EMPLOYMENT TRIBUNALS

Claimant		Respondents
Mr C Saunders	AND	Peloton Interactive UK Limited

Heard in London Central Employment:

Before: Employment Judge Nash Date: 20-31 January 2025

Members: Mr Pearlman
` Ms Sandler

For the Claimant: In person
For the Respondents: Mr Platts-Mills of Counsel

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Introduction

1. At this final hearing the Tribunal had sight of a bundle to 1232 pages. This included three particulars of claim, an original dated 21 July 2023, an amended particulars of claim on 7 August 2023, and what was - although not labelled as such - a re-amended particulars of claim on 1 September 2023. It was agreed that the September particulars of claim was the relevant version for the purposes of the claim. There was a single grounds of resistance on 5 September 2023.

2. This matter previously came before the Tribunal at a case management hearing for two days from 23 October 2024. Amongst other matters, the case management order set out reasonable adjustments for this hearing and limited reasonable adjustments to those set out in the case management order, unless there was a further application.

3. At this hearing all witnesses swore to their written witness statements, the Tribunal heard from the following witnesses:

- The Claimant

From the Respondent:

- Ms Rebecca Watson - Senior Manager and one of the Claimants Line Managers
- Mr Wayne Rodgers – Assistant Manager, Concierge and Member Experience another of the Claimants Line Managers
- Ms Scarlett Dutnall – Director of Studio Experience with the Respondent at the material time
- Ms Bhati Bhangu – People Generalist
- Mr Mario Cardoso – at the material time the Respondent's People Business Partner and Senior Business Partner

The Issues

4. The Tribunal had sight of an agreed list of issues. At the hearing there were a number of amendments to the list of issues made by consent, following full discussion with the parties. The amended agreed list is appended to this judgment. The amendments were

a. The allegation in respect of indirect discrimination as to the interview question was withdrawn
b. the Respondent set out what legitimate aim it relied upon in its "justification" defence; and
c. constructive dismissal was added as a further act of direct discrimination.

Reasonable adjustments

5. The Tribunal ensured that the adjustments set out in the case management order were effected. The Tribunal was able to provide the Claimant with a private waiting room to which no other party had access. In the event the Claimant did not need to use earplugs during the hearing. The Tribunal sat for 50 minutes at a time and then adjourned for 10 minutes. The lights in the Claimants waiting room were adjusted and latterly at the Claimants request in the Tribunal room itself. The Tribunal day started no earlier than 10:30am and finished before 4:30pm, sometimes well before 4pm. The Tribunal regularly checked with the Claimant as to his wellbeing. It sought to make it clear to the Claimant that he did not need to answer such enquiries immediately but could revert to the Tribunal later after consideration. The Tribunal allowed the claimant more time to question respondent witnesses. The Tribunal had regard to the provisions of the equal treatment bench book in respect of persons with autism whilst reminding itself that it should not assume people with autism are a homogonous group, and that each person has individual needs.

6. The Claimant raised no concerns about his ability to participate in the hearing.

Preliminary matters

7. The first preliminary issue was when the tribunal should consider the preliminary issues. The case management order had not timetabled the hearing beyond the first two days. The first day was timetabled for reading and the second day for dealing with preliminary matters. Both parties attended the hearing on the first day. The Tribunal raised this matter with the parties.

8. The Tribunal had to balance two considerations. It sought to ensure that the Claimant felt under no pressure to change arrangements that had been agreed in advance or answer questions immediately. At the same time, it sought to guard against making assumptions about what was in the Claimant's best interests and reminded itself that he was the best guide to how he could best participate in the hearing. This was the approach that the tribunal sought to apply during the rest of the hearing.

9. The tribunal raised the issue of whether it would be better to deal with preliminary matters on the first day. The Claimant, who was accompanied by his father, stated that he would prefer to have the discussion as to preliminary issues on the first morning of the hearing. The Respondent objected on the basis that the Claimant as an autistic person should not be put on the spot and asked direct questions, and it would be better for the Tribunal to stick with its predetermined timetable.

10. The Tribunal considered this issue. It explained to the Claimant that if he would prefer to discuss the preliminary issues as originally timetabled that is on the second day the Tribunal would be happy to do that. The Claimant told the Tribunal he would prefer to deal with the preliminary issues immediately.

11. The Tribunal in making its decision took into account the fact that the Claimant had prepared for the first day of hearing a list of preliminary issues together with a list of documents and lengthy and thorough submissions. It accordingly appeared that he was well prepared to deal with preliminary issues on the first day.

12. The Respondent's Counsel was concerned that the respondent might not be adequately prepared and therefore at a disadvantage. The Tribunal took the view that matters such as applications to amend were not complex or abstruse matters of the law and the Respondent should be ready to deal with these. However, if more complex matters - such as the nature of waiver of privilege - arose, the Tribunal could think again. In the event the Tribunal was satisfied that no such complex issues arose.

13. The Tribunal determined that it should not in effect second guess a litigant in person because he had autism. The Claimant gave cogent and clear reasons as to why he would prefer to deal with preliminary issues on the first day. He would prefer to know the tribunal's decisions earlier, so he would have time to consider and plan how to proceed. Accordingly, the Tribunal addressed the preliminary issues at the beginning of the first day of hearing.

14. The issues raised by the Claimant were as follows. Firstly, that he could wear informal clothes in the hearing, to which there was no objection. Secondly, that the Respondent's draft cast list, chronology and key documents were not agreed. The tribunal took note of this. Thirdly, a renewed application for specific disclosure which in the event the Claimant pursue.

15. The claimant also applied to amend his claim to add a complaint of victimisation under s27 Equality Act. The Tribunal heard full arguments from both parties and gave four reasons orally at the time, which is not proportionate to repeat here, save to say the result was that the Tribunal did not permit the application to amend in respect to the claim concerning the Respondent's legal team's letter to the Employment Tribunal or to add a claim for protected disclosure. It did grant an amendment in respect of a victimisation claim based on a change to the grievance appeal outcome letter.

16. The Claimant criticised the Respondent's conduct in respect of disclosure. The Tribunal advised the Claimant to address those matters as appropriate in cross examination and/or submissions.

17. There was an application by the Respondent for late disclosure being photographs of the workplace. The claimant objected. The tribunal heard arguments from both parties and gave a reasoned decision. In brief, the Tribunal was satisfied that the value of the documents was outweighed by the prejudice to the Claimant on the first day of the hearing being confronted with new documents.

The Facts

18. The Respondent's business is selling an interactive fitness platform which provides amongst other things instructor-led classes for use on its bespoke hardware. The respondent is the UK arm of an international business. The respondent employed at the material time approximately 396 people including 163 at its studio in London where the Claimant worked. The studio provides live exercise classes that are attended by members and customers. The classes are provided to its subscribers worldwide, both by live streaming and on demand. The studio also provides members facilities, including a lounge, showers, storage and bars. The Claimant contended that the Respondent's business model is primarily in its subscriptions and there was no challenge to this. The tribunal accepted that the Respondent needs to provide high quality content to attract and retain its subscribers. The Respondent's subscribers had access to both live streamed content and to a library of prerecorded classes.

19. The Claimant commenced employment at the London studio on 6 June 2022 as a part-time member experience (MX) associate. He worked three days a week, at the time he was a student. The role was a front of house role, greeting and servicing customers and members coming onto the premises and getting them into classes. It was analogous to a reception role. The salary was Level One which is the lowest salary level. When the Claimant started work, he asked by email for adjustments due to his autism. He said he

had sensory issues and asked for no rush hour travel and to wear sunglasses at work. The respondent agreed.

20. The London Studio is a high-profile large glass fronted building in Covent Garden. It had state of the art recording and production facilities to generate the content. At the time the Claimant started work, the Respondent was in a preopening period and had few customers attending. There were some trial runs for classes for members, families or staff.

21. The building had three office spaces. The office space was quiet as many staff were still working from home in June 2022, so it was easy for the Claimant to find a desk, locker and so on. Off the atrium were two studios where the Respondent filmed its content - instructor led classes. There were stairs behind up to a café and stairs down to the changing and lounge facilities.

22. The respondent's headquarters was nearby in a separate building.

23. In August 2022 the Claimant moved to a new role as a part time studio concierge with an increase of pay from Level One to Level Two. The concierge was also a member facing role which had additional duties such as taking member photographs. There were usually four concierges on duty at a time. The Claimant said he preferred working behind the desk and that essentially there was a degree to which the concierges between themselves would move around and cover each other's duties.

24. There were usually four concierges on duty who were "zoned" or assigned to specific areas. One worked on the downstairs lounge reception, one by the downstairs lounge, one upstairs in the atrium, and a fourth was a "floating" role.

25. In August the Respondent held a big opening event. Ms Dutnall joined as its global leader for studios. She led the opening and according to the Claimant did an excellent job.

26. After opening, customers entered the studio's large atrium to be greeted by the receptionists, the member experience (MX) team behind a desk. The customers went downstairs to change and then back upstairs into the atrium to wait to be led into the studio to film the classes. That meant that there would be crowds of people waiting downstairs or upstairs to go into the studio. It was an important part of the concierges' role and to a lesser extent the MX role to keep customers' energy levels up whilst they were waiting to go into the filmed classes.

27. After the customers had finished their class, they were led to a location in front of large logo and photos were taken by one of the concierge team with the instructor. The concierge edited the photographs and sent them to customers within 24 hours.

28. The studio at this time was only open to customers approximately Friday to Sunday, the days the Claimant worked. There were other members of the concierge and MX teams who worked on the days when the studio was closed to customers. The

Respondents case was that it was only once the studio was fully opened did it make up its mind about the exact difference between the MX and the concierge teams.

29. It was not in dispute that the Respondents full time staff in both MX and concierge were required to be fully flexible. Essentially full-time staff had to be available to work any time between 5:30am to 10:30pm. About six weeks in advance they would be given their shifts, being 40 hours a week.

30. On 22 September Mr J J Money successfully applied for the vacant advertised role of concierge lead for which the Claimant did not apply.

31. The Claimant returned to work in September after sick leave having been diagnosed with depression. His manager, Ms Watson said that the Claimant asked for flexibility in his zoning, that is the area in which he was scheduled to work. She therefore assigned him to the changing lounge and the floater roles. Her thinking was that the floater role operated as a back up to the other concierge roles, and it would be easier for him to take breaks, with less impact on other team members and customer service. Further, the lounge role was in her view somewhat less customer facing than the others. The lead concierge would check in with the Claimant at the beginning of his shifts in respect of his tasks and his medications.

32. From about October to November the Claimant was therefore zoned either in the lounge role or the floater role. The claimant, started to feel overwhelmed and suffer from sensory overload. He took unpredictable and unscheduled recovery breaks of about 20 minutes away from role because of sensory overload. The other concierges had to cover the claimant's role during the breaks, without notice. This caused difficulties for the team.

33. On 7 October Mr Money emailed Ms Watson about zoning problems with the Claimant.

34. The tribunal accepted the Claimant's evidence that from about 13 November to 16 December 2022 additional tasks were not allocated to him, for instance photographs. The Claimant's account was that he was slower to edit photographs than others, and therefore it made sense that this task would be allocated to him less frequently. Further it was plausible that the floater role and changing roles involved less admin tasks.

35. The working environment for the Claimant continued to change. In November 2022 Peloton worldwide required staff to return to site at least three days a week. By the end of 2022 the studio and the content generation had ramped up. Accordingly, there were many more classes with many more customers in the building.

36. The studio was deliberately planned as a highly stimulating environment for customers in order to increase their energy levels, so they were excited and high energy during the filmed classes. Fragrances were pumped into the public spaces, lights were bright and there was loud pop music. As there were more people in the building, there was more music more frequently and simply more noise. The Claimant gave vivid

evidence that some of the instructions had groups of fans, like fans of a pop star, who screamed in excitement when they saw their instructors. There was a very different clientele compared to the select few during pre-opening. The noise, sensory stimulation and numbers of people increased from September and continued to do so.

37. On 25 November the Claimant was called into a meeting with Mr Money and Ms Watson. He was given feedback from the concierge team that they were concerned that he was not providing good customer service, that he was slow editing photos and that he was essentially walking off and being absent whilst on duty. The Tribunal understood this to be the Claimant taking breaks to decompress due to the sensory overload in the studio. Ms Watson did not give the claimant notice of the meeting because she tried to avoid doing so for feedback meetings, to avoid publicity or anxiety. During this meeting Ms Watson said the Claimant in effect stormed off and the Claimant himself accepted that he did walk out. The Tribunal accepted that at least the Claimant became angry, did not accept the feedback well, and walked out of the meeting.

38. Ms Watson was surprised at the claimant's reaction. The Respondent had not passed on to her the information that the claimant had autism. She only knew that he was diagnosed with depression. The respondent did not explain why it had not provided Ms Watson as the Claimant's line manager with this important piece of information. Ms Bhangu of HR told the Tribunal that the respondent had never had this situation before and that the Respondent had no disability policy.

39. After the meeting Ms Watson discovered that the Claimant was autistic. Mr Money sent an email to the Claimant apologising that he had not received notice of the meeting.

40. On 30 November Ms Watson sent the Claimant an Occupational Health form. She informed the clamant in an email that Mr Money, as the team leader would schedule breaks for the Claimant during his working day. It was agreed there would be a 15-minute break every hour and the claimant would receive 24 hours' notice of any meetings. Further, Ms Watson would relook at the roles available, including whether there was any retail space role available for the Claimant.

41. The tribunal was satisfied that the Claimant understood that his taking unexplained unscheduled breaks was not sustainable, and he therefore came up with a solution of regular breaks to help him manage the sensory overload in a structured way.

42. Unfortunately, the plan for the team leader Mr Money to schedule the breaks did not work. Mr Money and the Claimant discussed the matter on 2 December at the desk and agreed that the Claimant himself would decide when to take these breaks. Mr Money told the Claimant he could choose which zone he wanted. The claimant accepted that he might wrongly have given the impression to Mr Money that he was content to schedule his own breaks, and he might have misunderstood. This agreement was not recorded in writing, which might have helped the claimant understand and engage with what had been agreed. It was recorded that the Claimant was suffering from sensory

overload because of the number of people, the fragrance, the loud music and the screaming and the higher number of classes.

43. The Tribunal accepted that this conversation was a miscommunication, and the Claimant struggled to schedule and take his breaks on his own because of his disability. In practice therefore the Claimant sought to take his 15-minute breaks on his own and the team leader whose responsibility it was failed to schedule breaks.

44. On 14 December Ms Watson emailed Ms Bhangu of HR stating that the Claimant was not performing the role at all, and communications were really bad from him to the team, that this was affecting team morale hugely and it was a tricky situation.

45. In December a colleague Mr Nzuzi successfully applied for the advertised vacant role of concierge lead. The Claimant did not apply for this role.

46. On 16 December the Claimant emailed Ms Watson saying that he had been zoned least on photos than anyone in the concierge team, and others were getting more admin (non-customer facing) tasks such as end of day reports, managing google groups. He contended that other colleagues were favourites, he was suffering from health issues, he was exhausted from fixing IT and tidying up. He said that he found it difficult to greet new customers because of his autism and that he was ostracised from the team. He had been working in the floater and lounge zones which were the least suited to his disability. He said he did not want to be the only person in the changing rooms. He said that he was not getting all of his one-hour breaks, and the 15-minute breaks were not being implemented.

