 2023

90. The Claimant presented the Claim Form which commenced this case on 18 July 2023.

The Respondent advertised a 10 am to 6 pm Warehouse FLM position, October 2023

91. Some time after the Claimant's employment terminated, the Respondent advertised a Warehouse FLM position with the working hours of 10 am to 6 pm – which fitted into none of the Day Shift (6 am to 2 pm), Late Shift (2pm to 10 pm) or Night Shift (10 pm to 6 am) patterns at Allington. This shift was not significantly different to the 9 am to 5 pm shift proposed by the Claimant when he was discussing redeployment with Mr Stevens in January and February of 2023.

92. The Claimant applied for this position on 10 October 2023.

93. On 18 October 2023 the working hours of the vacant position were altered to align with the Late Shift (2 pm to 10 pm).

94. The Claimant was notified that his application was unsuccessful on 25 October 2023. The rejection of his application does not form the basis of a complaint to this Tribunal, but the Claimant does point to it as, he says, showing that the Respondent could have accommodated the working pattern the Claimant had requested in January and February 2023.

95. Mr Stevens' evidence was that this arose because a Day Shift Warehouse FLM was due to return to work after maternity leave and had some childcare problems, so it was envisaged that that particular Warehouse FLM could work from 10 am to 6 pm for a period – however the colleague decided to leave the business instead, so the advertisement altered to be for a Late Shift Warehouse FLM.

Preliminary Hearing for Case Management, 12 March 2024

96. This matter came before Employment Judge Rice-Birchall for Case Management on 12 March 2024. EJ Rice-Birchall made a number of Orders, including some relating to a list of complaints and issues which were drawn up.

A further Preliminary Hearing for Case Management, 24 June 2024

97. A further Preliminary Hearing for Case Management was conducted by Employment Judge T Perry on 24 June 2024. The Claimant made an application to amend his claim to include complaints of associative discrimination and victimisation pertaining to his son, who has epilepsy seizures at night, as well as some other health conditions. EJ T Perry refused to permit those amendments.

The Claimant asked the Tribunal to make a witness order in respect of Mrs Motyczńska, January 2025

98. The Claimant wrote to the Tribunal on 7 January 2025, asking the Claimant to make a witness order in respect of Mrs Motyczńska.

99. On 24 January 2025 the Tribunal wrote to the Claimant, saying that more information was needed so as to consider his application, namely the efforts the Claimant had made to secure her voluntary cooperation, the evidence she would give, why that evidence is relevant to the case, and why an order was required to compel her attendance.

100. The Claimant replied on 31 January 2025, stating merely that "*Mrs Motycznska is currently employed from respondent and does not feel comfortable to attend as a witness at my request.*" No further information was forthcoming before this hearing commenced on 12 February 2025.

Facts pertaining to disputed disability status concerning the Claimant's stress and anxiety

101. The Claimant has suffered from periods of stress, and had some stress-related absences from work, periodically from 2019.

102. In March 2019, the Claimant was diagnosed with stress at work, and had a period of sick leave from March until he returned to work in August 2019. His Statements of Fitness for Work at this time cited "*stress at work*", and some of them "*anxiety and depression*". The Claimant's symptoms at this time were poor sleep, poor concentration, lack of motivation, anxiety and stress. Because of these symptoms he had little interest in socialising. In that period of absence he attended counselling sessions, cognitive behavioural therapy (**CBT**), and was prescribed medication (Propranolol and Diazepam). The counselling ended on 28 June 2019, and the medication until August 2019, when the Claimant felt his symptoms were under control.

103. The Claimant was assessed by Occupational Health on 3 July 2019. The report then-produced referred to:

    a) The severe psychological effect of a disagreement at work with a particular manager;

    b) The Claimant's related suspension from work;

    c) The fact that the Respondent had stopped his pay; and

    d) The fact that his young son had been diagnosed with epilepsy.

    The report also recorded that if the work matter could be resolved, "*he would start to feel much better and almost certainly would be ale to start back at work again*". It concluded that: "*my view is that this is largely an organisational matter which has affected Armand's health, rather than a health condition that has affected his fitness for work*".

104. The Claimant described how his symptoms of depression and anxiety returned, triggered by the Covid pandemic and the subsequent death of his mother. He did not date this, but as his response was to "step down" from his-then Shift Operation Manager role on 20 July 2020 so as to reduce the pressure from work,

this episode must have been proximate to that date. His symptoms at that time were low mood, poor sleep and a general feeling of being depressed.

105. In December 2021 the Claimant described a further episode, where he experienced symptoms of low mood, feeling stressed, poor sleep, low self-esteem, irritable thoughts, a lack of appetite and a lack of desire to see friends – returned. He says that he believes that the trigger on this occasion was an allegation he was facing at work of gross misconduct. He took a period of sickness absence "*to control my symptoms*", returning to work in mid-April 2022. During this period he was prescribed Sertraline.

106. The Claimant was again assessed by Occupational Health on 4 January 2022. That report concluded that the Claimant's "*Assessment with me today would indicate Armand's current reduction in his psychological well-being is work related due to a relationship issue with a colleague within his department.*" At that time, the Claimant was not taking medication and was using techniques he learned from his CBT treatment in 2019 to reduce his anxiety levels. He had one counselling session, and contacted the Respondent's EAP service. He was assessed as being moderately anxious and severely depressed. The report included the following: "*It is my opinion that the Equality Act would be seen as applicable by the Courts on account of the possibility of disability attributable to his medical circumstances.*"

107. The Claimant experienced another episode of stress, he says "*due to the Misconduct Issue and subsequent actions of the Respondent*", in October 2022. His symptoms at that time included low mood, poor sleep, negative thoughts about how the Respondent had treated him and related to his view that the Respondent was manufacturing a case against him. The Claimant was prescribed Sertraline, and that course of medication continued for some time.

108. The Claimant describes his ongoing symptoms as being of low self-esteem, low confidence, a tendency to over-analyse his actions, dwell on thoughts about the Respondent's treatment of him, low concentration, and poor focus. He says that these have a significant impact on his life and his family. He says that his self-esteem and confidence have been shattered, and he is no longer interested in socialising.

109. As noted above, the Claimant was assessed by Occupational Health again on 9 December 2022, during his medical suspension by the Respondent, and the Physician noted that:

    a) The Claimant told them that he finds considerable difficulties in dealing with the patterns of being asleep and awake if he were to work either the Day Shift or the Night Shift;

    b) The Claimant felt the changes would have an adverse psychological impact on him; and

c) The Claimant felt that the shift changes would make it difficult for him to play as active a part in the care for his son (who has Autism and Epilepsy).

The Physician considered the Claimant fit for work.

Are there any inferences of discrimination that should properly be drawn from considering the totality of the primary facts?

110. The Tribunal is conscious that, as observed by Neill LJ in *King*, direct evidence of discrimination is unusual, but it does not mean that discrimination has not occurred. The Tribunal therefore needs to consider, in light of the totality of the primary facts (those agreed by the parties together with those found by the Tribunal), whether it is appropriate to infer from those facts, and all the circumstances of the case, that there was a disability ground for the acts the Claimant complains of (*Qureshi*). The Tribunal is conscious that any inferences drawn must be based on evidence (*Stockton on Tees BC v Aylott* [2010] ICR 1278).

