EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000064/2024

Final Hearing held in Glasgow on 13 – 16 January 2025, with deliberation day held on 18 February 2025

Employment Judge A Kemp
Tribunal Member E Farrell
Tribunal Member W Muir

EF — **Claimant In person**

McQueens Dairies Ltd — **Respondent Represented by: Ms F Gorry, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the claims, which are made under the Equality Act 2010, do not succeed and the Claim is dismissed.

REASONS

Introduction

1. This was a Final Hearing on the claims made by the claimant. She acted for herself. The respondent was represented by Ms Gorry.

2. There had been two Preliminary Hearings, on 21 March 2024 and 8 July 2024. After the first such hearing case management orders were issued, including for the preparation of a single file of the documents parties were to rely upon, and arrangements made for a Final Hearing to be held in person over four days. Thereafter the respondent sought and was granted an Information Order. The respondent alleged that the claimant had not fully complied with it. The claimant later sought a Document Order and the postponement of the Final Hearing. Those issues were addressed at the second Preliminary Hearing which extended the time for the claimant to comply with the Information Order, and the claimant withdrew her application for a document order. The postponement was not allowed at that stage in the absence of medical evidence, but that evidence was later produced and the respondent did not oppose the postponement.

3. The initial days for the Final Hearing which had been arranged to take place in August 2024 were then formally postponed, and the present hearing dates fixed by Notice dated 13 August 2024.

4. On 22 December 2024 the claimant made a new application for a document order. The respondent opposed this on 30 December 2024. It was not possible to arrange a hearing of that matter before the first day of the present hearing. On 7 January 2025 the claimant applied to have her evidence given remotely, which the respondent objected to the following day. On 8 January 2025 the claimant applied for a strike out of the Response, which the respondent objected to on the following day. On 9 January 2025 the Tribunal wrote to the parties with a decision by EJ Kemp that the application to have evidence heard remotely was refused, but could be renewed with medical evidence. On that day the claimant also applied for reasonable adjustments to be made for her, which the Tribunal responded to noting that the claimant had not copied it to the respondent and asking for further specification of what she sought.

5. There were accordingly a number of outstanding preliminary matters, which are addressed below.

6. Before evidence was led at the hearing the Judge explained to the claimant the terms of the overriding objective in Rule 3 of the 2024 Rules,

that the Tribunal could assist her to an extent but not so as to act as if her solicitor, and then as to how the hearing would be conducted, the leading of her own evidence with the possibility of an aide memoire (which the claimant did then use), and the function of cross examination of the respondent's witnesses being to challenge any aspect of the evidence by the other party not considered accurate, otherwise it would be likely to be considered established, and putting to the witness any matter not in their evidence in chief they should know about which was relevant to the issues. He explained that documents in the Bundle required to be referred to by page number and that if not referred to in the evidence would not be part of the evidence considered; about Tribunal questions and re-examination. He explained about the closing of a case after which adding evidence was permitted only in exceptional circumstances, and about making submissions.

7. The evidence was heard until around 2.40pm on 16 January 2025. There was then a discussion over submissions. The claimant preferred to do so in writing and asked for time to do so. Ms Gorry was content to proceed on that basis, and after discussion it was agreed that written submissions would be exchanged at 4pm on 27 January 2025. That was done, although the claimant's submission was late. The Tribunal then met remotely on 18 February 2025 to consider the submissions and deliberate. The Tribunal was grateful to both the claimant and Ms Gorry for the helpful way in which they each conducted the hearing, and the submissions that were made.

Claims

8. The claimant relies on the protected characteristics of disability and race, and has identified herself as being black. The respondent has admitted disability status but not knowledge. The respondent admitted the dismissal. The claimant makes claims under sections 13, 15, 20 and 21, and 27 of the Equality Act 2010. She has named an actual comparator. All the claims are denied.

Preliminary Issues

9. There were as stated above a number of preliminary issues that the Tribunal addressed prior to the hearing of evidence, and some later arose during the hearing. They were as follows:

(i) Documents

The respondent produced one Bundle, and the claimant produced her own. There was a large measure of duplication although the claimant's documents also had some highlighting on them. The Tribunal considered it appropriate under the overriding objective to allow the claimant to refer to some items in her own documents both when giving evidence and more generally where there were not duplicates, but not for her witness statement as no such statements had been sought or ordered. We understood that the claimant was content with that.