47. On 28 December the respondent received the Occupational Health report for the Claimant. It suggested considering redeployment and a referral to an Occupational Health physician for a more detailed explanation. It stated the Claimant had hypersensitivity to noise and light, particularly when he had to interact with lots of people such as customers, he struggled with attention, memory, information and problem solving - but he was not unfit for work.

48. On 5 January 2023 the Respondent announced a restructure of its London studio which impacted the Claimant's role. This was part of a major redundancy programme of up to 150 staff across all of the Respondent's sectors. In the studio there was no loss of head count. The studio was to open up seven days a week and open up its retail space and there was no additional budget. The Respondent chose to make all staff in concierge and MX reapply for their jobs. There were no redundancies as there were more roles than staff.

49. Ms Watson and the Claimant discussed the situation on 9 January. The Claimant received 24 hours' notice of his interview with Ms Watson.

50. Ms Watson offered the Claimant roles including café, retail or member experience. As the Claimant did not want café or retail, he chose the level one MX role. Ms Watson advised him that she thought that MX would be less triggering for him

because it was a less customer facing role with more admin time. Her thinking was because there were more people scheduled on the front desk at MX, that would make it easier for the Claimant to take more breaks. There were periods on Thursday and Friday when the customers were in class so there was less customer-facing time. Unlike in concierge, he would not have to deal with photographs and hosting, welcoming and managing large groups. The Claimant accordingly applied for the part time member experience associate role.

51. Ms Watson had a meeting with the claimant on 19 January where he was not given 24 hours' notice. She explained that in moving back to MX, his pay would reduce from level 2 back to level 1. The Claimant verbally accepted the MX role. But he said he was very surprised about the pay cut because he thought from previous experiences his pay would be protected when he went down a grade. The Claimant's evidence was that it was difficult for him to engage in the meeting on 19 January because of the lack of notice, and he felt pressurised to agree. It was a major reorganisation, and he was one of many moving parts. Further he had a lot of personal issues and distractions at the time.

52. He emailed his acceptance of the part time member experience role on 25 January with a start date of 7 February.

53. When he moved to the MX team, Mr Wayne Rodgers became his line manager. At that time MX was operating two zones, the café and the reception desk. It had a spreadsheet recording MX zoning. (The concierge team had always had a zoning spreadsheet because it always worked across multiple zones.) The MX team was made up of 5 full time associates including the lead, plus about 10 part time associates - the number varied - including the Claimant. Whilst a member of MX the Claimant worked mainly at the atrium reception desk in front of a large bright screen streaming classes or promotional videos. Other video screens operated in the café.

54. During the filming of classes, the feed was broadcast including loud music and noise from the class including the instructor shouting encouragement. As the number of classes grew, this became more and more frequent. Music played constantly, when there were no classes, the Respondent had a play list. Respondent witnesses gave unchallenged evidence that pop music was fundamental to the Peloton brand. This was how the respondent attracted customers to classes, for instance there were classes themed around particular music.

55. There was a need to strictly control customer movement to ensure that they were was ready for filming the classes efficiently. The Respondent was about 4 days of classes a week in late 2022 and in late January/early February 2023 this went up to 5 days of classes a week.

56. Ms Watson said that at this time the Respondent was dealing with about 100 emails a week, which might be random requests from tourists and different time zones which needed immediate replies. Ms Dutnall estimated that many of the emails would not be time consuming because there was often a macro response, or the enquirer

could be referred to the FAQs. The respondent also needed to schedule for instance VIP guests or an important member.

57. Ms Dutnall gave evidence that full time MX staff who were in the studio on days and times when there were no classes were not very busy. They were salaried and the Respondent in effect had to find things for them to do. Her evidence was that in the New York studio, which was four times bigger, there was not enough admin for a full-time admin person.

58. On the days when the Respondent was operating classes there were always two members of the MX team on duty at the atrium desk and a lead who did office work. They could also call up a third person, but it was a tight fit for four people around the atrium reception desk.

59. Ms Dutnall's evidence was that the respondent required full time staff to be fully flexible over seven days because the global production team preset the global schedule for content production with a set number of classes. The London studio would receive the global timetable about six weeks in advance. The London studio then had to ensure that it could produce the content allocated at the allocated time, which included the correct schedule of MX team members. Sometimes on days when the studio was not open to customers, there might still be classes, for instance, trials of non-member classes, employee classes, press classes or an instructor flying into the UK to do a special class. Ms Dutnall's evidence was that the admin load reduced as the operation got up and running.

60. On 2 February 2023 the Claimant refused to sign a contract confirming his MX role due to the associated reduction in pay. On 6 February he submitted a request to the respondent's people team, that is HR, that he was unable to do the concierge role. He said that he had been moved to MX because of his autism, and he requested the following adjustments:

1. Fifteen-minute break after an hour of a meeting,
2. Fifteen-minute break after 90 minutes in public facing areas, to be scheduled on the zoning schedule spreadsheet
3. A fixed working day schedule of Thursday, Friday and Saturday
4. Financial support to buy noise cancelling headphones
5. Relaxation of triggers for disciplinary action for sickness leave or mistakes arising from infective function impairment
6. Retain his level two pay grade

61. The Claimant's first week in member experience was the week commencing 6 February. The Claimant started work in member experience on 7 February. At this time almost all the managers were absent. The claimant was rota'd for four days rather than three, Mr Rodgers said that he was not aware that the Claimant had a fixed schedule because this was only requested on 6 February and in effect, too late. The Claimant said that he did much more public facing work that week. Mr Rodgers who was not there doubted this as there were emails showing that the Claimant had done at least some

admin on this week. The Tribunal accepted that there was a disproportionate amount of public facing work for the Claimant in his first week on MX when things were settling down and no managers were available, but he did do some admin work. Essentially, his first week in MX did not go well.

62. On 8 February there were discussions about the Claimant's request for reasonable adjustments. HR together with Ms Watson agreed to all of the reasonable adjustments save for relaxation of sick leave triggers and the pay - which were left outstanding. Mr Rodgers, the Claimant's line manager, was not consulted.

63. On 18 February the Claimant made an application to access to work. The Respondent told the Tribunal it had never heard of the access to work scheme.

64. On 20 February the Claimant raised his first grievance, this essentially was the same as his earlier request for reasonable adjustments. He stated that the two December reasonable adjustments of 15-minute breaks and notice of meetings had not been implemented.

65. On 22 February 2023 the Claimant met with Ms Watson to discuss the adjustment requests and the grievance. He also informed her that he suspected that he might have ADHD. He came in on his day off and received 24 hours' notice of the meeting. The Claimant asked if the Respondent could fund an ADHD assessment due to lengthy delays in the NHS. The Claimant requested scheduling the 15-minute breaks on the spreadsheet so that it was effective. Ms Watson told him that the Respondent was considering the final two, the relaxation of triggers and the pay scale. The Claimant also chased the second OH referral.

66. Following this meeting the Claimant withdrew his grievance. On 10 March the Claimant signed the contract at the lower pay. The Respondent told the Claimant it did not have any sickness triggers which it could adjust, but it would be more flexible on its sick pay and sick leave policies.

67. On or around 14 March the MX team received a customer complaint that a man on the front desk had ignored three customer questions and played with his Apple watch. Mr Rodger's account was that he identified three possible male staff, including the Claimant, by checking the shifts and if they had watches. Mr Rodger's evidence was he spoke to each of these three men including the claimant separately. He did not ask who was responsible but said that staff must be mindful of how they come across to members.

68. The Claimant's account was different. He said that Mr Rodgers openly criticised him in a meeting with all three there. He accepted that Mr Rodgers did not realise that the Claimant was fiddling with his watch because, on the Claimant's case, he was "stimming" that is a repetitive activity which enabled him to cope with his symptoms of autism. The Claimant's account of Mr Rodgers in the meeting was inconsistent. He variously stated that Mr Rodgers directly criticised him, or indirectly criticised him, and that Mr Rodgers did or did not say that the claimant was not doing his job properly.

69. The Tribunal considered the evidence and preferred Mr Rodgers account – which was more consistent - save that it found that Mr Rodgers had spoken to all three staff members at the same time rather than separately. The reason was that it would have been inefficient and awkward to see each separately. His purpose - that of telling staff to answer customer questions and to appear attentive to customers would be better achieved by talking to staff in a group. The tribunal concluded that the claimant was remembering not what Mr Rodgers had said, but his genuine impression of what Mr Rodgers meant. This, however, was not the same as the Claimant being incorrect about specifics such as numbers in meetings. The Tribunal concluded that the Claimant was likely to be more reliable on this because this was not a question of impressions but a simple fact as to how many people were in a meeting.

70. On 23 February the studio's retail space opened, and the Respondent prepared to open its café. The effect was that the café was moved away from the member experience team and therefore there was no longer a need for a zoning spreadsheet. The MX team dispensed with the spreadsheet which meant there was nothing on which to record the claimant's breaks. The claimant's account was that at a one to one on 9 April 2023 Mr Rodgers made the claimant responsible for scheduling and managing his own breaks. Mr Rodgers said that he had discussed with the Claimant how the breaks would be implemented and had offered the Claimant options. When the Claimant told him he liked to map out his day, it was agreed that the Claimant would plan the breaks and inform the team at the start of the shift. Mr Rodgers said he did not see the breaks happening, but he was not always on the desk to check.

71. There was no written recording of this significant change to a reasonable adjustment that had been agreed in writing and in promise of which the Claimant had withdrawn his grievance.

72. This new plan did not work well because the Claimant had to in effect negotiate with his team every day about his breaks, instead of being able to rely on a schedule set out in advance in writing by management. The Tribunal accepted that this caused a particular difficult situation for the Claimant because of his disabilities. The result was that at times the breaks got missed or truncated or were not sufficiently timed because they were not properly scheduled. Mr Rodgers said that the Claimant had agreed to this plan, whilst the Claimant said that he made it clear that he was unhappy about this plan. The Tribunal found that there was miscommunication. The Claimant may not have pressed Mr Rodgers during a discussion because he found it much easier to deal with things that were in writing, rather than verbal agreements.

73. On 21 April 2023 the Claimant messaged Ms Dutnall about his difficulties with the music. Ms Dutnall told the Tribunal she accepted she could have kept the Claimant more informed about her enquiries concerning the music.

74. On the same day the Claimant had a one to one with Mr Rodgers who referred to the breaks and the scheduling. The Claimant according to Mr Rodgers said the role was boring, he was suffering from sensory overload and had problems being around

customers and members. Mr Rodgers told the claimant that his MX role could not be limited to admin only. There was a discussion about the Claimant for applying for the MX team leader role. Mr Rodgers said that the Claimant's idea was that this would be less member focussed and more back-office work. Mr Rodgers corrected him; it would require a lot of time on the floor, and he dissuaded the Claimant from applying. Mr Rodgers also said the Claimant had said he was going to apply for the part time concierge role because that would involve less member facing duties.

75. The Claimant denied Mr Rodgers discouraged him from applying. The claimant accepted that he said the MX role was no longer right for him, that he was bored and suffering from sensory overload although not in that meeting. The Tribunal found that Mr Rodgers had swept up what the Claimant had said over a number of meetings into one meeting, and the email of 25 April broadly reflected the Claimant's views.

76. Ms Watson replied to Mr Rodgers saying the Respondent, "was going round in circles" with front of house roles for the Claimant, who was not performing to standard in the roles despite the adjustments. The Tribunal understood Ms Watson was referring to the Claimant moving from MX to concierge, back to MX and now seeking to move back to concierge.

77. Mr Rodgers learnt that the Claimant had been diagnosed with ADHD in April.

78. The Claimant applied for the member experience lead role. Mr Rodgers rejected his application on the papers. The claimant was told this was because he had no management experience and had not shown any signs in the current role – where he was struggling - of being ready for leadership. This account of why the Claimant was rejected was not entirely accurate. The Tribunal accepted that the Claimant's lack of leadership experience was a factor in the decision. Ms Dutnall said that the potential comparators - Patrick and Joe - both had previous leadership experience. However, the Respondents' witness statements made it clear that a more important factor was that the Claimant was unable to carry out the functions of his current role as MX member associate and would therefore be unable to carry out the functions of the lead which included significant front of house work.

79. The Claimant also applied for the role of concierge. There were eleven candidates of which the Claimant was the only internal candidate. Ms Hall interviewed the external candidates in a group whereas Mr Rodgers interviewed the Claimant in a one-to-one interview.

80. The Tribunal had sight of the claimant's score card. Mr Rodgers asked the following questions:

(a) How do you ensure quality when you are under time constraints/change management
(b) Describe a time when you made a mistake a work and how did you deal with it
(c) Example of a time when you used customer feedback to drive improvement
(d) Why Peloton?

(e) Why concierge?

81. Mr Rodgers and Ms Dutnall said in their witness statements that the first question was a common question for a lead role. However, the concierge role was not a lead role. Mr Rodgers said that the question was one of a bank of questions he had, and he used it for front of house roles because they involve last minute changes, for instance delays in live classes, issues with the bikes, and no shows. The Tribunal accepted that the first question was a reasonable and relevant question for the concierge role. The purpose of the concierge role was to ensure the member experience was smooth but also to ensure that members were energised and efficiently deployed so that they could play their part in content generation in the classes.

82. Mr Rodgers made contemporaneous notes of the Claimants interview which the Tribunal accepted as broadly accurate because they appeared plausibly unpolished as if they had been written during an interview. Further, the Claimant did not challenge the accuracy of these notes, when he robustly challenged another document in which Mr Rodgers carried out his analysis of the Claimant's answers.

83. Mr Rodgers went through his list of set questions in the interview. Part of the Claimant's answer to Mr Rodgers' first question was a reference to time blindness, and the claimant described some of his coping strategies. There was no record of any other discussions save a comment from the Claimant that he did not want to work front of house and "it's just work". According to Mr Rodgers the Claimant said, I don't want a front of house role.

84. On 3 May Ms Watson told Mr Rodgers and Ms Dutnall that Ms Bhangu was going back to legal given the sensitivity of the situation. The Tribunal found that these four members of staff were at least aware of the possibility of an Employment Tribunal claim and that this had some impact of their actions going forward.

85. On 5 May the Claimant was rejected for the concierge role. He was offered feedback with Mr Rodgers but did not take this up. At this time, he declined three invites to meetings with Mr Rodgers - one when he was sick - and did not reply to Mr Rodger's email asking why. The email was copied to Ms Watson.

86. On 8 May the Claimant raised his second grievance. He asked that the Respondent reallocate all his front of house duties to other team members and find him a suitable alternative role. He explained that he had moved to MX because he had been led to believe the role would be less customer focussed. He first week in MX had been very difficult, with a lack of management. He explained that wearing headphones and having a fixed schedule of working days had helped to some extent. He said he had been unfairly treated in the 25 November meeting. He was suffering from sensory overload in particular because of the music and could not use earplugs because he could not hear the customers. He grieved about Mr Rodger's comment about the watch and raised the continued delay to obtain a full OH report. He said he was not able to do his role in the current circumstances. He asked the Respondent to identify suitable alternative work

and, in the meantime, implement the reasonable adjustments. He said that his interview for the concierge role turned into a discussion of his disabilities.