111. The Tribunal has concluded that no such inferences should be drawn.

112. There were aspects of the factual matrix, and other circumstances of the case, that could have given cause for concern:

a) There was no direct evidence from a principal character in the factual situation, Mrs Motycznska. That in itself is not unusual, but what not common is for the parties to each put such a totally different spin on whether Mrs Motycznska supported their contention either that she could not work with the Claimant again (as the Respondent maintains), or that she could (as the Claimant avers);

b) There was also no direct evidence from Mr Clark, who was identified by the Respondent as the person who took the decision that the Claimant could not return to working the Late Shifts; and

c) As the Claimant pointed out, he was suspended while the Respondent investigated the misconduct allegations against him (brought by Mr Parkes and Mrs Motycznska). By contrast, Mrs Motycznska was not suspended while the Respondent investigated the Claimant's complaint against her, despite his request that she be so in a meeting between him and the Grievance Manager appointed in respect of his grievance against her.

113. However, it is important to put these matters into their proper context when considering whether they should form the basis for an inference of discrimination:

a) As regards the absence of direct evidence from Mrs Motycznska, the Tribunal was satisfied that its examination was of the evidence before the relevant decision-makers, namely Mr Clark, Mr Osborne, Mr Stevens and (critically) Mr Ansell – what they knew at the time they took their decisions.

The Tribunal has the copies of contemporaneous records of notes of meetings, and either those notes, or what was said in them, was what was considered by those individuals;

b) While the absence of direct evidence from Mr Clark was unfortunate, it was not in fact problematic, as Mr Clark's decision had been entirely and thoroughly examined by Mr Ansell, who was made available to the Tribunal; and

c) The Tribunal noted that suspension is not, in itself, automatically a disciplinary sanction, and nor has the Claimant relied upon it as the basis for a legal complaint. Moreover, the notes of the meetings where each of the Claimant's grievance against Mrs Motycznska, and Mrs Motycznska's complaint against the Claimant, were discussed, show a difference in how each of the complainants reacted to the event about which they were complaining. While Mrs Motycznska said on 29 June 2022 "*It is really hard to work with someone who offends you and humiliates you*", the Claimant made his complaint on 30 June 2022 (after he had been suspended by the Respondent), in which he referred to being called an offensive word and described that as "*inappropriate*" and "*unprofessional*" behaviour – he did not indicate that it would be difficult to work with Mrs Motycznska again. In the notes of the meeting in which the Claimant's grievance was discussed, he requested that Mrs Motycznska be suspended, because he had been suspended for inappropriate conduct and he said that she had also displayed inappropriate conduct, but he made no mention of feeling unable to work with her in the future, albeit that he thought it should be a matter for coaching for Mrs Motycznska, and should be the subject of an apology from her to him. The Claimant's request seemed to be more of a 'tit-for-tat' than an expression of a broken working relationship. This difference in response is therefore explicable by the way each complainant felt about the matter complained of. It was appropriate, in light of the Respondent's duty of care towards its employees, that it engage with what had happened and how it had made each of the Claimant and Mrs Motycznska feel. While the Claimant was angry, Mrs Motycznska felt humiliated, demeaned and undermined. It was explicable that the Respondent tailor its response accordingly. The suspension of the Claimant, and the failure to suspend Mrs Motycznska, does not support an inference of discrimination.

114. The Claimant complained bitterly throughout the hearing of Mr Parkes' desire to 'get rid of him', and that Mr Scutts had failed to make himself available to meet the Claimant. He believed that one or both of those individuals had pursued a vendetta against him to orchestrate his exit from the Respondent's employment. Both Mr Parkes and Mr Scutts have since left the Respondent's employment, but the legal complaints the Claimant has brought relate to decisions taken by other people – by Mr Clark, Mr Osborne and Mr Stevens. Even if those decisions were inappropriately influenced by Mr Parkes and/or Mr Scutts, the Tribunal was

satisfied that Mr Ansell engaged with the propriety of the decisions that had been taken, and he gave cogent and convincing evidence to the Tribunal of why he reached the conclusions he did. The Tribunal was satisfied with the credibility of that evidence, supported as it is by contemporary documentary evidence of the questions Mr Ansell asked in meetings, as well as the explanations he gave in meetings with and letters to the Claimant.

115. Consequently the Tribunal draws no inference of discrimination from consideration of the primary facts and circumstances of the case.

Law

Unfair dismissal: generally

116. The protection of employees from unfair dismissal is set out in section 94 of the 1996 Act.

117. Section 98(1) sets out that that an employer may only dismiss an employee if it has a fair reason (or principal reason) for that dismissal:

"*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

118. Subsection (4) of section 98 provides:

"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

119. In other words:

a) the burden of establishing the reason for the dismissal sits with the employer; and

b) when the employer has been shown to have a potentially fair reason for dismissal, a further enquiry follows as to whether, looked at 'in the round', the dismissal was fair or unfair. The burden of proof is, at this stage, neutral as between the parties.

120. The Supreme Court in *Royal Mail Group Ltd v Jhuti* [2020] ICR 731 held that:

"*In searching for the reason for a dismissal... courts need generally look no further than at the reasons given by the appointed decision-maker*".

121. The test in section 98(4) is an objective one. When the employment tribunal considers the fairness of the dismissal, it must assess the fairness of what the employer in fact did, and not substitute its decision as to what was the right course for that employer to have adopted (*British Leyland v Swift* [1981] IRLR 91).

122. In many (though not all) cases, there is a band of reasonable responses to the situation within which one employer might reasonably take one view, another quite reasonably take another. The correct approach is for the tribunal to focus on the particular circumstances of each case and determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

123. Section 98(4) requires a tribunal to "*consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances, the employer had acted reasonably in treating it as a sufficient reason to dismiss*" (*Taylor v OCS Group* [2006] EWCA Civ 702). As Smith LJ, giving the judgment of the Court, said in (paragraph 48 of) that case: "*it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not… the employment tribunal … should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee.*"

124. Consequently, not every procedural defect will render a dismissal unfair. As Mr Justice Langstaff (President) stated, in the EAT case of *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/SM:

"*It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness*".

125. If there has been a procedural flaw at the 'decision to dismiss' stage, but that stage is followed by an appeal brought by the employee against that decision, it is the entirety of the employer's process (together with its reasons for dismissal)

that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).

126. Moreover, the assessment of the fairness of the dismissal required by section 98(4) takes account of the particular factual circumstances, including the "*size and resources of the employer*".

Dismissal for 'some other substantial reason'

127. The language of section 98(1)(b) provides a bit of a 'catch-all' – recognising that dismissals for reasons other than those specified section 98(2) may potentially be for a fair reason.

128. The case law points us to ask and answer a series of questions to determine the fairness or otherwise of a dismissal for some other substantial reason:

Question 1: Was the reason for dismissal a reason other than one of those specified in section 98(2)?

Question 2: If so, was the reason for dismissal of a kind that could justify dismissal of an employee holding the job in question?

Question 3: If so, considering equity and all the circumstances of the case, did dismissal fall within the range of reasonable responses?