(ii) Document order

Although the claimant was very late indeed in making the application for a document order the respondent had helpfully gathered some of the documents falling within the application and did not wish to pass them to her without a formal order given privacy issues. They had produced what they had thought appropriate, and not for example all emails between the respondent and the comparator as that was, it was argued, disproportionate. We considered it in accordance with the overriding objective to grant the order sought to the extent of those documents the respondent had with it, for the reasons given more fully orally. They were added to the documents before us, and after a break over lunch to allow the claimant to read them the evidence was heard.

(iii) Strike out

The claimant sought strike out of the Response, but accepted that some of her concerns over the documentation had been allayed. For the reasons given orally we did not accede to this application, which was refused.

(iv) Adjustments

The position with regard to documents which the claimant had raised in her application for adjustments was addressed as above, and the claimant

was allowed to take breaks when she wished to. No other adjustments were sought.

(v) Timetabling

The Judge did not impose a timetable formally but indicated to the parties that it was in the interests of all that the hearing conclude within the four days allocated, and to effect that in basic outline the claimant would be expected to conclude her evidence in chief by 1pm on the second day, cross examination may take until the morning of the third day, and the respondent's evidence would be expected to be concluded by 3pm on the fourth day, with the last hour for submissions.

(vi) Objection to Member

During a discussion before the commencement of the second day of the hearing Ms Farrell one of the Tribunal members disclosed to the Judge that she was a customer of the respondent. The Judge informed the parties of that when the hearing resumed. The Judge explained the matter to the parties. The claimant intimated her objection to the Member continuing to sit. The respondent had no objection. There was an adjournment whilst the Judge considered that issue as well as another one regarding a late production from the respondent addressed below. On the hearing resuming the Judge intimated that the objection was refused. He outlined that the test was set out in ***Porter v Magill [2002] 2AC 357, Locabail (UK) Ltd v Bayfield Properties Ltd [2000] IRLR 96*** and ***Lawal v Northern Spirit Ltd [2003] ICR 856*** and in very brief summary was whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal Member was biased. He explained that Ms Farrell had stated that she had had no material communication with the respondent, which simply delivered milk to her. In all the circumstances the Judge did not consider that that met the test and that it was appropriate to proceed with the hearing.

(vii) Late productions

Also on the morning of the second day the respondent intimated that it wished to add a further production being timekeeping records for the comparator. The claimant objected as she wished to have her own records

similarly. They were then obtained by the respondent, which tendered them. The claimant maintained her objection as there were no records for September 2023. The respondent explained that there were no such records either for the claimant or comparator as their machine had broken. The Tribunal decided to allow the late productions and take a view after hearing evidence about them as to the weight if any to give to them, which it considered to be in accordance with the overriding objective.

(viii) Hypothetical comparator

On the morning of the third day the Judge explained to parties that as the claimant had said on the second day that the proposed comparator also had ADHD, and there was a dispute over whether the comparator was appropriate for the claim as to race discrimination separately, the Tribunal may consider, or be under a duty to consider, whether the question of an hypothetical comparator arose, under reference to ***North Bristol NHS Trust v Harrold EAT 0548/11***. Parties were given an opportunity to consider that and address it thereafter. No point was raised during the hearing itself or directly in submission.

Issues

10. The Tribunal had identified the issues for determination at the first Preliminary Hearing and they were raised during the preliminary discussions. The claimant was given an opportunity to add to them during the first break held at the commencement of the hearing and confirmed that she did not wish to raise any other matter. The list of issues is:

    (i) Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 ("the Act") on the grounds of her disability or race?

    (ii) When, if at all, did the respondent know or ought reasonably to have known that the claimant was a disabled person under the Act?

    (iii) Did the claimant suffer unfavourable treatment under section 15 of the Act by the respondent dismissing her?

    (iv) Was the claimant's "time blindness" something arising out of her disability under section 15(1) of the Act?

(v) If so, was the unfavourable treatment because of disability?