87. On 10 May Ms Bhangu referred to a PIP (performance improvement plan) in an email to Mr Cardoso. Ms Bhangu's evidence was that this was something that HR was considering but she could not remember any details. Her evidence was unclear, and the tribunal was unable to place any reliance on it. Mr Rodger's evidence was that in his view it was too soon for a PIP. The Tribunal concluded that there was some discussion of implementing a PIP, but nothing came of it.

88. On 12 May the Respondent acknowledged receipt of the Claimant's grievance and told him Ms Bhangu would investigate. Ms Bhangu held an investigation meeting on 18 May with the Claimant. He told her that the MX role had really changed over time, there was more music, more people, more noise, and it was extra loud in the front of house. In fact, the MX role was if anything worse for him than the concierge role. The concierge role had some parts which suited him better, such as photographs, where there was less people interaction. He said the fixed days and the 10:30am start were helping, but it was over whelming because there were so many more people on the premises.

89. When he was asked about other reasonable adjustments, he said that he could be zoned more easily in the concierge role. He said that he was spending 50% time on front of house, that is customer facing duties, and that breaks were not being scheduled. MX was not the right role for him. Mr Rodgers had mentioned the watch incident in front of the whole team. He was struggling as the environment became increasingly busy and stimulating. The studio was all about the members and creating an experience for them - but it was not working for him. When he was asked what the Respondent could do to help, he said to deal with the OH referral which was by now significantly overdue, and to help to find another role.

90. Ms Bhangu held an investigation meeting with Ms Hall and Mr Rodgers. Mr Rodgers told her that when making the decision on the concierge application he took into account that the Claimant had previously said he did not want to do the concierge role and had given reasons. Further, the Claimant had told him that he did not want to work front of house and the concierge role was a front of house role. In addition, there were issues with the Claimant's performance - he was missing things and had "disappeared" for a two-hour lunch. Mr Rodgers said he had avoided bringing these performance concerns up with the Claimant. He said that he would not be able to re-allocate 50% of the Claimant's duties - his remaining customer-facing duties - to others.

91. The Claimant then was absent on sick leave until the end of May.

92. The Claimant and Mr Rodgers attended on 31 May a disability training event that was run by a member of the business disability forum and the Respondent's international head of diversity and inclusion. This was a session on disabilities, mental health and long-term health conditions. It was partly in person and partly remote. The Claimant was participating in person in a crowded room which he found difficult, so he arranged remote participation by video.

93. Mr Rodgers reported back from his breakout group. He said that some of front of house staff were reporting that they were uncomfortable dealing with disabled members. The Claimant thought that this suggested unease by his colleagues in working with him.

94. Mr Rodgers in oral evidence said he was referring to a discussion in the breakout about staff not knowing British Sign Language. This was not mentioned in his witness statement nor was it put to the Claimant. The tribunal did not accept that BSL was mentioned in plenary, although it may have been discussed in the breakout group.

95. On 31 May the Claimant also attended a return-to-work meeting with Mr Rodgers. He again asked for the full OH assessment. He asked to step away from customer facing work. He told Mr Rodgers about his ADHD diagnosis, and he was on new medication.

96. In his witness statement the claimant stated that Mr Rodgers had said that it was a lot of hassle to have to keep going back to HR. Mr Rodgers flatly denied saying this. The earliest document in which this comment appears was the grievance appeal interview of 29 June - it was not mentioned in the grounds of appeal. The Claimant told Ms Dutnall that when he explained about another adjustment, [Mr Rodgers] was saying I do not want to get HR involved if not needed. It made it seem like a kafuffle or extra work that he does not want to do as much. The Claimant said that he could not remember which was the adjustment that was being discussed. In the particulars of claim he said that Mr Rodgers had complained to the Claimant about the hassle of going to HR and in the witness statement he had said it was a lot of hassle to keep going to HR.

97. The Tribunal considered the context. Mr Rodgers had been putting in place, with varying degrees of success, a new system to support the Claimant. This inevitably had some negative effect on the rest of the team. Mr Rodgers was aware that this was a sensitive issue which had been raised with HR. The Claimant's account of what Mr Rodgers said was not consistent. In the view of the Tribunal, it was unlikely that Mr Rodgers would complain about going to HR when that was exactly what was happening. The tribunal found that Mr Rodgers said words to the effect that he did not want to get HR involved if it was not needed. The Claimant had confused what he thought Mr Rodgers meant with what Mr Rodgers actually said.

98. The evidence from the witnesses about the special measures that were put in place to assist the Claimant upon his return from sick leave in late May was inconsistent and it was not easy to determine what had happened. The Claimant told the tribunal that there was a temporary period on his return where he had no front of house work, after which he returned to normal duties. This was reasonably consistent with the account in his witness statement. The Claimant was not challenged on this evidence, and he asked during the appeal meeting why this change was not permanent.

99. Mr Rodgers' account in his evidence in chief was not in his witness statement and came after the Claimant's oral evidence. He said that after the Claimant's return from

sick leave in late May, new fixed shifts were put in place which included significant time which was not customer-facing, and he put extra head count into the MX team to allow the Claimant to do less front of house duties for a time. He said that some of the busiest time was from 5-5:30pm because two classes were starting at the same time, so it was agreed that the Claimant would avoid being on the desk for that period. This system did not alter before the Claimant resigned. The Claimant did not challenge this account.

100. The account in the witness statement was prepared somewhat nearer to the time and was not affected by the other party's evidence. The Claimant made a reference in the appeal meeting (much nearer the time) to his doing no customer-facing duties on his return to work. Nevertheless, Mr Rodgers' evidence about the system that was put in place after the Claimant came back to work was detailed and made sense.

101. The Tribunal accordingly found that the Claimant did not do any front of house work for his first week upon his return from sick leave. After that Mr Rodgers' system was put in place which survived until the Claimants resignation.

102. On 2 June 2023 the DWP contacted Mr Rodgers about the access to work application which Ms Watson had actioned. On 2 June the Claimant and Mr Rodgers met to discuss their working relationships. The Claimant on 3 June emailed Mr Rodgers and Ms Watson that perceived fairness amongst other staff on his reasonable adjustments was mentioned. He stated this in his grounds appeal and at his appeal meeting. In oral evidence the Claimant said that Mr Rodgers' comment was out of the blue and offensive because the meeting had not been about adjustments. Mr Rodgers said that he had made comments to the effect that it was important that adjustments were perceived as fair. The Tribunal found that Mr Rodgers had said that it was important that the adjustments were seen as fair by other team members, or words to that effect.

103. The Claimant had changed his medication. He wanted proactively to explain to his team how the meds might make it appear that he was ignoring or blanking them, when he wasn't. Therefore, time was made in the team meeting for the Claimant to explain this. After the meeting Ms Ravikumar - who had obtained the part time concierge role for which the Claimant had interviewed - approached the Claimant to say she thought him brave to talk about the disability as he had. The Claimant accepted that Ms Ravikumar did not mean to be offensive, but the Claimant found the comment offensive as he felt this was a patronising comment and implied that it was brave for him to be disabled.

104. On 9 June Ms Bhangu sent the Claimant her grievance outcome letter. The letter stated that the Claimant would be referred to an OH physician. However, the 50% of his role which was customer facing would not be reallocated to others because his role was fundamentally a public facing role. He would have to follow the usual recruitment process if he wanted to move to concierge or any other role. The letter included Mr Rodgers' concerns about the gaps in the Claimants performance.

105. The same day the Claimant contacted ACAS to start early conciliation and Ms Bhangu emailed him that the OH referral had finally been made on 9 June.

106. On 13 June the Claimant appealed the outcome of his grievance. On 20 June he asked the Respondent to amend the colours on its slides because a recent rebranding resulted in colours that were too bright for him. On 21 June access to work awarded a grant for aid and equipment. Ms Watson alleged that at this time the Claimant had shouted at her during a call. The Claimant accepted that he had shouted on at least one occasion and therefore the Tribunal accepted Ms Watson's account.

107. On 23 June Ms Dutnall confirmed to the Claimant she would hear the grievance appeal and invited him to an appeal hearing on 29 June.

108. On 27 June the Claimant attended the OH physician appointment. According to this report, the Claimant had ADHD and struggled with attention and hyperactivity. He would benefit from firm boundaries and help with focussing. Flow charts, alarms and timers would assist because he would find keeping to time potentially difficult. The Claimant was medically fit for work. He would be best working in a quiet situation with no interruptions. He would benefit from clear and unambiguous instructions. He might benefit from the use of headphones during complex work. Bright lights and noise should be minimised as much as possible and busy, noisy and chaotic environments should also be minimised as much as possible. On some days he might struggle with change. If these recommendations could not be accommodated, then the OH physician would recommend that the Respondent considered whether there were any opportunities for redeployment.

109. Ms Dutnall held a grievance appeal meeting with the Claimant on 29 June and as requested she sent the questions to the Claimant in advance. At the meeting the Claimant explained why he thought it would be practicable to do a 100% non-customer facing role. He said that his role did not need to be 100% customer facing because the Respondent employed staff – both full time and part time – to work on the days when there were no customers and who were accordingly carrying out admin duties such as emails. He proposed that in effect he carry out his colleagues' admin work and they work more on the member days and carry out his front of house duties. This would be practicable and sustainable.

110. He said that after he returned to work in late May this was what happened, and it was signed off by his GP. There were no major issues, and the experience did not change for members. He accepted that he was not privy to other team members' experience at the time. He also commented about how the members could be more like fans of a teenage boyband than conventional fitness class participants. He said he would prefer to sit at the same desk in a corner in the office. Since the return-to-work mandate, the building was very busy, and it was hard to find a desk in the corner.

111. On 10 July Ms Dutnall sent a draft appeal outcome to HR. She chased HR about the letter that was subject to significant delays, and she experienced difficulties in

setting up a meeting to take the Claimant through the result. On 12 July the Claimant's ACAS early conciliation certificate was issued.

112. On 14 July Ms Dutnall and the Claimant met, and he asked for the following additional reasonable adjustments

- fixed working days on Tuesdays, Wednesday and Thursdays,
- on Tuesday and Wednesday a shift from 10am to 7pm
- on Thursday any shift the respondent required,
- the furthest corner desk on the third floor would be reserved,
- weekly check ins with the line manager to receive support and feedback,
- meeting rooms adjusted to his needs, low lighting and maximum occupation not exceeded
- slides in meetings to have clear simple black and white colours
- 24 hours' notice of meetings.

113. On 23 June a Ms Armstrong successfully applied for the vacant advertised retail and café lead position for which the Claimant did not apply.

114. On 20 July the respondent announced some staffing changes. Ms Watson was promoted to senior manager studio experience. The Respondent's case was that this was only a change of job title to reflect her duties in line with US practice and there was no change to pay or benefits. On the same day it announced that another employee had a new role as community and corporate programming assistant manager. The Respondent's case was that this was only a change of title following restructure of the department. Two US employees were promoted.

115. On 21 July the Claimant submitted his claim to the tribunal.

116. On 25 July Ms Dutnall, having amended the letter to soften criticism of the Respondent following input via HR or legal, sent the Claimant a grievance appeal outcome letter. In the letter she agreed to support the Claimant in applying for vacancies where he was qualified and to make adjustments for interviews. She said there was no opportunity to create a new role although many roles were advertised internally before being shared externally. She stated

> I agree that there is an amount of administrative work that requires us to have a full time member experience position, however it is not feasible to move that person to solely work member days as it is not a set shift position. The Full Time Role is a role that is flexible across 7 days, not set 5 days. You do currently have an adjustment of having set shifts within your role, and are working Thursdays, Fridays and Sundays. Due to programming, 10/24 hours of these shifts are non-member facing, and 14 hours member facing. 41% of your role is already non member facing, and there has already been an adjustment to move you towards shifts with less member facing time. I understand that your manager will consult with you about other proposed adjustments shortly, taking into account the recent occupational health report and your feedback

117. She did not uphold the Claimant's grievance about Mr Rodgers' hassle comment because he had insufficient recollection of the reasonable adjustment that he was seeking and because Mr Rodgers denied it.

118. She said there should be mediation between the Claimant and Mr Rodgers because the Claimant felt he was not receiving feedback on his performance. The Respondent had put significant effort into reasonable adjustments, but this was ongoing and there would be consultation about further reasonable adjustments. She also said that Ms Watson would replace Mr Rodgers as the Claimant's line manager.

119. The original draft contained the following

> However, I do agree that additional reasonable adjustments could have been made in the lead up to the interview, such as sharing the area of questioning in advance, and this is something that we will monitor to ensure we are being as accommodating as possible moving forward.

120. The final version following input contained the following

> However, I do agree that it is important for discussions about reasonable adjustments which may be needed as part of a recruitment process for a role to take place in the lead up to the interview, such as sharing the area of questioning in advance, and this is something that we will monitor to ensure we are taking this into account moving forward.

121. The Claimant accepted that about 40% of his role at that time was non-member facing.

122. Ms Dutnall was not able to set up a meeting to discuss the appeal outcome because the Claimant was on leave.

123. On 27 July 2023 the Claimant resigned with immediate effect whilst on leave. He came into the studio in personal and handed his letter to Ms Dutnall.

124. The Respondent's evidence was that the head count at the studio had reduced as had the amount of content generation. The Tribunal saw no evidence of this, and the Claimant's evidence was that he had seen no sign of this during his employment. The Respondent evidence was that during Summer 2024 there had been large scale redundancies but again the Tribunal saw no evidence of this.

<u>The Law</u>

125. The law in these proceedings is set out in the Equality Act 2010 as follows: -

13 Direct discrimination

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
…
(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

15 Discrimination arising from disability

(1)A person (A) discriminates against a disabled person (B) if—
(a)A treats B unfavourably because of something arising in consequence of B's disability, and
(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

19 Indirect discrimination

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a)A applies, or would apply, it to persons with whom B does not share the characteristic,
(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c)it puts, or would put, B at that disadvantage, and
(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

20 Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2)The duty comprises the following three requirements.
(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
…
(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring

that in the circumstances concerned the information is provided in an accessible format.
(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

21 Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person…

26 Harassment
(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
…
(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

27 Victimisation
(1)A person (A) victimises another person (B) if A subjects B to a detriment because—
(a)B does a protected act, or
(b)A believes that B has done, or may do, a protected act.
(2)Each of the following is a protected act—
(a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.
(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4)This section applies only where the person subjected to a detriment is an individual.

136 Burden of proof

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

Submissions

126. The Respondent provided three documents of submissions which were provided to the claimant in advance. The Respondent spoke to its written submissions. The Claimant made only oral submissions.

Applying the facts to the law

Disability

127. The Respondent accepted that the Claimant was disabled by virtue of depression, autistic spectrum disorder (ASD) and ADHD.