129. Question 1: Was the reason for dismissal a reason other than one of those specified in section 98(2)?

130. This question is answered by looking at the employer's reason, or principal reason, for dismissal, and seeing whether it falls in the list in section 98(2), being capability, conduct, redundancy and infringement of legislation.

131. Question 2: If so, was the reason for dismissal of a kind that could justify dismissal of an employee holding the job in question?

132. For a reason to be "*substantial*", it must:

a) not be frivolous or trivial (*Kent County Council v Gilham* [1985] IRLR 18);

b) not be whimsical, capricious or dishonest – it cannot be a reason which most employers would not be expected to adopt (*Harper v National Coal Board* [1980] IRLR 260); and

c) not be based on an inadmissible reason such as unlawful discrimination (*Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood* [2006] ICR 1552).

133. The reason must be a genuine one (*Harper*).

134. A fundamental breakdown in the relationship between the claimant and:

a) their employer; or

b) one or more other employees,

may, on the facts, about to some other substantial reason justifying dismissal (*Hutchinson v Calvert* EAT/02/05/06, and *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 55).

135. Question 3: If so, considering equity and all the circumstances of the case, did dismissal fall within the range of reasonable responses?

136. This involves considering whether, in all the circumstances, including the employer's size and administrative resources, the employer has acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The fairness of the procedure followed by the employer is part of what should be considered here.

137. Some principles that aid the exercise of determining the range of reasonable responses emerge from the case law:

a) A relevant question will be whether the breakdown in the relationship *is* fundamental, i.e., why it is impossible for it to continue to employ the claimant (*Leach v Office of Communications* [2012] ICR 1269).

b) One consideration as to whether the relationship breakdown was a sufficient reason to bring dismissal within the range of reasonable responses may be the complexity or ease with which the respondent could reorganise its business in a way which would avoid the two individuals working together (*SA Brain and Co Ltd v Philippart* EAT/0571/06).

c) Where there has been a breakdown in the working relationship between two employees, the employer should take reasonable, sensible and practical steps to try and improve the relationship (*Turner v Vestric Ltd* [1981] IRLR 23). The employer is not required to take *all* reasonable steps before dismissal will be within the range of reasonable responses (*Matthew v CGT IT UK Ltd* [2024] EAT 38). Where the employer's conduct contributed to the breakdown in the relationship between the two employees that will be a highly relevant factor is considering the steps that it is reasonable for the employer to take (*Tubbenden Primary School v Sylvester* UKEAT/0527/11).

d) The refusal of the claimant, or the other employee, to work with each other will be relevant if it creates an impasse which can only be resolved by dismissal or one of the other of them (*Driskel v Peninsula Business Services Ltd* [2000] IRLR 151). In such an instance, the question of whether the breakdown in the relationship was caused by the claimant's conduct or the other parties will often be relevant.

Disability status

138. The 2010 Act defines the protected characteristic of "disability" in section 6(1) as follows:

"*A person (P) has a disability if—*

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

139. The burden of proof is on the claimant to show, on the balance of probabilities, that they were disabled at the relevant time (*Morgan v Staffordshire University* [2002] IRLR 190).

140. When considering the meaning of section 6(1), the following should be considered:

a) the terms of Part 1 of Schedule 1 of the 2010 Act, entitled "Determination of disability";

b) guidance issued by the Disability Unit on matters to be taken into account in determining questions relating to the definition of disability (section 6(5)), the latest version of which was published on 8 March 2013 (the **Guidance**); and

c) the Code of Practice on Employment (2011), published by the Equality and Human Rights Commission

(and, indeed, an Employment Tribunal *must* take account of (b) and/or (c) where it considers the Guidance and/or Code of Practice, as applicable, relevant, pursuant to paragraph 12 of Part 1 of Schedule 1 of the 2010 Act).

141. The leading case on the examination of whether a person is disabled is the EAT decision of *Goodwin v Patent Office* [1999] I.C.R. 302. While that case concerned the predecessor legislation to the 2010 Act, the four questions identified in *Goodwin* remain appropriate:

(1) *The impairment condition*: Does the claimant have an impairment which is either mental or physical?

(2) *The adverse effect condition*: Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect?

(3) *The substantial condition*: Is the adverse effect (upon the claimant's ability) substantial?

(4) *The long-term condition*: Is the adverse effect (upon the claimant's ability) long-term?

142. The assessment is done as at the date of the alleged discriminatory acts to determine whether the claimant was disabled then (*Cruickshank v VAW Motorcast Ltd* [2002] ICR 729).

143. These questions need not be asked in the order identified (*J v DLA Piper UK LLP* UKEAT/0263/09/RN).

(i) <u>Does the claimant have an impairment which is either mental or physical?</u>

144. The Employment Appeal Tribunal in the *DLA Piper* case noted that it can in some cases be difficult to draw a distinction between:

a) A mental illness, such as clinical depression, which it referred to as "*unquestionably*" being an impairment within the meaning of the 2010 Act; and

b) A reaction to adverse circumstances, such as problems at work or adverse life events, which is not.

In such cases the EAT considered it may be sensible for the tribunal to firstly address the question of whether the claimant's ability to carry out normal day-to-day activities had been substantially impaired by symptoms characteristic of depression for 12 months or more. It may be that, if the tribunal finds that there has been such an impact, that it considers it appropriate to draw an inference that a mental impairment exists.

145. In *Igweike v TSB Bank plc* [2020] IRLR 267 Auerbach J, examining the decision of the tribunal in that matter, noted that:

"*there is still a valid distinction to be drawn between a normal reaction to an adverse and tragic life event and something that is more profound and develops into an impairment*", and

"*It seems to me that on a fair reading of the [employment tribunal's decision] as a whole, the Judge was doing no more… than to apply this valid general conceptual distinction to a case in which the adverse life event was bereavement through the loss of a loved one. In some cases, bereavement may lead to ordinary symptoms of grief which do not bespeak any impairment. In others, they may lead to something more profound which is, or develops into, an impairment over time. A clinician using the word 'depression' may be regarded as one form of evidence that this indeed is what has happened in a given case; but, to repeat, the matter is one for the appreciation of the Tribunal, drawing on the totality of the evidence, and the application of a clinical label is neither necessary nor, if it has been applied, conclusive.*"

146. The 2017 EAT decision of *Herry v Dudley Metropolitan Council* UKEAT/0100/16 also considered this distinction. Judge David Richardson observed:

"*Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress then as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or*

a refusal to compromise… are not themselves mental impairments: they may simply reflect a person's character or personality."

(ii) *Does the impairment affect the claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect?*

147. This assessment is personal to the claimant.

148. As the EAT in *Goodwin* observed:

The examination is of the "*impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts.*"

"*The focus of attention … is on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do.*"

(iii) *Is the adverse effect upon the claimant's ability substantial?*

149. This is a question of fact. The effect must be "*more than minor or trivial*" (section 212(1) of the Act).

(iv) *Is the adverse effect long-term?*

150. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

a) Has lasted for at least 12 months;

b) Is likely to last for at least 12 months; or

c) Is likely to last for the rest of the life of the person affected.

151. This is determined as at the date(s) of the alleged discriminatory act(s), by reference to facts and circumstances existing at that date (*McDougall v Richmond Adult Community College* [2008] EWCA Civ 4).