(vi) If so, was a proportionate means of achieving a legitimate aim of managing sickness absence and ensuring satisfactory client care established under section 15(2) of the Act?

(vii) Did the respondent apply a provision, criterion or practice under section 20 of the Act to the claimant in relation to (a) fixed start times and (b) a no missed calls criterion?

(viii) If so did doing so put disabled persons at a substantial disadvantage compared to those who are not?

(ix) Did doing so put the claimant at a substantial disadvantage?

(x) Did the physical feature of open tables with minimal divisors put the claimant at a substantial disadvantage compared to whose who are not disabled?

(xi) Did the respondent know or ought it reasonably to have known of the disadvantages?

(xii) If so, did the respondent not take any step that was reasonable to take to avoid the disadvantage under the terms of section 20 of the Act, in (a) allowing flexible working or (b) providing noise-cancelling headphones?

(xiii) Did the claimant do a protected act under section 27 of the Act when speaking with Martha McLaughlin in September 2023 about possible race discrimination involving Erica Francisco and that the claimant was a witness to sexual harassment towards Person X?

(xiv) If so did the respondent subject the claimant to a detriment because she had done so under section 27 of the Act, in respect of (i) the frequency and intensity of shouting at the claimant increasing, (ii) increasing disciplinary or absence and lateness documentation and (iii) the dismissal.

(xv) If any claim succeeds to what remedy is the claimant entitled, including

(a) what sum for injury to feelings is appropriate and

(b) what were the claimant's losses?

Evidence

11. The respondent had prepared a Bundle of Documents, as to which there were the preliminary discussions referred to above. Most but not all of the documents were spoken to in evidence. Further documents were added during the course of the hearing including one set that the claimant had sent to the Tribunal and respondent on 12 January 2025.

12. Evidence was given by the claimant first. She did not call any witnesses. Evidence for the respondent was given by Ms Martha McLaughlin the claimant's line manager, and Ms Alison Burnett and Mr Robert Allan both of HR of the respondent.

Facts

13. The Tribunal considered all the evidence led before it and found the following facts, material to the case before it, to have been established:

Parties

14. The claimant is EF.

15. The respondent is McQueens Dairies Ltd. It operates a business delivering and selling milk.

16. The respondent has its Headquarters in Glasgow. It also has an administrative office in Altrincham. It has about 1,200 employees. It has an HR department.

17. The respondent employed the claimant as a Retentions Adviser, in which role her function was to discuss issues with customers with a view to dissuading them from terminating their relationship with the respondent.

18. The claimant's employment commenced on 12 June 2023. Its terms were set out in a contract of employment. There was separately a Handbook including a Disciplinary Policy. That provided both for a disciplinary procedure, and that that did not apply to those on probation.

19. The claimant identifies herself as a black person.

Disability

20. The claimant is a disabled person and was at all times material for the present case. She has Attention Deficit Hyperactivity Disorder ("ADHD"). The effects of the condition for her were a lack of focus and attention, a lack of concentration and difficulties with time management including "time blindness" by which is meant having an inaccurate sense of time taken or passing.

21. The claimant stated on a form provided to her at induction that she had ADHD.

22. The claimant informed her line manager Ms Martha McLaughlin that she had ADHD and that it affected her concentration and similar matters on 20 June 2023. On that date Ms McLaughlin emailed her and stated "thanks for bringing your ADHD to my attention this morning", and she suggested breaks.

23. Later that day Ms McLaughlin emailed the claimant and stated "If you have any work to do after calls just pop yourself into a code as its shown up to pick up to some calls and its just less stress for you." By referring to code she was referring to software programmes used by the respondent called Horizon and Roundsman.

Background

24. The claimant worked in a team of about 14 Advisers. There were two such teams, one line managed by Ms McLaughlin the other by Mr Mike Gibbon. They were in the same room. The claimant's work station was next to Ms McLaughlin, and Mr Whittaker was situated one station further along from the claimant. Mr Gibbon's work station looked generally towards the door to enter and exit the room. Ms McLaughlin was at the side such that the door was over her left shoulder.