128. As to knowledge, the Respondent prior to the hearing accepted it had knowledge that the Claimant was disabled due to ASD from November 2022. During the hearing it accepted that it did have knowledge from 9 June 2022. The Respondent accepted that it had knowledge that the Claimant was disabled due to ADHD from May 2023. Prior to the hearing it said it had knowledge that the Claimant was suffering from depression from September 2023. The tribunal found that the respondent knew that the claimant was suffering from depression from at least November 2022.

Direct disability discrimination s13 Equality Act

129. In this case, the acts relied upon by the claimant were not inherently discriminatory, therefore (as per *James v Eastleigh Borough Council* [1990] IRLR 572), the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator(s) acted as they did. Although their motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason. This is a subjective test and is a question of fact.

130. The tribunal reminded itself of the guidance in *Nagarajan v London Regional Transport 1999 ICR 877, HL* (a case under legacy race legislation but relevant to section 13) as follows,

> ‘Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of a claim members of an employment

> tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

131. It does not matter if the decision-maker was consciously or subconsciously motivated by a protected characteristic. The tribunal asks why they acted as they did.

132. The Tribunal also had regard to the comments of Lord Phillips, then President of the Supreme Court, in *R* (*E*) *v Governing Body* of *JFS* [2009] UKSC 15, also a case under legacy race discrimination. In deciding what were the grounds for discrimination, a Tribunal is simply required to identify the factual criteria applied by the respondent. This is simple shorthand for determining whether the proscribed factor operated on the alleged discriminator's mind. Whilst any discriminatory reason must be an effective cause of treatment, it does not have to be the only reason. The Equalities and Human Rights Commissions Employment Code states that the protected characteristic needs to be a cause of the less favourable treatment, but it does not need to be the only or even the main cause.

133. The House of Lords in *Najaragan* stated that for discrimination to be made out "racial grounds" (the material test at that time), it must have a significant influence on the decision. According to *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT* (a legacy sex discrimination case relating to pregnancy), the discriminatory reason does not have to be the main reason, as long as it is an effective cause. See also the judgment of the *Employment Appeal Tribunal in Amnesty International v Ahmed* [2009] IRLR 884.

134. As to the burden of proof, the Tribunal directed itself in line with the guidance of the Court of Appeal in *Igen Ltd v Wong and Others* CA [2005] IRLR 258. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

135. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

136. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare

facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see *Madarassy v Nomura International* [2007] IRLR 246. As stated in *Madarassy*: -

> "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

If the Claimant does not prove such facts, the claim will fail.

137. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed.

138. The Tribunal also directed itself in line with *Hewage v Grampian Health Board* [2012] UKSC 37 that the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the tribunal is able to make positive findings on the evidence one way or the other.

139. In *Laing v Manchester City Council* [2006] ICR 1519, the EAT stated that:

> "No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon* …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race."'

140. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16* Mrs Justice Simler (then President of the EAT) stated that tribunals,

> "…must avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

141. In this case the Tribunal was able to make positive findings on the evidence one way or the other. It was therefore not necessary to work mechanistically through the provisions of the law on the burden of proof. To put it another way, the Tribunal concentrated on the reason why the Respondent had acted as it had.

142. The Tribunal also had regard to the disability specific law on comparators at s.23(2)(a).

143. The Employment Code at paragraph 3.2(9) states: EHRC Employment Code states:

> 'The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)' — para 3.29.

144. It gives an example of a disabled man with arthritis who can type at 30 words per minute and who applies for a job including typing but is rejected because his typing is too slow. The correct comparator in a direct discrimination complaint would be a person without arthritis who as the same typing speed and the same accuracy rate.

145. The Tribunal also reminded itself of the Code at paragraph 3.5 that the worker does not have to experience actual disadvantage economic or otherwise for the treatment to be less favourable. It is enough that the worker can reasonably say they would have preferred not to be treated differently from the way the employer treated or would have treated another person.

<u>Direct Disability Discrimination s13 Equality Act</u>

146. The Tribunal addressed the issues in chronological order, rather than the order in the list of issues.

147. The Tribunal considered the issues 4a to 4c together as they happened at the same time and overlapped.

4 (a) *in late 2022 not allocating additional tasks to the Claimant such as creating zoning for fellow team members, writing the end of day report and managing the Respondent's email communications in relation to concierge services*

b) in late 2022 that the Respondent zoned the Claimant in the floater or changing lounge areas, and
(c) in late 2022 not allocating highly important responsibilities such as photo opportunities whereas other members of the team were given those opportunities on two or more occasions in a single day.

148. The Claimant in his witness statement said these matters occurred between 13 November and 16 December 2022.

149. It was not in dispute that the claimant was zoned at this time in the floater and changing lounge roles. The Claimant said that this zoning change was not agreed. The Tribunal noted the email from Mr Money in early December that said that the Claimant could choose his role. This was not a verbal exchange where the claimant might struggle to engage effectively. It was put in writing and the Claimant did have time to consider it. The Tribunal found therefore that there was a good degree of agreement that the Claimant would work in the floater or changing lounge roles in the hope that this would involve less customer facing time, be less stimulating, and allow the claimant to take more time out.

150. The tribunal did not accept that the change in zoning amounted to less favourable conduct. It was an attempt, on reasonable grounds, to assist the claimant. The clamant was struggling in the previous zoning roles and the new system was the respondent's attempt to reduce his difficulties.

151. Nevertheless, for the avoidance of doubt, the Tribunal went on to consider whether the Respondent would have treated an comparator - that is someone in the same role as the Claimant who had been going off the floor for up to 30 minutes without any pre-arrangement, who suffered sensory overload because of problems working in the highly stimulating environment and who when this was raised became angry and who proposed a system of planned breaks to avoid unscheduled breaks. The Tribunal accepted that it made sense to try the changing lounge role in the hope that it had less sensory overload because it was near where the customers were changing and was away from the high energy environment of the atrium and that the floater role, being less structured, might allow the claimant to take more breaks.

152. The Tribunal accepted Ms Watson's evidence that the Respondent had struggled to find a less stimulating zone because there was music and customers everywhere. The respondent would have moved a comparator to the floater role so that it was easier for them to take a break and/or to the changing lounge role where it would be hoped that there was less of a sensory overload.

153. Accordingly, the Respondent would have treated an appropriate hypothetical comparator no differently than it treated the claimant.

154. The Tribunal had accepted in respect of (4a) that the Claimant did get less work in respect of end of day reports and emails. The reason for this was that he was zoned in the floater role and the changing lounge role where such duties arose somewhat less

frequently. Ms Watson gave unchallenged evidence that the Claimant could check in every day about his meds and if he wanted to do photos.

155. The claimant did do some photos because one of the matters on which Ms Watson fed back on 25 November was that he was taking too long to do the photos compared to the service level agreement. The claimant himself accepted that he took longer than his colleagues to do photos. When this was raised on 25 November the Claimant became angry and walked out. The tribunal found that these factors led the respondent to give the claimant less photo work after this to prevent delays and reduce further conflict.

156. The tribunal was satisfied that the respondent would have treated a hypothetical comparator in the same way as the claimant. It was the personal circumstances of the claimant - which would have been shared with the hypothetical comparator - which led the respondent to treat the claimant as it did.

157. Accordingly, the Tribunal found that the direct discrimination issues 4 a, b and c were not made out because a hypothetical comparator would have been treated the same.

158. Issue 4d On 7 February 2023 transferring the claimant to the role of member experience

159. The hypothetical comparator was a person who was experiencing grave difficulties in working in a highly stimulating environment and who needed breaks and the other adjustments sought by the claimant. The Claimant himself also wanted to go back to MX. This was likely because his experience in MX was pre-opening and so he associated the MX role with a quieter time. The Claimant had not done an MX role when the studio was open which was a very different environment. Further, the Claimant did not want to go into a retail role.

160. The Tribunal found that the Respondent would have the same difficulties in finding a role for this hypothetical comparator. Ms Watson had encouraged the Claimant to apply for the MX role because she genuinely thought this would involve less customer-facing time, there would be more colleagues available, and the natural pattern of the day would involve more quiet times. This would be less overwhelming for the Claimant. She would have treated a hypothetical comparator in the same way in that she would have proposed the same solution for – in effect – the same situation.

161. The Tribunal accepted that Ms Watson did not “transfer” the Claimant, but she strongly influenced him to move to MX and the tribunal was satisfied this amounted to much the same thing. There was no suggestion or evidence of prejudice by the respondent against a person with autism or putting such a person in a front of house role. If the respondent wanted to keep a person with autism away from front of house, it would not have moved the claimant to MX. The tribunal found that the reason for strongly encouraging the claimant to move back to MX was because the Claimant was struggling with the concierge role.

162. 4e *On 7 February 2023 changing the Claimant's role and pay within the Respondent's internal system without informing the Claimant*

163. The Tribunal did not find that this act was made out. The Respondent did inform the Claimant of the change of role and pay on 19 January. The Claimant agreed that Ms Watson informed him. Whilst he may not have received notice of this meeting contrary to the agreement, he was informed.

164. 4f Scheduling the Claimant to work four days in the week commencing 6 February 2023 contrary to the advertised three days per week

165. It was not disputed that this occurred. In the view of the Tribunal the Claimant's move to MX was poorly planned and poorly executed and the relevant managers were absent. The Tribunal found that the reason was that the Respondent was in the middle of a significant reorganisation. A number of staff were moving roles, the café and retail arms were opening up, and the studio was opening up for more days. There was simply a good deal going on and the Claimant's individual needs got over-looked. Also, the new adjustments had only just been agreed, and the system had not settled in. The fixed days had only been requested the day before the Claimant was due to start. Whilst this was particularly unfortunate because of the Claimant's autism, there was no evidence that this was anything other than a poor piece of planning and execution by the Respondent in complicated circumstances.

166. The Tribunal found that the Respondent would not have treated a person with the Claimant's characteristics i.e. needing to work fixed days, reducing front of house time and highly stimulating environments any differently. This was a question of the Respondent not paying enough attention to the claimant's situation, rather than taking the Claimant's disability into account.

167. 4g. *Requiring the Claimant to work in public facing areas of the work place for all hours of his shift during the week commencing 6 February 2023*

168. The Claimant accepted that he did not work all hours in public facing areas that week, but he did work a disproportionate number of hours. The Respondent contended that he had worked a material number of hours on non-public facing work. The Tribunal being satisfied that the Claimants first week in MX was not well planned, it was more likely than not that he did do more than a usual number of public-facing hours.

169. The tribunal accepted that the hypothetical comparator was the same as in issue 4f. For the same reasons as in 4f, the tribunal found that the Respondent's motivation was not the Claimant's autism. This was the same problem with planning and execution as in 4f. In as much as the Respondent actually had a motivation - and the Tribunal was not satisfied that it had addressed this matter in its mind at all - it was simply a matter of getting the work done when the relevant managers were away. The respondent would have treated a hypothetical comparator in the same way. The Respondent was not motivated - consciously or unconsciously - by the Claimant's disability, rather his disability was not taken into account that week.

170. 4h. *On 9 March being criticised by Wayne Rodgers in front on two other members of staff regarding a complaint from a member of public that the Claimant was fidgeting with his apple watch*

171. The Tribunal accepted that Mr Rodgers had received a complaint, so he needed to deal with it with his team. His way of dealing with it was not directed at the Claimant individually but at three members of staff including the claimant. There was no indication or suggestion that Mr Rodgers thought the Claimant was responsible and was directing this feedback at him personally. Mr Rodgers' comment was not focussed on the fact that the member of staff was fidgeting with the watch, rather that the member of staff had failed to respond to three questions. The problem was that the member of staff was inattentive. The watch was an exacerbating and illustrative factor.

172. The comparator in this case would be someone else in the MX role who was the subject of a customer complaint that they had failed to respond to three customer questions and was fidgeting with the watch, but for a non-disability related reason. This person was included in the meeting with Mr Rodgers.

173. The fundamental point of the MX role was dealing with customers. The Tribunal had no doubt that the Respondent would have acted in an identical way with a hypothetical comparator. The Tribunal accepted that the Respondent wanted high standards of customer service from its front of house team because it needed members in a positive frame of mind and energised, in order to generate the content. It needed to deal with any failings in customer service.

174. 4i. *On 2 May 2023 an interview with Wayne Rodgers turned into a discussion of the difficulties the Claimant had working for the Respondent that related to his disabilities*

175. The Tribunal found that the discussion of the claimant's disabilities in the interview was because the claimant raised the issue himself. The tribunal had found that the interview format was a series of questions drawn from a bank of standard questions, with the space for input from the Claimant. The claimant's raising of the issues arising from his disability only formed one part of a longer interview. The interview remained a conventional interview with extra input about his disability from the claimant.

176. On the Claimant's case in his witness statement and before the Tribunal, the Claimant raised his disability when answering the question concerning time constraints and change management. Mr Rodgers noted down what the Claimant said in his answers. When asked, the claimant said he explained that the member experience role was putting him in environments that frequently caused sensory overload exacerbating his disabilities, he explained he did not want to work in the front of house environment because of its negative effect of his health emphasising that work should not have such a detrimental impact. The Tribunal accepted that this was the Claimant's response to Mr Rodgers "why concierge?" question because it was a logical answer to the question and the notes were consistent. There was no evidence nor was it suggested that Mr

Rodgers introduced any disability-specific questions such as - are you having problems because of your disability with the MX role?

177. In determining what occurred during the interview, the Tribunal took into account that Mr Rodgers and Ms Watson gave an incorrect explanation as to this question in their witness statements. They wrongly stated that this was an interview for a lead position. However, nearer the time when interviewed by Ms Bhangu for the grievance Mr Rodgers said that he used the same bank of questions for these roles. The tribunal found that it was likely that he and Ms Watson had later confused the recruitment for the MX lead that had taken place at a similar time, a year before the statements were written.

178. The Respondent failed to disclose a document recording Mr Rodger's analysis of the interview and the making of his decision. The Claimant only obtained the document through a subject access request. The Claimant invited the Tribunal to draw an adverse inference from that. The tribunal could not see that there was anything obviously prejudicial to the respondent in the non-disclosed document. It was relevant and thus the respondent was in breach of its disclosure obligations. However, it did provide the document under the SAR which was not consistent with a desire to supress documents. The tribunal therefore concluded that, whilst it drew no specific adverse inference from this instance, there was reason to believe that there might be other omissions by the respondent in respect of disclosable documents.

179. Further, Mr Rodgers had a good explanation for asking the question. It was an unexceptional question to ask for the concierge role which was at a higher level than the MX role. Concierge was an inherently time constrained role - needing to get members ready and energised for a class in line with a strict timetable. Change management was inherent in the role which involved dealing with people - making sure they were ready and in the proper emotional state at a very precise time.

180. The comparator was therefore an internal candidate who raised the same or similar difficulties with work as had the claimant, but for a non-disability reason. The tribunal found that Mr Rodgers would have engaged in the same discussion and made the same notes. Mr Rodgers was interviewing for a public facing role so it would have been surprising if he had not engaged with and noted down the comments the claimant made because they were manifestly relevant. Accordingly, a hypothetical comparator would have been treated no differently.

181. 4j rejecting the Claimant's application for the Member Experience Lead role (Patrick Nzuzi, Roz Armstrong, and/or Joe James Money -- are relied upon as comparators)

182. The tribunal found that the three actual comparators were not in the same material circumstances as the claimant for the following reasons.