152. Paragraph C4 of the Guidance states that:

"*In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age).*"

153. In carrying out that assessment, the tribunal should look at the state of evidence as at the material time, not with the benefit of hindsight as to what in fact happened subsequently (*Thyagarajan v Cap Gemini UK plc* UKEAT/0264/14).

154. When assessing what is "*likely*", the approach of the tribunal should be to ask whether it "*could well happen*", whether it is "*a real possibility*" - not whether it is "*more probable than not*" (*Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)* [2009] ICR 1056).

155. Where, such as in the case of mental ill health, for example, the effect of the condition on the claimant fluctuates, the question for the tribunal is not whether the condition is likely to recur, but whether the substantial adverse effect is likely to recur (*Boyle*). The Guidance (in paragraph C6) gives uses the following example:

"*a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period. However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.*"

Direct discrimination

156. Section 13(1) of the 2010 Act describes the prohibited conduct of direct discrimination as follows:

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

157. In other words, two conditions must be satisfied for a complaint of direct disability discrimination to be made out:

1. The employer must have treated the claimant less favourably than it treated or would treat others; and
2. The reason for that difference in treatment is disability.

158. When answering the second question, the examination of the reason why the decision-maker acted in the way that they did, the claimant need not show that the protected characteristic was the sole reason, but it needs to have been a "*significant influence*" (Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572). It is not necessary that the decision-maker was conscious of this significant influence.

159. Lord Nicholls in *Nagarajan* observed that "*the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom*

be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."

160. In many cases, the best approach to deciding whether the treatment was "because of" a protected characteristic is to focus on the reason why the employer acted as it did. As noted by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, the complaint may be answered by posing the question: did the claimant, because of a protected characteristic, receive less favourable treatment?

Discrimination arising from disability

161. Section 15 of the 2010 Act provides that:

"*(1) A person (A) discriminates against a disabled person (B) if-*

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

162. This, as Simler J summarised in *Secretary of State for Justice v Dunn* UKEAT/0234/16/DM, means there are four elements that must be made out in order for a claim for discrimination arising from disability to succeed:

a) There must be unfavourable treatment;

b) There must be something that arises in consequence of the claimant's disability;

c) The unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability; and

d) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

163. In addition, as per subsection (2), the respondent must have known, or should reasonably have known, that the claimant had the disability.

164. The causative link between the unfavourable treatment and the something that arises in consequence of the claimant's disability should be approached by way of a two-stage enquiry:

a) What caused the unfavourable treatment? This focuses on the subjective reason in the mind of the alleged discriminator, which may require an examination of the conscious or unconscious thought processes of that person; and

b) Was the cause "something arising in consequence of the claimant's disability"? This is an objective question, which does not depend on the thought-processes of the putative discriminator.

(*Pnaiser v NHS England* [2016] IRLR 170)

Failure to make reasonable adjustments

165. The duty to make reasonable adjustments is set out in section 20 of the 2010 Act, and for the purposes of this case the relevant part of that duty is as follows:

"*where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a matter in comparison with persons who are not disabled,* [A is] *to take such steps as it is reasonable to have to take to avoid the disadvantage*".

166. Elias P in the EAT decision of *Project Management Institute v Latif* [2007] IRLR 579 confirmed that the claimant must not only establish that the duty has arisen, but also that it has been breached.

167. A "*prospect*" of an adjustment removing a disabled employee's disadvantage would be sufficient to make the adjustment a reasonable one, it need not be a "*real prospect*" (*Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10).

168. This effectively involves four questions:

1. Did the respondent know (in fact, or by reason of knowledge being imputed to them because they could reasonably be expected to know) that the claimant was disabled at the relevant time?
2. If yes, did the respondent apply a provision, criterion or practice (the **PCP**)?
3. If yes, did that PCP cause the claimant (a disabled person) a substantial disadvantage?
4. If yes, was there a step that could reasonably have been taken that had a prospect of ameliorating the disadvantage?

169. The terms "*provision*", "*criterion*" and "*practice*" are to be construed widely. Although determined under the predecessor legislation, the conclusion of the House of Lords in *Archibald v Fife Council* [2004] ICR 954 that the term PCP encompasses the disabled person's terms, conditions and arrangements relating to the essential functions of their employment still applies.

170. The words "*provision*", "*criterion*" or "*practice*" are not defined in the 2010 Act, but they were considered by the Court of Appeal in the case of *Ishola v Transport for London* [2020] IRLR 368. The Court concluded that a one-off act or decision is capable of being a PCP, but only where there is a state of affairs indicating that similar cases will be treated in a similar way. It is not necessary for the approach to have in fact been applied to anyone else in order for it to amount to a PCP, but

there must be an indication that it will or would be done again in future if a hypothetical similar case arises.

171. The future application could be confined to the Claimant alone and still amount to a PCP (*Carreras v United First Partners Research* [2018] EWCA Civ 223). As HHJ Beard put it in *Ahmed v Department for Work and Pensions* [2022] EAT 107, "*A PCP, simply put, is where the employer has an expectation of the employee, and either the same expectation is made of other employees or there is an element of repetition in the expectation with the particular employee*".

172. There must be some causative nexus between the claimant's disability/ies and the substantial disadvantage (*Thompson v Vale of Glamorgan Council* EAT 0065/20).

Inferring discrimination

173. As has been acknowledged in the case law:

"*it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in'.*"

Neill LJ in the Court of Appeal decision in *King v Great Britain-China Centre* [1992] ICR 516)

174. As described by the EAT in *Qureshi v Victoria University of Manchester* [2001] ICR 863, in relation to disputed facts in discrimination cases:

"*The function of the tribunal in relation to that evidence was therefore twofold: first, to establish what the facts were on the various incidents alleged by* [the claimant] *and, secondly, whether the tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a racial ground for the acts of discrimination complained of.*"

175. This approach was confirmed in *Igen*: after the primary facts have been determined, tribunals must consider what, if any, inferences are appropriate to draw from those primary facts seen in their totality (*Qureshi*), so as to determine what facts it is proper to infer. After the primary facts have been determined and the consideration of whether it is proper to draw any inferences of secondary facts, the question of whether the claimant has established a prima facie case of discrimination can then be answered. If a *prima facie* case has been made out in relation to any of the complaints, the burden of proof then shifts to the respondent to demonstrate that the respondent's actions were in no sense whatsoever on the protected ground.

176. Inferences must have a basis in the facts agreed by the parties or found by the tribunal. "*A mere intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion*" (*Chapman v Simon* [1994] IRLR 124).

177. Drawing inferences must be based on evidence, not by making use (without requiring evidence) of a verbal formula such as 'institutional discrimination' or 'stereotyping' (*Stockton on Tees BC v Aylott* [2010] ICR 1278).