25. When the claimant was taking a call from a customer she was encouraged to record it in writing electronically during the call. The policy was for someone in her position as Retention Adviser to have up to 45 seconds to complete the written record. If that was not sufficient the Adviser could log

in to another code to complete the work, but was encouraged to complete that within 2 minutes.

26. Codes were used for breaks including for lunch, and for other purposes. It was possible for managers to override the code that the Adviser had engaged so as to have a customer call transferred to that Adviser. The expectation was that the call would be answered by the Adviser at that stage. If it was not as the Adviser entered another code the call was ended without being answered.

27. On 4 July 2023 Ms McLaughlin emailed the claimant after reviewing some of her calls stating that they were “really great….super impressed with your work”, and that she would use one for training. The claimant regularly provided above average statistics for retention, at times the best in her department and comparable with those with much more experience.

28. The claimant had intermittent absences from work, either as sick days or unauthorised absence. The respondent’s absence policy that if there were three periods of absence a review meeting was held. A period could be a single day or a series of consecutive days.

29. The claimant was on occasion late for work on some occasions by up to five minutes. She was 30 minutes late on 8 August 2023. On 18 August 2023 she was over 30 minutes late when her bus was delayed by a police incident and routes being closed. She had informed Mr Jamie Ramage a more senior manager than Ms McLaughlin, by telephone of that at the time.

30. In August and September 2023 the claimant was late back after breaks on an almost daily basis.

31. In August 2023 the claimant asked Ms McLaughlin whether she could have flexible work times, such that if she arrived later she would finish later. Her request was refused after Ms Burnett of HR told Ms McLaughlin that the respondent did not offer that. On 23 August 2023 the respondent varied the claimant’s breaks which they understood was at her request. Breaks taken within agreed hours were not paid.

32. Two managers of the respondent were concerned that the claimant was avoiding answering calls and addressed those by email to Ms McLaughlin and Mr Ramage on 23 August and on 12 and 13 September 2023. They included reference to the claimant being logged onto calls when she had otherwise been in another code, but the claimant not accepting that call and logging into a new code. The result of the claimant doing so was that the customer's call was not answered.

33. In August 2023 Ms McLaughlin spoke to the claimant about a comment she had made concerning supermarket milk and as to dropping prices for customers without authorisation from a manager.

34. On 31 August 2023 the claimant met Ms McLaughlin who raised issues of the claimant being late back from breaks every day, the concern over call avoidance, and stated the need to always answer calls. The claimant was informed to focus on doing so. The claimant asked to be referred to HR. Ms McLaughlin passed that request to Ms Alison Burnett of HR.

35. On 1 September 2023 a disciplinary hearing was held to address the lateness, triggered after the claimant had had three separate absences, and after the claimant explained matters Ms McLaughlin decided to take no further action. That was confirmed by letter issued that day.

36. Separately on 1 September 2023 Ms McLaughlin varied the claimant's pattern of breaks at her request.

37. In week commencing 4 September 2023 the claimant was late in arriving for work on two occasions by 7 and 15 minutes.

38. On 5 September 2023 the claimant met Ms Burnett. They had a discussion lasting about half an hour. The claimant informed her that she had ADHD and had difficulties with her concentration. Ms Burnett discussed reasonable adjustments offered regarding breaks. No note of that conversation was kept. A few days after that meeting Ms Burnett met her line manager Ms Deborah Solley, who suggested that a report be obtained from the claimant's GP. Ms Solley did not immediately action that.

Probation review

39. The claimant had a probation review meeting with Ms McLaughlin on 13 September 2023. She attended work that day late by 5 minutes. Prior to the meeting Ms McLaughlin exchanged emails Alison Burnett of HR referring to the claimant returning late after breaks in particular, commenting that she gave an inch but was taking a mile, and in a later message that day stated "I was planning on extending due to her calls being good and results high – however I don't condone the extra long breaks, sickness and going into codes while meant to be taking calls. I will expect a big improvement within a few weeks and make this clear during our one to one today. If in a week it's the same I think my decision will be made."

40. Ms McLaughlin met the claimant that day for the review meeting, and confirmed that her probation was being extended. Ms McLaughlin recorded after the meeting on a review form that both she and that claimant signed that she wished to see the claimant improve on keeping to break times, not miss calls by moving from one code to another, work on correct prices, credits and reasons for that, product complaints and time-keeping and attendance. She decided that the probation would be extended. She wrote to the claimant to confirm that on 14 September 2023 with the period to end on 12 December 2023.