183. The Tribunal accepted the Respondent's account that Mr Nzuzi and Mr Money had relevant management experience, unlike the claimant. There was insufficient evidence

as to whether Ms Armstrong was promoted to a management role and whether or not she had management experience, and the tribunal could not make any reliable findings in respect of her.

184. Further, the claimant's lack of management experience was not, the tribunal found, the only or main reason he was rejected. The Respondent at the time gave lack of management experience as its only reason. Mr Rodgers' evidence in his witness statement was contradictory on this point. He gave a number of reasons for the rejection. The Tribunal found that it was evident from the contemporaneous documents that, whilst this was one reason, the respondent was also influenced by the claimant's performance issues in the MX role. Mr Rodgers believed that, contrary to what the claimant believed, the MX Lead role would not involve materially less public facing work and less sensory overload because the Lead would spend considerably more time in the office. The Tribunal accepted that, a good manager should be on the floor as much as they are in the office – they would need to manage the team and keep on top of what was happening on the floor. Accordingly, the claimant's difficulties with public facing work and sensory overload were relevant to his ability to perform in the Lead role.

185. There was no suggestion that any of the three comparators had difficulties with public facing work or sensory overload.

186. The tribunal went on to consider a hypothetical comparator. This person would have the same lack of relevant management experience as the Claimant and also have the same freely expressed difficulties with public-facing work and with sensory overload. Such characteristics would make the comparator not an attractive candidate and the tribunal found that they would have been rejected.

187. 4k. *During a training session on 31 May 2023 Wayne Rodgers stating that public facing staff members who work for the Respondent feel uncomfortable speaking to disabled members of the public*

188. The Tribunal found that Mr Rodgers was feeding back from his breakout group when this was said. The Tribunal did not accept his evidence that he had in front of the Claimant mentioned British sign language in this context. Mr Rodgers' comment about sign language was not in the witness statement when it was an obvious point to raise. Further, the Tribunal did not believe that the Claimant - who Respondent Counsel accepted was a generally honest witness - would have missed out such a relevant point.

189. Mr Rodgers was reporting back from breakout. This was not less favourable treatment compared to a hypothetical comparator. Mr Rodgers would have done the same, whoever had been in the plenary session.

190. Nevertheless, in the opinion of the tribunal, this was not well handled by the respondent. This was a comment which might have been expected to cause some follow up. It was not possible from the evidence before the tribunal to know if this comment reflected for instance prejudice by a staff member or was a request from staff for training and help in order to better support disabled customers. Whichever it was, what

came out of this training session was evidence that there may have been shortcomings in how at least some Respondent staff were able to serve disabled members. It was unclear what was the point of disability training that did not pick up on such an issue and seek to improve the Respondent's service to disabled customers going forward. Whilst this would be consistent with a respondent which did not take a proactive approach to disability issues, it was not evidence of direct discrimination against the claimant.

191. 4l. *During a meeting on 31 May 2023 by Wayne Rodgers complaining to the Claimant about the hassle of going to HR when the Claimant asked not to work in public facing areas.*

192. The Tribunal had found that Mr Rodgers said he did not want to keep going back to HR about adjustments for the claimant if it was not necessary. Mr Rodgers would have reacted in the same way and said the same thing to a hypothetical comparator who had the same issues as the claimant. He would simply not have wanted to keep going back to HR not because the Claimant had autism but because going back to HR was time consuming and not always productive.

193. 4m. *During a meeting on 2 June 2023 by Wayne Rodgers stating that any assistance given to the Claimant in relation to his disability had to be seen to be fair in the eyes of the other team members.*

194. The Tribunal found that this occurred during a discussion about balancing the needs of the Claimant and of his colleagues. The Tribunal did not accept this amounted to unfavourable or less favourable treatment. This was in the context of the Respondent having made a number of adjustments because of the claimant's needs. The Respondent had amended shifts so that the Claimant worked fixed days and came in later, the Claimant's role was amended to keep him off the desk at the busiest times (when otherwise he might be most needed), more staff were zoned on the desk, and 40% of his working time was not customer facing. Whilst it was not effective, the respondent had taken some steps to provide the claimant with breaks amounting to a not insignificant percentage of his work hours.

195. Whilst the tribunal had concerns about the Respondent's lack of understanding about disability discrimination legislation and the lack of information it provided to its managers, its staff on the ground had themselves made a number of changes to their working arrangements to seek to keep the claimant at work. The Tribunal had no doubt that Mr Rodgers would have said the same thing about a comparator for whom the same adjustments were made for non-disability reasons. All things being equal, such changes are easier to make work if the team is on board.

196. 4n. *During May or June 2023 in the context of the grievance investigation Mr Rodgers informing Bharti Bhangu that there were gaps in the Claimant's performance and that in his opinion the Claimant was not ready to move into a lead role despite never having raised such concerns with the Claimant.*

197. Whilst there was no dispute that Mr Rodgers had told Ms Bhangu that there were gaps in the Claimant's performance and he was not ready for a lead role, there was a dispute about whether Mr Rodgers had previously raised these concerns with the Claimant. Mr Rodgers' explanation was that he had not provided this feedback to the Claimant because he was not the Claimant's line manager. However, he had only stopped being the Claimant's line manager in July, so when he spoke to Ms Bhangu, he was in fact the line manager. Further, his explanation was not consistent with his witness statement when he said he had provided the Claimant with feedback.

198. The Tribunal in light of the shortcomings in this evidence preferred the nearest contemporary account, that is what Mr Rodgers said to Ms Bhangu in his interview. He said that he had been avoiding bringing these performance concerns up with the Claimant.

199. The Tribunal had to consider whether this amounted to less favourable treatment - in that the Claimant did not or might not know of the Respondent's concerns about his performance. The Tribunal directed itself with the guidance of Lord Scott in *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48 in 2001 that in order for less favourable treatment to be made out the complainant must be able to reasonably say that he would have preferred not to have been treated differently.

200. The claimant was well aware of his difficulties in performing the role. He knew and advocated that he was struggling with customer facing duties and with the noise, lights and the smell, and was experiencing difficulties with time management. Further, he did not seek out feedback from Mr Rodgers after the interview even though he was expressly offered this. Indeed, he cancelled at least two one to one meetings with Mr Rodgers.

201. The Claimant's previous response to feedback was mixed. He reacted positively to feedback when Mr Rodgers raised the fact that he was changing bookings from home. However, he reacted badly to what he did not deny was accurate feedback about slowness with photos and that he was having difficulty interacting with members. In respect to the feedback concerning the watch, the claimant misunderstood the feedback. He thought it was focussed on the watch when it was focussed on a failing to serve customers. He reacted badly to that to the extent that he saw it as discriminatory.

202. The Tribunal also considered whether the claimant's ADHD might affect whether he would welcome feedback. The ADHD diagnosis stated that the Claimant told the psychiatrist that he often failed to give close attention to detail, he made careless mistakes in work, he did not read instructions carefully and he overlooked or missed details. Accordingly, had Mr Rodgers raised his concerns about the Claimant making mistakes, the claimant would have likely linked this to his disability and not welcomed the feedback. This finding was consistent with the ADHD diagnosis - under evidence of impairment in adulthood - stating that the Claimant has an excessive intense reaction to criticism because he suffers from perfectionism.

203. Accordingly, the Tribunal found that the Claimant would not have preferred to receive the feedback from Mr Rodgers. He would have reacted poorly. Further in *Khan* Lord Scott reminds Tribunals to concentrate not on the end result of the act (in this case the Claimant not being fully aware of Mr Rodgers' views of his performance and its possible effect on job applications) and more on the act itself (the provision of negative feedback to the Claimant). Accordingly, in the view of the Tribunal this did not amount to less favourable treatment.

204. 4o. *By not creating a new role for the Claimant (Julie Offermans, Gabbie Ambrus and/or Rebecca Watson are relied on this comparators).*

205. The Tribunal first considered whether the actual comparators were materially in the same circumstances. Ms Ambrus was not because she was employed by a different organisation. The Respondent stated that Ms Offermans "moves into a new role". According to Ms Dutnall's statement this was a result of the restructure, and her job title was changed to reflect new responsibilities. The Respondent had carried out a large-scale restructure and the Tribunal accepted that Ms Offermans moving into a new role was therefore likely to be as a result of this restructure, rather than individual factors relating to Ms Offermans. The respondent had not created a new role for her because of her individual characteristics, but because this was what the structure required. Accordingly, she was not an appropriate comparator.

206. Ms Watson was referred to as to moving into an elevated role rather than a new role per se. The Tribunal accepted that this was not a new role because she continued to have her previous responsibilities whilst gaining new ones. Her role developed which was not comparable to creating a new role. The tribunal was satisfied that this was different from creating a new role for the claimant. A new role for the claimant would be bespoke for him and would be different from the other members of the MX or concierge teams for reasons relating to his personal characteristics. The tribunal was satisfied that Ms Watson was not in materially the same position.

207. The Tribunal went on to consider a hypothetical comparator. Would the Respondent have created a role for a hypothetical comparator with the Claimant's characteristics i.e. no or little member facing work, away from public spaces, avoiding sensory overload and the other adjustments.

208. In view of the Tribunal there were real limitations on what the Claimant could do in the respondent's workplace and a person with those limitations would not have had a new role created for them by the Respondent. There was no evidence that the Respondent had or even considered creating new positions for anyone because of their personal characteristics or because that person had for some reason become unfit for their current role or because their role had changed materially. Accordingly, direct discrimination was not made out.

209. 4p. *His dismissal consequent upon the conduct alleged at sub-paragraphs (a) to (o) above*

210. The Tribunal had not found that any acts of direct discrimination were made out. Accordingly, a constructive dismissal claim based on such acts as amounting to a fundamental breach or breaches of contract - that is one going to the core relationship between employer and employee showing that the employer no longer intends to be bound by the terms of the contract - must fail.

211. Accordingly, the direct discrimination claim failed and was dismissed.

Indirect disability discrimination s.19 Equality Act 2010

212. The Tribunal reminded itself that an indirect disability discrimination there is no requirement for a Respondent to have actual or constructive knowledge of the disability or its effects.

213. 5. Working hours, did the Respondent apply the provision criterion practice PCP of requiring employees in full time member experience roles to be fully flexible across seven days.

214. Upon questioning by the Tribunal, it was established that the PCP relied on by the claimant was the respondent's practice that full time staff must be available to work at any time during the respondent's hours of 5.30am to 10.30pm on a flexible basis, rather than have fixed shifts or days.

215. The tribunal determined that the claim must fail because this PCP was not applied to the Claimant. It is fundamental to a claim under s19 based on the plain words of the statute (the Respondent relied on *Iteshi v General Council of the Bar* UKEAT/0161/11 noted in *Louis v Network Homes Ltd* [2023] EAT 76 at paragraph 24) that a PCP is applied to the Claimant.

216. The Tribunal reminded itself that it should not elevate the status of a list of issues to that of a pleading. It applied the case law and principles referenced below in the context of the reasonable adjustment claim for rest breaks. The tribunal directed itself in line with *Z v Y 2024 EAT 63* referencing *Parekh v London Borough of Brent* [2012] EWCA Civ 1630 that a tribunal is not required to stick slavishly to the list of issues where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence before it. A list of issues is a useful case management tool but should not be elevated to the status of a pleading. The tribunal also noted that it must consider including at the substantive hearing whether the list of issue "properly reflects the significant issues in dispute" (see *Moustache v Chelsea and Westminster NHS Foundation Trust* [2025] EWCA Civ 185, *Mr David Fong v David Montgomery, Michael Cordiner, and Eunice Low (t/a Raemoir Trout Fishery)*: [2025] EAT 31 and *Marston (Holdings) Ltd v Mrs A Perkins*: [2025] EAT 20.

217. The tribunal therefore sought to clarify the Claimant's case as to indirect discrimination by reference to the September reamended particulars of claim which stated as follows: -

> This means that from the view of the Respondent, a Disabled person who needs fixed days like the Claimant would never be hired for a full time member experience position. This is indirect discrimination to any person with a disability similar to the Claimant's Disability that needs fixed days.

218. Accordingly, the basis of the s19 complaint in the pleadings was not that the claimant had the PCP applied to him, and was put at a personal disadvantage, but the Claimant's view that the Respondent was carrying out practices which would be discriminatory against any disabled person with a disability similar to his and who wanted to work full time. The claimant did not want to work full time. The tribunal further noted that the respondent's requirement that a full-time member of staff be fully flexible across seven days was relevant to the respondent's defence to the reasonable adjustment claim and therefore that the tribunal would consider this issue in this context.

219. Simply put, the Respondent did not apply this PCP to the Claimant because he never worked or sought to work in a full time MX role. Therefore, the indirect discrimination claim was dismissed.

<u>Failure to make reasonable adjustments under s.20 and s.21 and Schedule 8 of the Equality Act 2010</u>

220. The Tribunal considered the reasonable adjustment claim first due to the requirement when considering justification under s.15 of determining the effect of reasonable adjustments.

221. 15 to 18. Notice of meetings

222. The Tribunal considered whether the Respondent applied a PCP of not giving advance notice of meetings. The Tribunal was satisfied that there was a practice of not providing advance notice of feedback meetings. It applied the guidance of Simler P as she then was that a PCP must be capable of application to others. Ms Watson's evidence was that she did not provide warnings about feedback meetings in general, so the PCP was applied to other staff. There was however no evidence that the Respondent more generally failed to give advance notice of meetings. The tribunal was only taken to one failure to give advance notice after this – the meeting on 19 January. The claimant was provided with notice of all other meetings and there was no evidence that the respondent had a practice of holding non-feedback meetings without notice. The Tribunal did not accept that the Respondent had a practice of not giving advance notice of meetings in general because this was not an effective way to go about things.

223. The tribunal then considered whether the PCP not giving notice of feedback meetings put the Claimant at a substantial disadvantage in comparison to persons who were not disabled. The Tribunal reminded itself that the definition of substantial disadvantage is one that is more than minor or trivial. The Tribunal accepted that this PCP put the Claimant at a disadvantage that was more than minor or trivial for the following reasons. The Claimant's evidence was on this point coherent, consistent and

plausible. According to the second OH report, he works best with minimal interruptions. OH also suggested that the Claimant had difficulties with meetings. In the view of the Tribunal, it was thus highly plausible that notice would mitigate these difficulties. Accordingly, the Claimant was put to a substantial disadvantage by the PCP.

224. The Tribunal considered whether the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at that disadvantage at the time of the feedback meeting. The Tribunal found that the Respondent was not on actual or constructive notice of this specific disadvantage. There was no evidence that the Claimant had, prior to the November meeting, told the respondent that he sought or would benefit from advance notice of meetings or that this was because of his autism and/or depression.