178. Examples of matters that may be relevant to the consideration of whether inferences of discrimination can properly be drawn may include:

a) Whether there is a non-discriminatory explanation for the behaviour, and if so, the weight of that explanation;

b) The tribunal's assessment of the parties and their witnesses, and of the alleged discriminatory 'actor', including of their credibility, reliability and motives, tested by reference to objective facts and documents, possible motives and the overall probabilities;

c) The relationship between the parties (e.g., if it is one of hostility and there is nothing else to explain it);

d) If the respondent behaved badly towards the claimant, whether that is consistent with the respondent's treatment of other people who do not have the claimant's protected characteristic (the 'generally-badly-behaving employer');

e) Whether there is a pattern of behaviour;

f) If there is a surprising lack of documents in evidence on a matter;

g) If there has been adherence to or a failure to follow applicable policies and procedures; and

h) Whether the claimant's response to the behaviour is reasonable. An justified sense of grievance cannot amount to a detriment for the purposes of less favourable treatment.

Application to the claims here

<u>Disability status: Stress and anxiety</u>

179. The Respondent concedes that the Claimant was a disabled person for 2010 Act purposes by reason of depression at the material time. The Respondent does not accept that the Claimant was also disabled at the material time by reason of stress and anxiety. In respect of the Claimant's stress and anxiety therefore, the Tribunal must ask and answer the four questions identified in the *Goodwin* case (though not necessarily in that order):

(1) *The impairment condition*: Does the Claimant have an impairment which is either mental or physical?

(2) *The adverse effect condition*: Does the impairment affect the Claimant's ability to carry out normal day-to-day activities, and does it have an adverse effect?

(3) *The substantial condition*: Is the adverse effect (upon the Claimant's ability) substantial?

(4) *The long-term condition*: Is the adverse effect (upon the Claimant's ability) long-term?

180. The central question in contention in relation to whether the Claimant's stress and anxiety amounted to a disability at the material time is the "impairment" question. The Respondent maintains that the Claimant's stress and anxiety is better characterised as reaction to adverse life events than as an impairment.

181. Taking the adverse effect condition question first: At the material time, did stress and anxiety affect the Claimant's ability to carry out normal day-to-day activities, and did it have an adverse effect?

182. The material time with which we are concerned is the period in respect of which the Claimant alleges disability discrimination based on the disputed disability of stress and anxiety, i.e., 11 October 2022 to 22 June 2023. The Tribunal considers this the period because Complaint 3 specifically relates to 11 October 2023 (the decision to change the Claimant's shift pattern), and Complaint 4 to the decision to dismiss the Claimant, which was taken on 20 February 2023 but which was appealed and that appeal only concluded on 22 June 2023. Complaint 5 concerned the whole of that period from 11 October 2022 to the appeal outcome on 22 June 2023. (This ignores Complaint 2, which the Claimant has effectively withdrawn.)

183. The evidence from the Claimant is that during this period, the Claimant suffered:

a) "*enormous stress and anxiety*", which were even greater after Mr Scutts was unable to meet with the Claimant to discuss the Claimant's reasons for being unable to work the alternative shifts offered;

b) Low mood;

c) Poor sleep;

d) Negative thoughts about how the Respondent had treated him and thoughts relating to his belief that the Respondent was manufacturing a case against him; and

e) Damage to his self-esteem, and felt let down by everyone involved in this process.

He was prescribed Sertraline.

184. The Claimant has described how he felt, but he has not described any adverse impact on his ability to carry out day-to-day activities, and nor has he shown that any such adverse effect was substantial. As per the *Morgan* case, the burden sits with him to satisfy the Tribunal of this – he has not discharged it.

185. In relation to the long-term condition, the Claimant is required to demonstrate that the substantial adverse effect on his ability to carry out day-to-day activities was

"*long-term*" which, as is described in paragraph 2(1) of Schedule 1 to the 2010 Act, involves that adverse effect:

a) Having lasted for at least 12 months;

b) Being likely to last for at least 12 months; or

c) Being likely to last for the rest of the Claimant's life,

and this assessment is to be carried out as at the date(s) of the alleged discriminatory act(s) by reference to the facts and circumstances existing at that date (*McDougall*).

186. The evidence relevant to this question comes from the Claimant's witness statement and answers given in cross-examination.

187. In his witness statement the Claimant described how:

a) "*The decision for my shift changes lead to me suffering enormous stress and anxiety at that time*";

b) "*I … was signed off work due to stress and anxiety caused from a shift change at work*";

c) "*it was so stressful and so frustrating because I knew that massive failings and manipulations on the investigation and the disciplinary hearing led to a bias decision discriminating on me in every level*"; and

d) "*I was in great stress and anxiety because I could not see any support from all the process so far and more frustrating was that HR business partners were allowing all this to happen with their support*".

188. In cross-examination the Claimant confirmed that it was the shift change, and the fact that he considered that the Respondent portrayed him as a nasty person, that caused his stress and anxiety.

189. This evidence indicates that, as at the material time (11 October 2022 to 22 June 2023):

a) *The adverse effect on the Claimant had not yet been long-term*. If the stress and anxiety was caused by the decision to change the Claimant's shift pattern, that effect can only have begun at the earlier when that decision was communicated to him on 11 October 2022;

b) *The adverse effect on the Claimant was not likely to be long-term*. As the Claimant has failed to show that the effect on him was a substantial adverse effect, he cannot show that the substantial adverse effect was likely to be long-term (*Boyle*), even if there was a "*real possibility*" of the effect of the stress and anxiety lasting longer than a year; and

c) *There is no evidence before the Tribunal that the effects of the Claimant's stress and anxiety will last for the rest of his life*.

190. As for the impairment question, the issue for the Tribunal is whether the Claimant's stress and anxiety was an "*impairment*" (as the Claimant's position that he was disabled on this basis implicitly asserts), or was (as the Respondent contends) a reaction to adverse life events, such as problems at work.

191. The evidence from the Claimant in his witness statement and under cross-examination is that the stress and anxiety arose from the work-related dispute about the Respondent's insistence that he not return to working Late Shifts, and his equally forceful insistence that he could not work either the Day Shifts or the Night Shifts.

192. As the *Igweike* and *Herry* cases show, the fact that the Claimant's stress and anxiety was caused by the dispute at work does not mean that it did not amount to an impairment, as what might have begun as a normal reaction to an adverse life event may, as Auerbach J put it in *Igweike*, "*lead to something more profound which is, or develops into, an impairment over time*". However, in the Claimant's case it could not have been impairment on 11 October 2022, as the more profound development into an impairment could not then have occurred. Moreover, even if the Tribunal concludes that the reaction to the adverse event became entrenched over time (including at some point over the material time), the Tribunal is not bound to conclude that it amounted to a mental impairment (*Herry*).

193. In this case, the Tribunal finds that the stress and anxiety from which the Claimant suffered was not a mental impairment for the purposes of section 6 of the 2010 Act. Rather, the Tribunal finds that it was a natural and understandable reaction to both the Claimant's perception of the events unfolding in his dispute with the Respondent, and the immense frustration that he felt that the various people at the Respondent (Mr Osborne, Mr Stevens and Mr Ansell) did not see matters the way the Claimant did (or, in Mr Stevens' case, did not consider the remit of his role to encompass consideration of the propriety of the decision that the Claimant should not return to work on the Late Shift). The Claimant's depression – accepted by the Respondent as a mental impairment – may well have exacerbated the stress and anxiety he felt as a consequence of the workplace dispute, but there is insufficient evidence to support any finding that the stress and anxiety the Claimant experienced was more than (as in the *Herry* case) an adverse reaction to a workplace dispute and to the Claimant's entrenched position in that dispute.