41. In a separate record that day Ms McLaughlin noted the claimant's comment at a one-to-one meeting that she was "needing more time to finish off process" by which she meant completing the written record of a call after it had ended.

42. The claimant was asked to provide her GP records in relation to ADHD on 22 September 2023 by Ms McLaughlin who asked that they be sent to Ms Burnett. The claimant did not wish to disclose all her records, and sent an email to Ms Burnett dated 22 September 2023 stating that, with some documents attached referring to a diagnosis of moderate ADHD. Ms Burnett did not reply.

Termination

43. On 27 September 2023 the claimant telephoned Ms McLaughlin a little after 8am and said that she would be 3 hours or so late. When asked why that was she said that it was personal. Ms McLaughlin said that the claimant should get to work when she could.

44. Ms McLaughlin spoke to her colleague Mr Ramage at around 9am that day. Ms McLaughlin considered that it was appropriate to terminate the claimant's employment in light of the background to matters and the late attendance without good reason that day. He agreed.

45. The claimant attended work at around 1pm and therefore about 4.5 hours late. At a meeting with Ms McLaughlin and Mr Ramage the claimant was informed that she had not passed probation because of her levels of sickness, performance which included for issues of call avoidance, and lateness both at the start of shifts and when returning from breaks, and that her employment was terminated. She was informed that she would be paid until 2pm that day, and for notice.

46. Ms McLaughlin emailed HR after the meeting to confirm that they had terminated her, stating "Late back from breaks, missing calls and lateness."

47. Stewart Robertson of HR wrote to the claimant to confirm the termination of her employment on 29 September 2023. It stated that she had not been successful in her probation, and added "Regrettably, you are not the correct fit for this business." That was a standard phrase used by the respondent, with two others relating to skill or time-keeping.

48. The claimant emailed the respondent with regard to that decision on 4 October 2023. It was treated as a grievance. On 6 November 2023 Ms Solley wrote to the claimant to explain that her grievance had been rejected, after being dealt with under the respondent's modified disciplinary procedure which is used where a former employee makes a grievance.

Comparator

49. Mr James Whittaker was employed by the respondent. He is a disabled white person, who has ADHD. His record was of two separate periods of absence in the period June to September 2023, and a third period then commencing. After that he had three days of leave, and then resigned. In the period June to September 2023 the claimant was recorded as being late on 7 occasions over 57 working days, and he was recorded as late on 8 occasions over 53 working days. Where there are records before the Tribunal of his retentions percentages they are not higher on average than those of the claimant. There was no disciplinary meeting held in relation to his level of lateness.

50. The respondent's three managers of the Retentions Department recorded any lateness on a system called Central Attendance. It was entered manually when that was noticed. There was also a fingerprint system for recording entry and exit, which was not always used and was not operational for much of September 2023. Mr Whittaker was late on some occasions in the period June to September 2023 but not all of those were noted on Central Attendance as the managers had not seen it.

51. Mr Whittaker's probationary review was held on 13 August 2023 with Ms McLaughlin. He passed it. He had not had absences to trigger a review of that. There were three areas for improvement noted. His timekeeping was not one of them. Ms McLaughlin noted about him - "fit in really well with the team".

52. Mr Whittaker resigned from the respondent on 28 September 2023.

Financial aspects

53. When employed by the respondent the claimant's net pay was £2,005 per month.

54. The respondent paid one week's notice in lieu after her termination.

Miscellaneous matters

55. The respondent transferred some employees it considered not performing well to other departments. It had 24 white males and 14 white females in the department. One white male and five white females were transferred. None of those transferred were black females. Both of the black females were dismissed, one being the claimant. The respondent employed no black males.

56. The respondent operated a policy to the effect that employees were required to start work at the allocated time.

57. The respondent operated a policy to the effect that calls from customers required to be answered such that none were missed.

58. The respondent's telephone line for customers to call operated from 8am to 5pm. Across its business it required staff to attend for work at the start time for their shift, and to observe the periods of breaks. Lateness was recorded.