225. The employer knew that the Claimant had autism and depression. Although Ms Watson herself had not been informed of the autism, the employer had made some reasonable adjustments as specifically requested. It had agreed to the sunglasses and the late start and Ms Watson made adjustments in zoning following the Claimant's sick leave. The tribunal could not see that what the respondent knew about the claimant's disability had put it on constructive notice that he would be disadvantaged by short notice feedback meetings. This was in the context of his having made specific requests for reasonable adjustments without mentioning meetings. Nor was there a suggestion that there had been previous meetings with less than 24 hours' notice to which the claimant had reacted negatively. Accordingly, the respondent was not on notice that this failure to provide notice for feedback meetings was likely to place the Claimant at a disadvantage. Therefore, the duty to make reasonable adjustments was not triggered.

226. 19 to 22 Rest Breaks

227. The tribunal considered whether the Respondent applied a PCP of requiring the Claimant to work without rest breaks. The tribunal had found that at times the respondent had provided the claimant with rest breaks. However, there were periods when the Respondent failed to ensure that rest breaks were taken by the Claimant. The respondent initially failed to tell his direct managers that the claimant had a disability. When the claimant raised his disability and request for regular fixed breaks, there was then an attempt to make a reasonable adjustment by the line manager scheduling breaks. However, what happened in practice was that the Claimant himself sought to manage the breaks, which did not work. It should not have come as a surprise to the respondent that the Claimant would lack authority to ensure the breaks were taken and that his disability would make the process of – in effect - negotiating them with his colleagues more than usually difficult. The tribunal accepted that unless the breaks were formally scheduled, for instance by a spreadsheet, they were not effective.

228. The Claimant then brought this problem to the respondent formally by raising a grievance. Upon the Respondent agreeing to implement the reasonable adjustments – breaks which were effective because they are scheduled in the department zoning spreadsheet - the Claimant withdrew his grievance. The Respondent did then provide effective breaks by scheduling them in the zoning spreadsheet. However, because the

respondent was dispensing with the spreadsheet for an unrelated reason, the scheduling of breaks was effectively removed. The removal of the spreadsheet – or the failure to provide a new spreadsheet - was a material change to a reasonable adjustment which had been agreed in writing as a solution to a grievance. This was in circumstances where the previous attempt to provide breaks had broken down because of the lack of formal scheduling of breaks and the scheduling had been introduced as a solution. The respondent should have known that without scheduling, there was a real risk that the breaks would simply not work. It was further concerning that such a change was not recorded in writing especially in light of the Claimant's specific disabilities.

229. The Tribunal considered if the PCP as set out in the list of issues as requiring the Claimant to work without rest breaks could be interpreted as a PCP of the Respondent failing to make effective provision for rest breaks and therefore in effect not permitting the Claimant rest breaks. The Respondent's case was in effect that it could not be so interpreted, and it would be prejudicial to the Respondent to do so.

230. The Tribunal considered the reamended particulars of claim of September and noted there were references to breaks. The tribunal directed itself in line with the *Z v Y 2024 EAT 63* line of authorities as above under the indirect claim and with the over-riding objective. The Tribunal took into account the fact that the Claimant was a litigant in person and had a disability. An employment Tribunal does not expect high court level pleadings and seeks to avoid formality. The tribunal was satisfied that the matter was sufficiently referenced in the ET1. There were references to the failure to provide rest breaks effectively and to allow the Claimant to take them in practice.

231. The Tribunal also considered the question of whether there was any material prejudice to the respondent. In the view of the Tribunal the question of whether the rest breaks were effectively provided was expressly articulated in the Claimant's witness statement, giving the Respondent the opportunities to lead evidence. The matter was well ventilated in oral evidence before the Tribunal. Accordingly, the Respondent was not at a material prejudice as it had had the opportunity to make its case on this point.

232. The Tribunal accepted that the PCP put the Claimant at a substantial disadvantage on the following grounds. The Claimant's evidence was convincing and cogent. Before the breaks, he was going in effect AWOL to decompress. He was criticised, and suggested a solution, which was poorly implemented, he grieved to get effective implementation which implementation later broke down. This was consistent with him suffering substantial disadvantage, that is one that is more than minor or trivial. The Tribunal took into account the medical evidence in respect of the Claimant's susceptibility to a highly stimulating environment and the likelihood that breaks properly implemented would be of assistance.

233. The Respondent was on notice of this disadvantage because the Claimant raised the matter frequently and Mr Rodgers himself raised the breaks for instance on 21 April 2023 in a one to one.

234. The Tribunal having found the duty to make reasonable adjustments was triggered went onto consider what reasonable adjustments could have been effected. According to the EHRC code at paragraph 6.28

> The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:
>
> - whether taking any particular steps would be effective in preventing the substantial disadvantage;
> - the practicability of the step;
> - the financial and other costs of making the adjustment and the extent of any disruption caused;
> - the extent of the employer's financial or other resources;
> - the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
> - the type and size of the employer.

235. In the view of the Tribunal the adjustment of scheduling the breaks onto a spreadsheet was practicable for the simple reason it had been done before. There was no suggestion the Respondent would be put at any material inconvenience or cost. There had been in existence a spreadsheet which could be kept or revived and adapted as necessary.

236. The Claimant ended up agreeing with the Respondent that he would take responsibility for implementing the breaks, but the Tribunal was not satisfied that this meant that the scheduling of breaks, for instance on a spreadsheet, was not reasonable. The adjustment had been agreed in writing as a result of a compromised grievance. The change to the adjustment was not recorded in writing and the Tribunal could not be satisfied that the Claimant gave informed and effective consent to the change. There was no email recording his agreement to the removal of the scheduling of break.

237. The tribunal considered whether or not the adjustment would have been effective. As set out in *Smith v Churchills Stairlifts plc 2006 ICR 524, CA*, the test of reasonableness is an objective one and it is the view of the Tribunal that matters. The tribunal should focus on practicable outcomes. Applying *Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10* there does not have to be a good or real prospect of an adjustment removing the disadvantage, is it sufficient to have a prospect of the disadvantage being alleviated. According to the Court of Appeal in *Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA*:-

> 'So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'

238. The question of effectiveness, which goes to reasonableness, has to be answered on the basis of the evidence available at the time when it was, or was not, implemented (see *Brightman v TIAA Ltd EAT 0318/19*.)

239. The Tribunal was satisfied that there was some prospect, whilst it was not guaranteed, that the adjustment would have mitigated or obviated the disadvantage. In the view of the Tribunal, it would have made things materially easier for the Claimant. It would have more likely to provide time to decompress during his shift. It would have been less stressful because he would not have to in effect negotiate with his colleagues and he would know in advance when his breaks would be. All of these would be real benefits for someone with his disabilities. The Tribunal was satisfied that this adjustment would be insufficient to allow him to perform a front of house role. Nevertheless, because there was some prospect that this would have alleviated some disadvantage, the claim succeeded.

240. The respondent paying the Claimant in line with the L1 rate of pay following his transfer to the Member Experience Associate role in February 2023

241. There was no dispute that this PCP was applied to the claimant. However, the Tribunal did not find that this PCP put the Claimant at a substantial disadvantage in comparison to persons who were not disabled. It was the respondent's policy and practice that everyone who transferred down the pay scale had their pay correspondingly reduced. Everyone, disabled or not, was put to the same disadvantage. The Tribunal could find no basis on which there was a disparate impact on disabled people. The claim was accordingly dismissed.

242. Work in public facing areas

243. The Respondent accepted that it did apply a PCP of requiring the Claimant to work in public facing areas.

244. As to putting the Claimant at a disadvantage in comparison to persons who were not disabled, the Claimant asserted that the disadvantage was a negative impact on his health due to his disability. The Respondent did not deny this, and its submissions impliedly accepted this. According to the Respondent's submissions

> "Because of his disability the Claimant is hyposensitive to noise, light and sound he must wear sunglasses indoors…The Peloton studios London member-facing environment is highly stimulating in terms of lights, sound and smell. The Claimant likened members attending to screaming music fans. The environment is carefully designed in such a way."

245. The Tribunal also relied on the extensive evidence in the OH reports as to the claimant's hypersensitivity to highly stimulating environments.

246. There was no dispute that the Respondent was well aware that the Claimant was likely to be placed at this disadvantage because he told the Respondent so on numerous occasions.

247. Accordingly, the duty to make reasonable adjustments was triggered and the burden shifted to the Respondent. The Tribunal considered whether the Respondent failed to take such steps as were reasonable to avoid the disadvantage. The Claimant suggested

(a) not requiring him to undertake public facing duties,
(b) redeploy back to the concierge role without competitive interview or
(c) redeploy him by creating an alternative role.

248. The Tribunal had no doubt that redeployment back to concierge would not have been a reasonable adjustment because there was very little prospect of this alleviating the disadvantage. The Claimant's case was before the Tribunal was with the February adjustments he could have done the concierge role. The Tribunal did not accept this because the Claimant told the Respondent that the adjustment to only 40% of his role being non-customer facing was insufficient for him to be able to perform the role. He asked the Respondent for a 100% non-customer facing environment. The tribunal was not satisfied that there was a sufficient degree of difference between the concierge environment downstairs and the member experience upstairs in terms of stimulation.

249. The Claimant said expressly in February in his grievance that the concierge role was not suitable for someone with ASD. He told Mr Rodgers in his interview in May that he did not want a front of house role. The Tribunal was satisfied that he suffered performing the MX role and would suffer in a very similar way doing the concierge role. He would be subjected to loud music, loud people, bright lights and noise. He would suffer fundamentally the same problems in concierge as in MX. As there was no real prospect of this adjustment alleviating the disadvantage, the claim must fail.

250. The Tribunal considered adjustments (a) and (c) together. It agreed with the Respondent's characterisation that these two adjustments could be distilled to the Respondent providing a desk-based role with little or no front of house or customer facing duties where the Claimant was removed from the highly stimulating front of house environment.

251. In the Tribunal's view, whether that were achieved by swapping duties between members of staff or designing a role around the Claimant, it amounted to essentially the same thing. Was it a reasonable adjustment for the Respondent in effect to provide a role where the Claimant did not work front of house and had no member facing duties?

252. The Tribunal expressly asked the Claimant if he could cope with less than 100% back-office work. He did not say in terms for instance that he thought he could cope with 10% or 20% public facing work. There was no suggestion that there was an amount of front of house work that he could have done. Thus, the Tribunal agreed with the Respondent's submissions the only effective adjustment was a role completely away

from front of house. The Claimant would have needed other adjustments such as headphones where necessary, turning down the music in the office if it were technically possible, and a dedicated desk. The Respondent did not really take issue with the feasibility of these adjustments and the Tribunal found that these were likely to be practicable and reasonable.

253. The Respondent's defence turned on whether there was enough back-office work and insufficient scheduling difficulties to create a back-office only role for the claimant. The Tribunal was satisfied that the Claimant had shown that there was at least a reasonable prospect that such a role might have worked for him. In analysing the reasonableness of an adjustment one of the factors is the likelihood of its effectiveness. The Tribunal - not unusually in these cases - did not have evidence going precisely to this point. The Claimant told the ADHD psychiatrist in Spring 2023 that he had made a number of mistakes at work. So there must have been a risk that he would not have been able to perform to standards in a pure back-office role. However, the Respondent - although it had considered a performance improvement plan - did not subject the claimant to this in respect of any admin failings.

254. The Tribunal considered how practicable such an adjustment might be. Ms Dutnall's evidence was that the respondent was not recruiting and was not replacing staff who left. The Tribunal accepted the respondent's evidence that there was a significant redundancy programme in early January 2023 because there the reorganisation of roles in the studio was consistent with this. There would be downward pressure on headcount generally. Nevertheless, the tribunal saw no evidence in respect of redundancies after early 2023.

255. The Claimant's case as to the practicability of this adjustment was articulated clearly in the appeal meeting. He argued that there were member experience full time staff who were present on non-member facing days, and why not transfer some of their duties to the claimant and transfer all of his front of house duties to them? The Tribunal had found that the respondent did this for about one week after the Claimant returned from sick leave in May 2023.

256. The head count in MX was five full time staff including the lead. In addition, there were about 10 part time workers. At the material time the studio was open to the public at least part of the day five days a week. In the normal course of events, it was not open to the public on Tuesdays and Wednesdays. There was no suggestion that all full-time staff (including the Lead) worked on non-open days. It made sense for the respondent to schedule its full-time staff more on open days than on days when the studio was closed. Nevertheless, two full time members of MX staff were present when the premises were shut to the public.

257. After focused questioning by the Tribunal, it was established from the Respondent's witnesses that all full-time staff had to be fully flexible across seven days from 5:30am to 10:30pm. This meant that full time staff had to be available to work during all of this period. They were given their shifts six weeks in advance.

258. There were restrictions on the shifts the Claimant could do. He said he could not start work before 10:30am, although he had suggested that he might be able to revisit this. The tribunal accepted that this might cause some difficulties for the Respondent in covering the early morning shifts. There was a risk of having too many staff on shift when the studio was closed. There was no suggestion or evidence, however, that the front of house element of the MX role was less popular with staff i.e. that it would pose a burden on other team members for them to do more front of house hours instead of back-office hours. There was no evidence that the front of house was inherently less desirable than back-office work (absent a specific difficulty such as the claimant's) or that the respondent would have to burden other staff with less desirable duties to fit around the claimant.

259. The Respondent's case was that there was simply not enough admin work to keep the Claimant busy during the shifts he could do. The Tribunal heard evidence from Ms Dutnall that there was less than half a day a week of emails. However, the Respondent's evidence about the lack of admin work did not sit well with the fact that two full time MX staff were in the building when it was closed and so there could by definition only be admin work available. Ms Dutnall said - without any corroborating evidence - that it was a struggle to give the full timers work and that in New York they only had one admin worker.

260. The Tribunal in order to clarify the Respondent's defence asked whether the respondent's case was that having the Claimant work solely in the back-office was a scheduling problem. The Respondent replied that this was the case. It said that because of the Respondent's lengthy working day – including late evening and early morning – it lacked room to manoeuvre because it needed to ensure other staff had the necessary rest periods between working days. However, the Tribunal was taken to no evidence going to this, for instance documents recording the respondent's staffing or zoning. According to Ms Dutnall, the Respondent looked at the issue of scheduling around the Claimant's needs including breaks. Accordingly, the analysis had on the Respondent's case already been done at least to some extent, but it was not before the Employment Tribunal.

261. The tribunal noted that it was necessary to ask careful questions of the respondent to in effect tease out its reasoning why the adjustment was not practicable. It was not front and centre of the respondent's case which might have been expected when this issue was evidently material to the case.

262. The Tribunal accordingly found that the Respondent had not discharged the burden upon it of showing that the adjustment was not reasonable. In the view of the Tribunal a reasonable adjustment would have been a trial period of up to two months in which the Claimant worked only away from public-facing areas and was not in the front of house environment. Other adjustments such as a dedicated desk, use of headphones and the reduction of music as much as was possible would also be effected. During this time reasonable adjustments would be kept under review and then at the end of the trial period the Respondent would carry out a formal review and decide in good faith whether this trial arrangement should be made permanent, varied or deleted. This

would be a reasonable balance between the needs of the claimant and respondent and give sufficient time to discover if the claimant's proposals were practicable. A two-month period would keep any disruption within reasonable bounds. Accordingly, the claim in respect of reasonable adjustments succeeded in respect of this adjustment.