194. To summarise, the Tribunal finds that the Claimant has not discharged the burden of proof that sits with him that the stress and anxiety he experienced in the period 11 October 2022 to 22 June 2023:

    a) Amounted to a mental impairment; or

    b) Had an adverse effect on his ability to carry out day-to-day activities in this period, or that such an effect was substantial or long-term.

195. While the Claimant was disabled by reason of his depression (as conceded by the Respondent), the Tribunal finds that he was not disabled for 2010 Act purposes by reason of stress and anxiety.

Complaint 1: Unfair dismissal

196. As described in the Law section above, the examination of whether the Claimant's dismissal was unfair involves asking and answering three questions:

Question 1: Was the reason for dismissal a reason other than one of those specified in section 98(2)?

Question 2: If so, was the reason for dismissal of a kind that could justify dismissal of an employee holding the job in question?

Question 3: If so, considering equity and all the circumstances of the case, did dismissal fall within the range of reasonable responses?

Question 1: Was the reason for dismissal a reason other than one of those specified in section 98(2)?

197. The Respondent says that the reasons for the Claimant's dismissal were:

a) Its decision that the Claimant and Mrs Motycznska could not both work on the Late Shift; and

b) The Claimant's inability or choice not to seek redeployment within the Respondent's organisation.

The Claimant disputes that, saying that the Respondent had a desire to get him out of the business, and it used the opportunity created by the disciplinary process to impose a sanction that would force the Claimant's resignation or otherwise bring about the termination of his employment.

198. The case of *Jhuti* indicates that courts (and tribunals) need look no further than the reason of the decision-maker. On the facts here, the person who took the decision to dismiss the Claimant was Mr Stevens. The evidence shows that Mr Stevens took some time to explore alternative options to dismissal with the Claimant, though no workable solution was found.

199. It is also clear, though, that Mr Stevens was not the decision-maker regarding the matter of whether the Claimant could return to work the Late Shift, and nor did he examine or question that decision as part of his decision to dismiss the Claimant. While Mr Clark, the disciplinary manager, did not appear before the Tribunal, the Respondent witnesses agreed that it was Mr Clark who decided that the Claimant could not return to work the Late Shift. The Claimant sought to paint a picture that his dismissal was pre-determined by the Respondent's Senior Management Team (including, or led by, Mr Parkes) – that Mr Parkes had effectively instructed

Mr Stevens to dismiss the Claimant, and that Mr Parkes had influenced Mr Clark into concluding that the Claimant could no longer work the Late Shift.

200. Ultimately, though, the propriety of that disciplinary sanction was genuinely probed and questioned by Mr Ansell as part of the Claimant's appeal against his dismissal. The Tribunal is entirely satisfied that Mr Ansell acted with no improper purpose, and not on anyone else's instruction. On the contrary, he examined whether *he believed* that Mrs Motycznska could work with the Claimant again, and he concluded, after strongly encouraging Mrs Motycznska to attempt mediation with the Claimant (his encouragement worked, but the mediation failed), that they could not. In light of the Claimant's position that neither of the alternative shift patterns could be accommodated by him, and his disinterest in a vacancy at the Respondent's Dartford site, Mr Ansell upheld the decision to dismiss the Claimant.

201. The appropriate reasons for dismissing the Claimant were therefore Mr Ansell's, those being:

a) That it was not viable to expect Mrs Motycznska to work with the Claimant again; and

b) While all the available redeployment options were explored, none were both suitable and acceptable to the Claimant.

202. These are not reasons that fall within section 98(2) of the 1996 Act.

Question 2: Was the reason for dismissal of a kind that could justify dismissal of an employee holding the job in question?

203. The Tribunal is satisfied that Mr Ansell's reasons were of a kind that could justify dismissal of a Warehouse FLM. They were substantial reasons:

a) Mr Ansell believed that, given the history and steps taken to try to heal the relationship between the Claimant and Mrs Motycznska, the working relationship between the Claimant and Mrs Motycznska had broken down beyond repair.

After a failed mediation attempt, Mrs Motycznska had subsequently told Mr Ansell that she may be able to work with the Claimant again, but Mr Ansell considered that she felt pressured to say that by the Claimant, and that in truth she was not comfortable to work with the Claimant again.

The Tribunal is satisfied that this conclusion was within the range of reasonable responses Mr Ansell could have had to the evidence available to him. He noted in oral evidence that Mrs Motycznska began each formal interaction with the Respondent management team saying that she could not work with the Claimant again, that their relationship was irretrievable, though she felt guilty about that - but that after communicating with the Claimant she appeared to change her mind and express tentative willingness to do so. It was open to Mr Ansell to conclude that, as he wrote

in his witness statement, he "*didn't believe [Mrs Motycznska] was voluntarily saying this*". Mr Ansell concluded that the true position was that Mrs Motycznska was not comfortable with working alongside the Claimant again, and that the decision to remove the Claimant from the Late Shift was a reasonable one in the circumstances. That was a reasonable conclusion for him to reach in light of the evidence available to him.

b) He noted that the recommendations from Occupational Health limited the shifts available to the Claimant, and that where the Respondent was able to identify potential roles at alternative sites those were declined by the Claimant.

204. These were substantial reasons – they were not frivolous or trivial, but related to the Respondent's decision that it was not viable for the Claimant to work with Mrs Motycznska in light of the relationship breakdown (as Mr Ansell judged it) caused by the Claimant's conduct on 28 June 2022 (similarly to the decision in the *Ezsias* case), and the Claimant's circumstances and preferences about redeployment.

205. It is clear to the Tribunal that these were genuine reasons – Mr Ansell had gone to some trouble to try to persuade Mrs Motycznska to attempt mediation, and if he had a desire to get rid of the Claimant from the business he would not have gone to that trouble. It is also clear that, at the decision-to-dismiss stage, Mr Stevens engaged with redeployment options, encouraged the Claimant to consider the vacancy in Dartford and gave an explicable rationale for why a new 9 am to 5 pm shift could not be created for him. The Tribunal also finds that Mr Ansell scrutinised that process and concluded that "*all available redeployment options were explored*".

Question 3: Considering equity and all the circumstances of the case, did dismissal of the Claimant fall within the range of reasonable responses open to the Respondent on the facts?

206. The Tribunal also notes the efforts that Mr Ansell went to try to understand whether there was a remaining difficulty in the relationship between the Claimant and Mrs Motycznska, in light of the Claimant's position on that point, and the ambiguity of Mrs Motycznska's position. The Tribunal is satisfied that he did so, and upon having that understanding he took reasonable, sensible and resolve the conflict between them, including actively encouraging mediation and seeing that mediation was then attempted (*Turner*). The Tribunal does not understand why those steps were not taken by Mr Stevens, but the flaw in his not having done so was corrected by Mr Ansell (and it is Mr Ansell's approach that is relevant for assessing the fairness of the dismissal in light of the *Taylor* case).

207. In light of those steps, the Tribunal finds that it was open to Mr Ansell to conclude that the breakdown in the relationship between the Claimant and Mrs Motycznska was a fundamental one, and therefore that one of them had to cease working on the Late Shift.