59. If a customer's call passed to the Retentions Department was not answered it was more likely that that customer would leave. The respondent sought to answer calls quickly with the intent of seeking to persuade as many who were considering terminating their contract for supply of milk not to do so.

60. The respondent had a web-based service also used to deal with customers which ended at 4.30pm. If that was to be operational after 5pm one of the managers would have required to remain at work after that time as a key-holder.

61. On a date not given in evidence the claimant asked for a new headset, and the respondent ordered and supplied a new headset for her.

62. The claimant commenced Early Conciliation on 11 October 2023, and the Certificate was issued on 6 November 2023. The Claim Form was presented on 19 January 2024.

Submissions for claimant

63. The claimant provided a written submission which although slightly late was accepted by the Tribunal and considered. For a party litigant it was of high quality, and she argued her points with skill. The following is a very basic and short summary of it given that it was set out in writing fully. The respondent had discriminated against her. It had not provided all documentation in relation to the comparator. Its evidence should not be accepted. It had not investigated the claimant's status as a disabled person, nor taken the adjustments reasonably required to avoid the disadvantage from her ADHD. The claim should be upheld and an award of slightly over £40,000 made in her favour (which she sought to increase later with an additional Schedule of Loss of over £45,000).

64. There are two points in relation to the submission we consider it appropriate to make. The first is that on a number of occasions the claimant made reference to detail that was not in the evidence before us. We are not entitled to consider a matter not raised within the evidence. The second is that the claimant argued that the respondent had not complied with a document order. That was not correct. The order was applied for very late in the day, as we noted above, and was granted to the extent of the documents that the respondent had with it. The claimant had asked for documents from the respondent but that was not the same as the Tribunal granting an order which was not then fully responded to. The claimant's earlier application for a document order had been withdrawn at the second Preliminary Hearing. The claimant as a party litigant may not of course appreciate the distinction between a request not met in the manner she sought, and a formal document order not being complied with.

Respondent's submission

65. The respondent also provided a written submission and the following is also a very basic and short summary of it. The respondent's evidence should be accepted. There were material differences with the proposed comparator. There were many reasons for the decision to terminate the claimant's employment which were unrelated to her disability. There were no reasonable adjustments which had not been made. There had been no protected act or victimisation. The claim should be rejected

Law

66. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) Statute

67. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that disability and race are each a protected characteristic. Section 9(1)(a) states "Race includes colour".

68. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> 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."

69. Section 15 of the Act provides as follows:

> "**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."

70. Section 20 of the Act provides as follows:

> **"20 Duty to make adjustments**
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.

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

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table the Schedule specified in the second column

Part of this Act	Applicable Schedule
……Part 5 (work)	Schedule 8”

[Part 5 includes section 39]

71. Section 21 of the Act provides:

“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….”

72. Section 23 of the Act provides

“**Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of sections 13, 14 and 19 there must be no material difference between the circumstances relating to each case….”

73. Section 27 of the Act provides:

“**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—

……

(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.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

74. Section 39 of the Act provides:

"**39 Employees and applicants**

An employer (A) must not discriminate against a person (B) –

……..

(c) by dismissing B

(d) by subjecting B to any other detriment."

75. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

76. Section 212 of the Act defines "substantial" as "more than minor or trivial."

77. Schedule 8 to the Act has provisions as to making reasonable adjustments, and at paragraph 20 states:

"**Part 3**

Limitations on the Duty

Lack of knowledge of disability, etc

20

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

78. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

79. The Directive is retained law under the European Union Withdrawal Act 2018, since renamed assimilated law by the Retained EU Law (Revocation and Retention) Act 2023.

(ii) Case law

(a) Knowledge of disability

80. The issue of whether or not the respondent knew of the disability is an issue of fact, and arises for the claims under sections 13, 15 and 20 of the Act. If the respondent did not know of the disability a direct discrimination claim is unlikely to succeed.