263. Did the Respondent apply a PCP of playing loud music in public facing member areas?

264. The Respondent accepts that it applied this PCP to the claimant and that the PCP put the Claimant at a disadvantage in comparison to non-disabled persons. The Tribunal was satisfied that the Respondent was on notice that the Claimant was likely to be placed at that disadvantage because Ms Dutnall agreed that she had discussed it with him.

265. Accordingly, the burden passed to the Respondent to establish that it had not failed to take such steps as were reasonable to avoid the disadvantage. There was no dispute that the reasonable adjustment was reducing the volume and/or the frequency of the music.

266. The Claimant's case was that it would have been reasonable for the Respondent to consult with him so that the music was at an acceptable level. In view of the Tribunal there was very little chance that such consultation would have been effective. The type and volume of music in public areas was a fundamental part of the Respondent's brand and the product that it provided to the public. The Claimant acknowledged that the music was intended to create "a vibe", that is, foster a highly stimulating and energising environment for members. The Tribunal accepted that the type and volume of music was central to the experience in the classes and to energising and exciting the participants before they went live on the streaming/recording. As explained by Ms Dutnall, like a theatre or cinema production, the studio production was about being immersed in the experience.

267. The tribunal found that any effective reduction in the type, volume or frequency of the music played would fundamentally alter the respondent's product. It would be highly disruptive to the respondent's way of doing business. An environment with loud immersive music was what the respondent provided to its customers; it was why its customers came to the studio. Accordingly, the tribunal found that such an adjustment would not have been reasonable.

268. Did the Respondent apply PCP of requiring the Claimant to undergo competitive interviews when applying internally for redeployment?

269. Ms Bhangu said in terms that the Claimant was required to undergo a competitive interview and this is what occurred prior to the grievance. Later Ms Dutnall said that she would assist the Claimant in applications, but there was no suggestion that she would remove the requirement of a competitive interview.

270. The Tribunal found that this was capable of amounting to a PCP because it could be applied to others and, on the Respondent's case, was applied to others. Competitive interviews for internal redeployment were the respondent's standard practice. In the view of the Tribunal the PCP was clearly identified in the list of issues. When the Claimant applied for a vacancy, the Respondent interviewed competitively and the claimant was treated equally with other candidates, i.e. even if he were appointable, he might not be appointed if another candidate was objectively better. The Tribunal rejected any submissions to the effect that the PCP could not be interpreted in this way. The PCP had to apply to competitive interviews, rather than to interviews per se, otherwise the word competitive was otiose.

271. The tribunal did not find that the PCP put the Claimant at a disadvantage compared to non-disabled people because there was no suitable vacancy identified for which the Claimant was qualified and for which he applied. In respect of the concierge role, and the MX lead roles, the Tribunal was satisfied that the Claimant did not want to and was not able to carry out a front of house role for the reasons set out above. Accordingly, this claim was dismissed.

<u>Discrimination arising from disability s.15 Equality Act,</u>

272. There is a two-stage test for causation under section 15. As set out in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT*,

a. the disability must have a consequence of something; and
b. the Claimant must be treated unfavourably because of that something.

273. According to the EAT in *Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT* it is well established that the Tribunal must investigate two distinct causative issues : (i) did the employer treat the Claimant unfavourably because of an identified something? and (ii) did that something arising in consequence of the Claimants disability? The first issue involves an examination of the alleged discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment. If the something was a more than trivial part of the reason, the test is satisfied. The second question is one of objective fact for a Tribunal to decide in light of the evidence.

274. The tribunal firstly considered whether each thing, or matter, relied on by the Claimant arose in consequence of his disability, having reminded itself that the Respondent's motivation or knowledge was irrelevant at this point.

275. The first matter relied on was 13(a) - *the Claimant took longer to edit photographs.* The Tribunal was satisfied that this arose in consequence of the claimant's disability for the following reasons. There was no reason for the claimant to claim this unless it were true. His slowness provided a reason for the Respondent to take him away from photograph work which he wanted to do. Further the first OH report referenced executive functions, attentional control, and problem solving which was consistent with the Claimant being slower on editing. The Tribunal was not taken to the

report of the General Adult Psychologist in November 2024, but this said that individuals with ADHD may struggle with focussing on tasks.

276. The tribunal considered (b) *the Claimant not greeting members of the public enough*. This was front and centre of the Claimant's case and the Claimant repeatedly told the respondent and the tribunal that his disability was making this difficult for him and he struggled with this. The Tribunal found the following evidence in the medical reports - the Claimant was described as having difficulties with interacting with a lot of people, he was suffering overload in very busy social environments and preferred to be left alone to work. He would struggle with conversation, he would be best in quiet environment with minimal interruptions. Busy noisy environments where things were chaotic would be difficult for him. He might prefer to keep quiet in meetings and not be asked his opinion. Individuals with autism may experience difficulties in understanding social cues, maintaining eye contact and engaging in conversations. The Claimant experienced fluctuating abilities to communicate effectively particularly under stress. The Tribunal also had regard to the equal treatment bench book which stated that, to have a diagnosis of autism a person will have difficulties with communication and integration.

277. Accordingly, the Claimant had shown that not greeting the public enough (that it is line with the Respondent's expectations) arose in consequence with his disability.

278. The claimant relied on 13(c) *fidgeting with his apple watch*. The Tribunal had regard to the explanation in the equal treatment bench book about the practice of "stimming", which the Claimant stated was a coping mechanism. According to the ETBB, anxiety...affects the person's ability to use communication strategies. As a result…they may use stimming to self-regulate anxiety (stimming is fidgeting, flapping, scratching, picking, humming, coughing - these are coping mechanisms).

279. The Tribunal was also influenced by the Claimant's evidence that he was working in a highly stressful environment even on a good day - and that day was not a good day because there was a major IT outage. Accordingly, the Tribunal found that the fidgeting arose as a consequence of his disability.

280. The claimant relied on 13(d) - *time blindness*. The Claimant never defined this term. It was not mentioned in the OH reports, the equal treatment bench book or the letter from the psychiatrist. The Claimant was never asked what he meant by "time blindness" by Ms Dutnall or Mr Rodgers.

281. The Tribunal accordingly applied the simple English meaning of the word "blindness", that is an inability or difficulty with perception, in this case of time. This would fit with the medical evidence that for the Claimant keeping to time can be a challenge and that alarms and timers might assist. Accordingly, the Tribunal found that time blindness - that is an inability or a disadvantage in perceiving time - arose as a consequence of the Claimants disabilities.

282. The claimant relied on 13(e) *difficulty with change*. The Tribunal accepted that this did arise in consequence of the Claimant's disabilities for the following reasons. The Tribunal noted at page 1111 that the psychiatrist recommended specific routines to assist him. According to the equal treatment bench book, people with autism can experience difficulty with unexpected and sudden change. This was referred in the OH reports - that generally people with autism will benefit from plenty of notice before change.

283. The claimant relied on 13(f) *having to use ear plugs*. The Tribunal had regard to the second OH report, that it is quite easy for an individual such as the claimant to become overloaded, for example by loud noises or a very busy social environment, The Claimant works best when he is in quiet environments where there is minimal interruption and he may possibly find it easier to undertake complex work that involves a lot of concentration if he has his choice of music to play potentially with headphones, loud noises should be minimised as far as possible. Further, the first OH report referred to self-help activities such as noise cancelling headphones. Accordingly, having to use earplugs arose in consequence of the Claimants disability.

284. The claimant relied on 13(g) *needing time off from public facing areas*. According to the first OH report, the Claimant was increasingly struggling with the working environment. He was hyposensitive to bright loud environments where he had to interact with lots of customers. According to the second OH report, autism means the senses are heightened and it is easy to get overloaded by loud noises, very busy social environments, very bright environments. The Claimant would prefer to be left alone to focus, and he works best in quiet environments with minimal interruption. Bright light and loud noises should be minimised as much as possible. A requirement to be in busy and noisy environments where things are more chaotic should be minimised. Thus, the Tribunal found that needing time off from public facing areas arose in consequence of the Claimants disability.

285. The claimant relied on 13(h) *the Claimant asking Mr Rodgers not to work in public facing areas*. That logically followed from 13(g) and the tribunal accepted it arose as a consequence of the Claimant's disability.

286. Finally, the claimant relied on 13(i) *in December 2022 a nurse recommended that the Claimant be referred to an OH physician*. On its face the reason that the nurse recommended this referral was because of the Claimant's disability. Accordingly, this arose as a consequence of the Claimant's disabilities.

287. Having found that all the matters, or things, relied on by the claimant at paragraph 13 of the list of issues arose in consequence of the claimants' disability, the tribunal went on to consider if the Respondent treated the Claimant unfavourably because of any of those things. At this stage of the causation test the Tribunal's focus is on the motivation of the decision maker.

288. The Claimant asserts that the following amounted to unfavourable treatment at paragraph 14.

289. 14(a) *negative feed back from Mr Money and Rebecca Watson at a meeting on 25 November about how long it took the Claimant to edit photos and not greeting enough members of the public.*

290. The Tribunal considered what was the motivation conscious or subconscious in the two managers' minds. The Tribunal accepted that the Claimant taking longer to edit photographs (13a) was a motivation as it was an express part of the feedback. The same applied to the feedback that the Claimant was not greeting members of the public enough (13b). The fact that the Claimant needed time off from public facing areas (13g) was referred to by Ms Watson in her witness statement.

291. Accordingly, the claimant was treated unfavourably because of the things arising from his disability. The Tribunal went on to consider if the Respondent could show that the treatment was a proportionate means of achieving a legitimate aim, sometimes referred to as justification.

292. The Respondent relied on what the Tribunal accepted was a legitimate aim - providing its employees with accurate feedback. The question was whether the means chosen by the Respondent to achieve this legitimate aim were proportionate. This involves a critical analysis of the respondents' objective justification. In assessing proportionality, the tribunal weighs the needs of employer and the discrimination against the employee, and amongst other matters takes into account whether there was a lesser or different measure which would achieve the legitimate aim.

293. The ECHR Code states at paragraph 5.2.1

> If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

294. The Tribunal had found that the Respondent was not under a duty to make relevant reasonable adjustments at this stage.

295. The fact that the Respondent was not on actual or constructive notice that his difficulties in greeting members and the claimant's difficulty with last minute meetings were consequences of the disability was a relevant factor.

296. The Tribunal found that it was a proportionate way of achieving its legitimate aim for the Respondent to provide feedback to an employee whose performance was causing concern, particularly in his first few months in the role. This was particularly so when the Claimant accepted that the negative feedback was balanced with positive because he was praised for the quality in his photos. The issue with the claimant needed to be addressed as soon as possible because it was causing difficulties within the team and negatively impacting the performance of the MX function. It is wise, all things being equal, for employers to raise performance issues as soon as practicable so that any explanation or solution can be explored and acted upon. This was what happened here. The claimant was able (if not in the meeting, then later) to explain his difficulties to the

respondent which was able to try to find solutions. Had the feedback not been raised, the situation would very likely have deteriorated perhaps to the point of being irreparable.

297. In balancing the respondent's needs with the impact on the claimant, the tribunal found that it would not have been in the claimant's interest for the respondent to fail to provide accurate feedback and, in effect, leave the claimant struggling. Once the respondent had identified the claimant's difficulties in his role, which the claimant agreed were genuine, there was no practical alternative to raising this with him. It was this feedback which was the catalyst for the claimant seeking a solution including by means of regular scheduled breaks. Further, the claimant considered a later failing by the Respondent to give timely feedback on his performance (in relation to the May interview by Mr Rodgers) to be serious enough to found a free-standing complaint of disability discrimination.

298. Accordingly, this was a proportionate means of achieving the legitimate aim and the claim was dismissed.

299. 14(b) *The Claimant being criticised by Wayne Rodgers in front of two other staff members about a customer complaint which he was fidgeting on his apple watch*

300. The Tribunal did not find that this was unfavourable treatment because of something that arose from the claimant's disability. The Claimant was not criticised. He was one of three members of the team who were told to ensure that they answered customer questions promptly and not give the impression of not paying attention. Further, Mr Rodgers did not treat the claimant in this way because of something arising from the disability. His focus was not the watch which was only relevant in the context of the actual problem which was the failing to respond to the three customer questions. The watch exacerbated the issue but was not the issue itself.

301. For the sake of completeness and if the Tribunal has fallen into error and that this did amount to unfavourable treatment because of something arising from disability, the tribunal accepted that the respondent had a legitimate aim - of ensuring customer complaints about staff were addressed and not ignored. It went on to consider proportionality.

302. This problem was something which needed raising with the MX team. Mr Rodgers took a low key non-confrontational stance. Essentially Mr Rodgers treated this a learning exercise rather than a disciplinary action. He took a far from severe form of action by bringing this matter to the attention of the three possible members of staff. Mr Rodgers did not seek to identify the individual beyond the three possibles. Mr Rodgers was not aiming his statements at the claimant. He did not know the claimant was responsible. Dealing with customers was a fundamental part of the MX job - it was they were there for. The claimant did not deny that he had ignored three questions from a customer whilst doing a customer-facing role. Mr Rodgers' actions were proportionate. Therefore, the claim is dismissed.

303. 14(c)*Wayne Rodgers decision in May 2023 not to appoint the Claimant to the part time concierge role.*

304. Mr Rodgers' reasons for this decision included the Claimant not greeting members of the public enough and needing time off from public facing areas, as evidenced by Mr Rodgers saying the Claimant was not able to perform the core parts of the receptionist role and did not want to work front of house. The tribunal did not accept Mr Rodgers' evidence that he found the Claimant's answer to the time management question and the reference to time blindness satisfactory. Mr Rodgers also said the Claimant struggled with managing time despite coping strategies there was a problem with lateness. The tribunal was satisfied that part of the reasons the claimant was not appointed was time blindness and difficulty with change. Therefore, Mr Rodgers treated the Claimant unfavourably for something arising from his disability.

305. The Tribunal accepted that the Respondent had a legitimate aim in ensuring that the successful applicant met the minimum needs of the role. The Tribunal found that the failure to appoint was a proportionate means of achieving the legitimate aim for the following reasons. Put simply, the Claimant did not meet the basic requirements of the role. The claimant himself recognised this - he did not want a front of house role and told Mr Rodgers so. In these circumstances, there was no alternative course of action to failing to appoint the claimant.

306. 14(d) *At a meeting on 31 May 2023 Mr Rodgers complaining to the Claimant about the "hassle" of going to HR when the Claimant asked not to work in public facing areas.*

307. The Tribunal had found that Mr Rodgers did not say this, he said he did not want to get HR involved if not needed. On its face this was not unfavourable treatment. Further, there was no reliable evidence that would render this comment unfavourable in context. The Claimant's account of what was said varied. In the appeal he said he could not remember which reasonable adjustment it related to. In the witness statement he said it was a reply to his chasing the Respondent's failure in respect of OH. In the list of issues, it is said that the comment was made after the Claimant asked not to work in public facing areas. Whilst the list of issues is not a pleading, this was another example of the inconsistency of the Claimant's case on this point.