208. While initially each of the Claimant and Mrs Motycznska had complained about the other's conduct, the Claimant was of the view that they could work together again, so it was evidently the Claimant's conduct that resulted in the breakdown of relationship. This conduct included causing Mrs Motycznska to feel humiliated and demeaned by (as Mrs Motycznska alleged) the Claimant implying that she was promoted by Mr Parkes in return for an expectation of sexual favours. As the Claimant's conduct was the cause, it was reasonable for the Respondent to conclude that the Claimant, rather than Mrs Motycznska, should be removed from the Late Shift. The Tribunal considers this approach to align with that taken in the *Driskel* case.

209. While amending the Claimant's working pattern so that he worked the Day Shift (6 am to 2 pm) or the Night Shift (10 pm to 6 am) would mean he would need to work on handover to the Late Shift, which would at times include Mrs Motycznska, the Respondent considered such interaction to be sufficiently limited that it was willing for the Claimant to be reassigned to work either of those shifts. However, the Claimant maintained that:

    a) His caring responsibilities for his son, who suffers with epileptic seizures, meant that he was responsible for monitoring his son's sleeping when he returned from work after his shift finished at 10 pm until 2 am (at which time the Claimant's wife took over monitoring their son); and

    b) The Claimant's sleeping patterns,

    meant that he could not work either the Day Shift or the Night Shift as a Warehouse FLM with responsibility, for among other things, matters of safety.

210. One alternative suggested by the Claimant was the creation of a new 9 am to 5 pm shift – but the parties agreed that there was no such shift, and the Claimant's position was that one should be created for him. Mr Stevens gave cogent evidence as to why that was not practicable:

    a) *It would involve adjusting the shift patterns of other Warehouse FLMs as well*. The role of Warehouse FLM was a supervisory role, and the shift patterns for Warehouse FLMs involved a rolling rotation throughout the 24-hour operation of the Morrisons' contract. Adjusting the start and finish times for the Claimant would both result in a three-hour gap in coverage between 6 am (when the Night Shift Warehouse FLM would finish) and 9 am (when the Claimant suggested he would start work), and would result in a three-hour overlap between the Claimant and Mrs Motycznska (from 2 pm, when Mrs Motycznska would start, to 5 pm, when the Claimant would finish), which was not acceptable to the Respondent.

    b) *It would require the approval of the Respondent's client, Morrisons*. The Morrisons' contract on which the Claimant worked was what the Respondent calls an "open book" contract, meaning that Morrisons has approved the management structure and arrangement on the contract,

and making a change would require Morrisons' approval, which the Respondent did not wish to seek in the circumstances. The other contracts serviced at the Allington site similarly did not operate a 9 am to 5 pm shift.

211. The Tribunal finds that, consistent with the *Philippart* case, the complexity of seeking to make a change to create a 9 am to 5 pm shift is a relevant consideration, and means that dismissal was within the range of reasonable responses open to the Respondent.

212. The Claimant disagreed that the creation of a 9 am to 5 pm shift was not viable, and pointed out that the Respondent had advertised a 10 am to 6 pm shift shortly after the Claimant's employment terminated. That arose from a temporary arrangement that the Respondent was going to put in place for a colleague returning from maternity leave, which ultimately did not happen. The fact that the Respondent was willing to make this arrangement for another Warehouse FLM does not, in the Tribunal's view, change the fact that dismissal was still within the range of reasonable responses for the Respondent in respect of the Claimant. The Claimant had been found to have committed misconduct and (the Tribunal has found) was reasonably sanctioned with removal from the Late Shift. The Claimant was unwilling or unable to consider working the Day Shift, the Night Shift or the equivalent to the Late Shift from the Respondent's Dartford site. These are relevant circumstances to what equity and all the merits of the case require, and the Tribunal finds that, having taken account of those matters, including the substantial size of the Respondent's organisation but also the limited shift patterns and contracts serviced out of its Allington site, that dismissal was within the range of reasonable responses open to the Respondent.

213. Complaint 1 therefore does not succeed.

<u>Complaint 2: Direct disability discrimination, subjecting the Claimant to disciplinary action</u>

214. To succeed on this complaint, the Claimant would need to show that the reason he was subjected to disciplinary action in the period 19 August 2022 to 5 January 2023 was *because of* disability.

215. The Claimant gave very clear evidence – which was repeated when the Respondent asked him the same question again – that he was not subjected to disciplinary action because of his disability, but rather than punitive sanction of changing his shift pattern at the conclusion of the disciplinary process was because of his personal issues and his health issues.

216. Complaint 2 therefore does not succeed. The Claimant has not pursued his complaint that the reason for the Claimant's treatment (being subjected to disciplinary action) was his disability. There is therefore no need to consider whether Complaint 2 was brought in time, or the Tribunal otherwise has jurisdiction to consider it because it is just and equitable to extend time to do so.

Complaint 3: Direct disability discrimination, changing the Claimant's shift pattern without consultation and with one week's notice

217. Again, to succeed with this complaint the Claimant would need to show that the reason the Respondent changed his shift pattern was his disability, and the disability he relies on here is stress and anxiety.

218. The Tribunal has already concluded that the Claimant was not disabled at the material time by reason of stress and anxiety.

219. Moreover, whoever took the decision to change the Claimant's shift pattern (whether it was Mr Clark, as the Respondent maintains, or Mr Scutts or Mr Parkes, as the Claimant argues), the Tribunal has seen clear evidence that that decision was examined and scrutinised by Mr Ansell. Mr Ansell could have overturned that decision, but instead he confirmed it. The reason why Mr Ansell upheld Mr Stevens' decision to change the Claimant's shift pattern was because of the irremediable breakdown in the working relationship between the Claimant and Mrs Motycznska, caused by the Claimant's conduct – it was not the Claimant's disability (*Shamoon*). There is no evidence to indicate that the Claimant's stress and anxiety played any part, let alone a significant influence (*Nagarajan*) on the decision to change the Claimant's shift pattern.

220. Complaint 3 therefore does not succeed.

Complaint 4: That the decision to refuse to permit the Claimant to return to work the Late Shift was discrimination arising from disability

221. Determining this complaint involves answering four questions (*Dunn*):

a) Did the Respondent subject the Claimant to unfavourable treatment?

b) What was the thing that arises in consequence of the Claimant's disability?

c) Was the unfavourable treatment because of that thing?

d) If so, can the Respondent show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

222. Taking each of those questions in turn:

a) Did the Respondent subject the Claimant to unfavourable treatment?

The treatment relied upon by the Claimant is his dismissal. This is undoubtedly unfavourable.

b) What was the thing that arises in consequence of the Claimant's disability?

(i) The Claimant relies here on both of the impairments he says amount to disability: stress and anxiety, and depression. He says that the thing that arises in consequence of each of those

impairments is his inability to work certain shifts, namely the full hours in the day shifts (6am to 2pm), or any portion of the late shifts (10pm to 6am).

(ii) The Respondent accepts that the Claimant was disabled at the material time by reason of depression, and the Tribunal has found that the Claimant was not disabled at the material time by reason of stress and anxiety.