308. Accordingly, this did not amount to unfavourable treatment and the claim was dismissed.

309. 14(e) *A meeting on 2 June 2023 Mr Rodgers stating that any assistance provided to the Claimant in relation to his disabilities had to be fair in the eyes of the other team members.*

310. The Tribunal found that Mr Rodgers had said that it was important that the adjustments were seen as fair by other team members, or words to that effect. The Tribunal accepted that this comment was made because of things arising in consequence of the Claimants disability - the Claimant not greeting members of the

public, his time blindness, his difficulties with time, difficulties with change and his difficulties with being in the front of house environment. All of these resulted in the respondent taking steps, with varying degrees of success, to assist the claimant.

311. The Tribunal considered whether the comment amounted to unfavourable treatment. The EHRC Code provides at paragraph 5.7

> Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably'
>
> And at paragraphs 9.8 and 9.9: -
> 'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards. A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment'

312. The related concept of detriment was described in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL* as when a reasonable person would or might take the view that the treatment was in all the circumstances to their disadvantage. The Supreme Court in *Trustees of Swansea University Pension and Assurance Scheme and anor v Williams 2019 ICR 230, SC* found that there was usually little difference between "detriment" and "unfavourable treatment".

313. In determining if this comment amounted to unfavourable treatment the tribunal took the context into account. The respondent had made material adjustments to the Claimant's role in particular after he returned from sick leave. He was doing 40% of his hours as non-client facing, he had a late start and fixed days, he received very usually 24 hours' notice of meetings and benefitted from a more lenient sick leave approach. At the same time, the respondent had failed to schedule breaks effectively.

314. This was a brief informal comment which was not explored or discussed at the time. This was not a legal discussion about the relevance of colleagues' perception of fairness on the question of whether or not an adjustment is reasonable. Mr Rodgers was explaining to the Claimant the limitations management was under. The tribunal saw no evidence that the purpose or effect of this comment was in some way to put pressure on the claimant or threaten him. There was no suggestion that the adjustments were going to be withdrawn. In the view of the tribunal the claimant could not reasonably

consider that he was put at a disadvantage. Accordingly, this did not amount to unfavourable treatment.

Harassment s.26 Equality Act

315. According to *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT* (a case under the legacy race legislation) tribunals are advised to consider the three elements of a harassment claim : (i) unwanted conduct, (ii) the proscribed purpose or effect, and (iii) which relates to the protected characteristic.

316. 39 (a) *On 9 March 2023 the Claimant was openly criticised by Mr Rodgers in front of two other staff members about a complaint from a member of the public that he was fiddling with the apple watch. Wayne Rodgers claimed the Claimant's actions meant he was purposely not paying attention to work.*

317. The Tribunal considered whether its findings of fact about this incident amounted to unwanted conduct. The tribunal had not found that Mr Rodgers said that the Claimant was purposely not playing attention to work. He was not openly criticised by Mr Rodgers.

318. The tribunal accepted that Mr Rodgers comments were unwanted by the claimant (see *Thomas Sanderson Blinds Ltd v English EAT 0316/10*).

319. However, the tribunal did not find that the treatment met the s26 definition of unlawful conduct. The Court of Appeal in *Pemberton v Inwood 2018 ICR 1291, CA* gave guidance as to s26 as follows

> 'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances — sub-section (4)(b). … The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so'.

320. The tribunal accepted that the claimant perceived that this created a hostile degrading and humiliating or offensive environment for him. However, it did not accept that it was objectively reasonable for him to have suffered that effect. Mr Rodgers chose not to single any one person out or to try to find out who was the relevant individual. Three people were spoken to. As the tribunal found above, he treated this more as a learning exercise and a reminder to front of house team, than a heavy-handed or disciplinary matter. The focus of the problem was not the watch but the failure to engage with three customer enquiries. Rasiing this failure in a non-confrontational way without seeking to identify the employee responsible did not

amount to conduct that it was reasonable for the claimant to feel had created a humiliating, offensive or otherwise proscribed environment for him. The fact that the claimant focused on the less important issue of the watch, rather than the fundamental problem of ignoring the customer, did not suggest that he understood the issue and why Mr Rodgers raised it.

321. 39(b) On 31 May 2023 at a staff training session Mr Rodgers commented that public facing staff felt uncomfortable speaking to disabled members of the public.

322. The Tribunal's findings of fact were that Mr Rodgers made this remark as the spokesman reporting back from his breakout group. The Tribunal accepted that this conduct was unwanted in that it was unwelcome or uninvited because the Claimant felt that it reflected how his colleagues felt about him. The tribunal also accepted that the claimant subjectively felt that the comment created a hostile or offensive environment because he thought the comment related to how his colleagues viewed or related to him.

323. The tribunal went on to consider whether it was objectively reasonable for him to regard the comment as violating his dignity or creating the proscribed environment. According to *Richmond Pharmacology v Dhaliwal*

> 'one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to … produce the proscribed consequences: the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt'.

324. According to Elias LJ in *Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390, CA*, whose judgment warned tribunals against distorting the language of the statutory definition of harassment,

> 'when assessing the effect of a remark, the context in which it is given is always highly material…It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable….Tribunals must not cheapen the significance of [the words in what is now s26(1)(b)]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'

325. The EHRC Code states that the fact that a conduct is not aimed directly at a person does not necessarily prevent it falling within s26, at paragraph 7.11. It also specifically provides an example of possible harassment occurring via a remark made at a training session.

> During a training session attended by both male and female workers, a male trainer directs a number of remarks of a sexual nature to the group as a whole. A female worker finds the comments offensive and humiliating to her as a woman.

She would be able to make a claim for harassment, even though the remarks were not specifically directed at her

326. The Tribunal found the context of this comment to be of fundamental importance. Mr Rodgers was providing feedback to the wider group from his breakout group for the purpose of reporting back what staff had said concerning issues around disability. The tribunal was not satisfied that the respondent dealt with this matter well. The comment indicated that there may be problems with the respondent providing a good service to its disabled customers. This appeared to be an area which needed improvement. It did not reflect well on the respondent that it did not seek to drill down into this comment and clarify the issue and, if appropriate, provide training to its staff in providing service to disabled customers.

327. However, in the view of the tribunal it was not objectively reasonable for the Claimant to assume that this was a report of prejudice or bias on behalf of his colleagues, rather than their raising a practical difficulty in serving customers, such as in communication. The point of this training was to find out what the issues were, and unless staff were able to be honest, it would be hard to identify any shortcomings or areas for improvement.

328. Further, the remark was not aimed at the claimant and there was no suggestion that it was intended to hurt. Whilst effect is distinct from intention, the tribunal accepted that the intent behind a remark is one, but not a determinative, factor to consider in weighing its effect, as per *Grant.*

329. The tribunal did not find therefore that the remark had the purpose of effect of violating the Claimants dignity or creating an intimidating, hostile, degrading, humiliating or otherwise offensive environment for him.

330. 39(c) *At a meeting on 31 May 2023 Mr Rodgers complaining to the Claimant about the "hassle" of going to HR when the Claimant asked not to work in public facing areas.*

331. The Tribunal had found that Mr Rodgers said in effect that he did not want to go back to HR unless he needed to. The tribunal found that this was far from amounting to the statutory definition in s26(1)(b). The context of the remark was the claimant and his line manager discussing the reasonable adjustments. It did not violate the claimant's dignity or create a hostile or create an otherwise proscribed environment for the claimant for his manager to say he did not want to go back to HR unless it was necessary.

332. 39(d) On 2 June 2023, following a weekly team meeting, Tanushree Ravikumar, part-time Concierge, approached the Claimant and told him that he was very brave for talking about his disability.

333. According to the Respondent in its submissions it was common ground that following the meeting Ms Ravikumar approached the Claimant and told him he was very brave for talking about his disability. The Respondent in its submissions did not take

issue with the comment being unwanted. The Tribunal found that it was unwanted on the basis of the Claimant's cogent and articulate evidence that he was unhappy about the comment. Further, it was objectively reasonable for him to find it unwanted as he objected to what he saw as the outdated stereotype of a person needing to be brave to have a disability especially at work. The claimant felt "othered", that is he felt he was seen as different.

334. The tribunal considered whether the comment came within the definition in s26(1)(b). Applying *Land Registry v Grant,* the tribunal accepted that intent may be a relevant consideration when considering the effect of a remark, but it is in no way determinative. In view of the Tribunal and the Claimant generally accepted this, it was an innocent remark. The colleague was trying to be supportive rather than to wound. The claimant may have thought the colleague's attitude outdated and her comment clumsy or patronising, but it would be distorting the language of s26(1)(b) – applying *Grant* – to find that this comment violated the Claimants dignity or created an oppressive or otherwise proscribed environment for him.

335. 39(e) On 2 June in a meeting with Mr Rodgers and Ms Watson, Mr Rodgers saying the assistance provided to the Claimant with this disability had to be seen fair in the eyes of his colleagues.

336. The Tribunal had found this was a discussion about balancing the needs of the Claimant and his colleagues and the context was that Respondent making some adjustments - fixed days, time off for breaks, altering the role, removing from the Claimant at the desk at the noisiest time, 40% not customer facing whilst seeking but failing to make others – scheduled breaks.

337. The tribunal accepted that the comment was unwanted as the claimant gave clear evidence that he thought that this was an irrelevant factor.

338. The context of the remark was that, whilst the Tribunal was concerned about the Respondent's lack of understanding about disability discrimination and its duties in general, the people on the ground including Mr Rodgers had done work to seek to implement a number of changes to try to assist the claimant, albeit they had failed to effectively implement the breaks.

339. The tribunal considered whether the comment came within the definition in s26(1)(b). Applying *Land Registry v Grant,* the tribunal accepted that intent may be a relevant consideration when considering the effect of a remark, but it is in no way determinative. The tribunal accepted that the intent of the remark was to explain to the claimant that Mr Rodgers was managing a team and had a number of competing priorities.

340. The Tribunal did not accept that this comment met the definition in s26. It did not violate the Claimant's dignity or provide a proscribed environment. Mr Rodgers was essentially explaining the management's need to manage the situation. There was no

intent to be hostile or to humiliate, rather the intent was to explain the situation to the claimant.

341. 39(f) *The claimant's dismissal consequent upon the conduct alleged at sub-paragraphs (a) to (e) above.*

342. The tribunal had found that conduct in paragraphs (a) to (e) did not amount to disability related harassment. Accordingly, as none of the putative fundamental breaches on which the claimant relied amounted to a breach of s26, any constructive dismissal could not constitute disability-related harassment.

Victimisation Section 27 Equality Act

343. Did the Respondent subject the Claimant to a detriment because he had done a protected act, or because the Respondent believed that the Claimant had done or may do a protected act? The Claimant alleges that: On or around 20 July 2023, Scarlett Dutnall revised a grievance outcome letter because she anticipated the Claimant may bring an ET claim.

344. The Tribunal considered what is required under s.27(1)(b) as to the anticipation of a protected act. According to *Oladipo v Lush Retail Ltd EAT 0050/18,* a Tribunal must make express findings as to whether the decision maker knew, believed or suspected anything about the protected acts when making the relevant decision

345. The Tribunal accordingly considered Ms Dutnall's statement of mind. Ms Dutnall was copied into the HR email at page 530 on 3 May about the sensitivity of the situation and which included a reference to legal. Further the bundle contained a number of letters from the Claimant which contained detailed reference to Equality Act provisions. In effect the claimant quoted discrimination law to the Respondent and told it that he thought it was in breach. The Claimant himself accepted that Ms Dutnall was a very competent manager, and the Tribunal had little doubt that she at the very least suspected that the Claimant might be making an application to the Employment Tribunal.

346. The Tribunal went on to consider whether the amendment to the letter amounted to a detriment. The essence of the change was the removal of the reference to agreement that the additional reasonable adjustments could have been put in place before the interview and that the Respondent would ensure that they would be accommodated as much as possible in the future.

347. In respect of the definition of detriment the Tribunal directed itself in line with *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL* that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to their disadvantage. An unjustified sense of grievance cannot amount to a detriment but the question of whether a Claimant has been disadvantaged is a subjective one.

348. The tribunal found that whilst the issue was finely balanced, the original draft had more of an admission that things could have been better managed and that there would be change going forward. Therefore, it was reasonable for the claimant to think that there was more value in the original draft, rather than the final version. Accordingly, the re-draft amounted to a detriment.

349. The Respondent's defence centred on causation as per the Court of Appeal decision of *British Medical Association v Chaudhary* [2007] IRLR 800. At paragraph 177 Lord Justice Mummery rules that it is an essential statement of the law that a person does not discriminate if he takes the impugned decision in order to protect himself in litigation.

350. Ms Dutnall prepared a first draft of her letter and then sent that letter to HR, who would be responsible (whether they took legal advice or not) if there were a future employment tribunal claim. Ms Dutnall then adopted their suggestions. The Tribunal accepted that the purpose of Ms Dutnall and the Respondent in amending the letter was to protect themselves in litigation. Accordingly, the respondent did not discriminate, and the victimisation claim must fail.

Jurisdiction - Time Limits

351. The ET1 was submitted on 21 July 2023, the notification to ACAS was on 9 June 2023 and the Early Conciliation certificate issued on 12 July 2023. Therefore, any act of discrimination that took place on or before 9 March 2023 was potentially out of time.

352. The tribunal firstly identified when time started to run in respect of the two acts of discrimination. Time starts to run in respect of a Respondent's failure to make a reasonable adjustment from the time when the Respondent should have made the reasonable adjustment, see *Humphries v Chevler Packaging Ltd EAT 0224/0* and *Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA*. Specifically, at s123 Equality Act: -

> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

353. In respect of the failure to schedule the breaks, the Tribunal accepted that this failure had occurred in effect on two occasions – in December 2022 when Mr Money di not schedule the breaks and left it to the claimant and at the 9 April meeting between Mr Rodgers and the claimant. The second part of the claim was in time. The tribunal was satisfied that the two failures were a continuing act. Although different managers were involved, the failure was the same thing. The managers failed to give effect to the reasonable adjustment. This was part of an ongoing issue with the respondent.

354. In any event, if the first part of the act was out of time the tribunal would have found it just and equitable to extend time. The tribunal had regard to the cases of *Robertson v Bexley Community Centre t/a Leisure Link 2003* IRLR 434, CA, *Miller and ors v Ministry of Justice and ors and another case* EAT 0003/15 and *Jones v Secretary of State for Health and Social Care* 2024 EAT 2 .

355. Although the burden was on the claimant, the tribunal was satisfied that he was a disabled and therefore vulnerable employee trying to make his job work. He did not apply immediately to the tribunal when the first attempt to schedule breaks failed. He tried to resolve the matter internally by way of a grievance which he withdrew upon agreement that the problem would be solved. It was just and equitable to extend time to permit the claimant to do this.

356. In respect of the reasonable adjustment of trialling a back-office role, it was difficult to argue that it could have started to run before early May because the Claimant was in early May applying for a concierge role - a front of house role. The claimant's wish to carry out back-office work only became clear by the time of his second grievance on 8 May. The respondent investigated this grievance and handed down its decision on 9 June 2023. Tribunal found that time started to run when the respondent rejected the second grievance. Accordingly, this claim was in time.

Employment Judge Nash

Dated: 14 April 2025

Sent to the parties on:

16 April 2025

……

……

For the Tribunal Office