(iii) The Claimant has produced no medical evidence that his inability to work Day Shifts or Night Shifts was a consequence of his depression, but this does not preclude the Tribunal finding that it was. However, it is abundantly clear from the evidence that the Claimant provided that this inability arose from his caring responsibilities for his son, not from his depression. The Claimant agreed in cross-examination that people can, over time, alter their sleep patterns. The true barrier to the Claimant working the Day Shift or the Night Shift was his need to monitor his son for part of the night to be ready to respond to his son if his son had a seizure in his sleep.

(iv) The Occupational Health Report from December 2022 recorded *the Claimant's feelings* that:

i. He would have considerable difficulties sleeping if he were to work the Day Shift or the Night Shift;

ii. Changing his shift to the Day Shift or the Night Shift would have an adverse psychological impact on him; and

iii. The shift changes would make it difficult for him to paly as active a part in the care for his son,

but it makes no mention of any of these difficulties arising from the Claimant's depression, and nor did the Claimant in his witness statement (which did not mention his depression at all) or oral evidence to the Tribunal.

c) Consequently, the Tribunal concludes that the Claimant's inability to work the Day Shift or the Night Shift arose from the Claimant's caring responsibilities for his son, not from anything that arose from his depression.

d) Was the unfavourable treatment because of that thing?

(i) In any event, the Tribunal has already found that the Claimant was dismissed because:

I. The Respondent determined that he was not to be permitted to work the same night shifts as Mrs Motyczńska because of the fundamental and

irremediable breakdown in the working relationship between the Claimant and Mrs Motycznska caused by the Claimant's conduct; and

II. There were no redeployment options that the Claimant would consider, either because those options were not suitable for him or because the Respondent would not provide him with a relocation package to Dartford.

e) The Respondent did not treat the Claimant unfavourably because of something arising in consequence of his disability. The Respondent treated the Claimant unfavourably because of the Claimant's misconduct. A consequence of the disciplinary sanction imposed on the Claimant was that he was no longer permitted to work the Late Shift, and the Claimant's caring responsibilities for his son meant that he could not work the Day Shift or the Night Shift, and he was not prepared to consider relocating to Dartford without a relocation package, which the Respondent would not provide.

223. Complaint 4 therefore does not succeed.

Complaint 5: That the Respondent failed to make reasonable adjustments in respect of him when it applied a provision, criterion or practice to him requiring him to work a shift pattern other than a shift pattern with his colleague, Mrs Motycznska, from 11 October 2022 onwards

224. The Claimant relies on both of his averred disabilities in respect of this complaint. As noted above, the Respondent accepts that the Claimant was disabled by reason of depression at the material time, but not by reason of stress and anxiety, and the Tribunal has found that the Claimant's stress and anxiety was not a disability for 2010 Act purposes. Therefore consideration of Complaint 5 proceeds solely in relation to the Claimant's depression.

225. The Respondent resists this complaint on various bases. It says:

a) The Respondent did not know, and nor could it reasonably be expected to know, that the Claimant had the disability when the decision was taken to change the Claimant's shift pattern on or around 11 October 2022;

b) The averred PCP is not, as a matter of law, a PCP, but rather a one-off act in the course of dealings with one individual;

c) The disadvantage the Claimant would have suffered as a result of working the Day Shift or the Night Shift was a consequence of both the Claimant's caring responsibilities for his son, and the Claimant's sleep patterns. The disadvantage was not as a result of the Claimant's own depression; and

d) The adjustments contended for by the Claimant were either not reasonable or not practical.

226. The PCP here, of requiring the Claimant to work a shift pattern other than the one with Mrs Motycznska, was not a one-off act, but would have continued to apply to the Claimant's future working arrangements (*Ishola*; *Carreras*). It was a PCP, and it was applied to the Claimant.

227. The Claimant suffered a substantial disadvantage – he could not return to work at Allington, because the only shift pattern he could work was the Late Shift from which he was now barred.

228. However, the Tribunal agrees with the Respondent that the substantial disadvantage the Claimant suffered by not being permitted to return to working on the Late Shift arose not from his depression, but from his caring responsibilities for his son. The Claimant has failed to show that there was a causative nexus between his depression and the substantial disadvantage suffered, and therefore the duty to make reasonable adjustments did not arise.

229. Complaint 5 also therefore, does not succeed.

Conclusions

230. For all of the above reasons, none of the Claimant's complaints succeed. There is consequently no need to consider the issue of time limits, which arose in respect of some of discrimination complaints.

Employment Judge Ramsden

Date 28 March 2025

Judgment sent to parties:

Date: 1st April 2025

For the Tribunal Office

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

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

List of Issues

The Issues

The issues the Tribunal will decide are set out below.

1. **Time limits**

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

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates, i.e., by 10 February 2023?

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

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

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

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

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

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely the breakdown in the claimant's relationship with his supervisor.

2.2 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?

3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the claimant be compensated?

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the claimant's compensation be reduced? By how much?

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

3.6.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.6.11 Does the statutory cap apply?

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Disability

4.1 The respondent concedes that the claimant was a disabled person by reason of depression (though knowledge is not conceded). The respondent does not concede that the claimant was a disabled person by reason of stress and anxiety.

4.2 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about by reason of anxiety and stress at work? The Tribunal will decide

4.2.1 Did they have a physical or mental impairment: anxiety and/or stress at work?

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

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

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

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

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

4.2.5.2 if not, were they likely to recur?

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 Subject the claimant to disciplinary action in the period 19 August 2022 to 5 January 2023; and/or

5.1.2 Change the claimant's shift pattern without consultation and with 1 weeks' notice on 11 October 2022?

5.2 Was that less favourable treatment?

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

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

The claimant has not named anyone in particular who they say was treated better than they were.

5.3 If so, was it because of disability? The disability the claimant says was the reason for the less favourable treatment was stress and anxiety.

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

6.1 Did the respondent treat the claimant unfavourably by dismissing him on 20 February 2023?

6.2 Did the following things arise in consequence of the claimant's disability (both stress and anxiety and depression):

6.2.1 The claimant's inability to work certain shifts?

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

6.4 Was the treatment a proportionate means of achieving a legitimate aim?

6.5 The Tribunal will decide in particular:

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

6.5.2 could something less discriminatory have been done instead;

6.5.3 how should the needs of the claimant and the respondent be balanced?

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

7. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

7.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

7.2.1 Requirement to work a shift pattern other than a shift with his colleague Veronica, which it applied to the claimant from 11 October 2022 onwards.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability (the claimant relies on both (i) stress and anxiety and (ii) depression), in that other shift patterns affected the claimant's sleep patterns and his stress levels and ability to function?

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

7.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

7.5.1 The respondent should have accepted the claimant's offer to work 9-2pm;

7.5.2 The respondent should have accepted the claimant's suggestion that he should be demoted ie to return to a colleague position from 9-2pm.

7.6 Was it reasonable for the respondent to have to take those steps?

7.7 Did the respondent fail to take those steps?

8. [Intentionally blank]

9. Remedy for discrimination or victimisation

9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the claimant?

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

9.4 If not, for what period of loss should the claimant be compensated?

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

9.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

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

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

9.9 Did the respondent or the claimant unreasonably fail to comply with it?

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

9.11 By what proportion, up to 25%?

9.12 Should interest be awarded? How much?