81. The separate issue of what has become known as constructive knowledge, which the respondent ought reasonably to have had, arises under sections 15 and 20 and is one on which the onus falls on the respondent. In ***Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283*** the EAT held that the correct statutory construction of s 4A(3)(b) [the predecessor provision in materially the same terms as the 2010 Act] involved asking two questions;

(1) Did the employer know both that the employee was disabled and that his or her disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then there is a second question, namely,

(2) Ought the employer to have known both that the employee was disabled and that his or her disability was liable to affect him or her in the manner set out in the statute?

82. In ***IPC Media Ltd v Millar [2013] IRLR 707*** it was held that it is necessary to determine who the alleged discriminator was (ie whose mind is in issue and who, in an appropriate case, becomes 'A'. It was subsequently held by the EAT that the knowledge of one element of the organisation (eg HR or Occupational Health) is not automatically to be imputed to the manager actually taking action against the employee; if that manager lacks the requisite knowledge, sub-s (2) may operate: ***Gallop v Newport City Council [2016] IRLR 395***. Separate acts can however amount to discrimination - ***Reynolds v CLFIS (UK) Ltd [2015] IRLR 562*****.**

83. The provision asking whether an employer could be 'reasonably expected to know' means that an employer may be under a duty to make enquiries to establish whether a person is suffering from a qualifying disability. The Code of Practice at paragraph 6.19 gives the example of an employee who has depression and cries at times at work and says that it is likely to be reasonable for the employer to discuss with the worker whether their crying is connected to a disability and whether a reasonable adjustment could be made to their working arrangements. The Court of Appeal in ***Gallop v Newport City Council [2014] IRLR 211*****,** held that it was essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment, rather than rely on advice from OH. In ***Donelien v Liberata UK Ltd*****,** ***[2018] IRLR 535*****,** the Court of Appeal clarified that, and emphasised that the case of ***Gallop*** should not be seen as discounting the value of OH reports generally, rather that an unquestioning reliance on an unreasoned report will not be sufficient.

84. In the context of a section 20 claim, the knowledge that the respondent ought to have known extends both to the fact that the claimant was disabled, and that the PCP was liable to disadvantage her substantially (***Wilcox v Birmingham CAB Services Ltd (2011) EqLR 810***)

(b) Direct discrimination

85. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

86. Further guidance was given in ***Amnesty***, in which the then President of the EAT explained the test in the following way:

> "… The basic question in direct discrimination case is what is or are the “ground” or “grounds” for the treatment complained of. ……..
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself……
> In other cases—of which ***Nagarajan*** is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the “mental processes” (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in ***James v Eastleigh***, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling

> ***James v Eastleigh*** and ***Nagarajan***. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

87. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

88. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. The claimant must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

89. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nicholls said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

90. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

91. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

92. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

93. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

94. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the

following (in a case which concerned the protected characteristic of disability):

> "5
>
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.
>
> 6
>
> In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

(c) Discrimination arising from disability

95. The EAT held in ***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*** that the requirement for knowledge under section 15 was

not that the putative discriminator knew that something arose in consequence of the disability; once the discriminator knew of the disability, and objectively the something which caused the unfavourable treatment arose in consequence of the disability, the terms of the section were satisfied. That "something" did not need to be the sole or principal cause of the treatment, but required to be at least an effective cause, or have a significant Influence on, the treatment.

96. The Supreme Court considered this issue in ***Williams v Trustees of Swansea 2018 IRLR 306*** and confirmed that this claim raises two simple questions of fact: (i) what was the relevant treatment and (ii) was it unfavourable to the claimant? 'Unfavourably' must be given its normal meaning; it does not require comparison. It is necessary to identify the relevant treatment that is said to be unfavourable and then a broad view is to be taken when determining what is 'unfavourable', measuring the treatment against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, because it is insufficiently advantageous.

97. In order to achieve the stated purpose, the concept of 'unfavourable treatment' will need to be construed widely, similar to how the concept of 'detriment' has been construed for the purposes of other anti-discrimination provisions although the two terms are not identical. The Code (at paragraph 5.7) indicates that unfavourable treatment should be construed synonymously with 'disadvantage':

> "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"

98. In ***City of York Council v Grosset [2018] IRLR 746***, Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

99. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

100. In ***iForce Ltd v Wood UKEAT/0167/18*** the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

101. In ***Dunn v Secretary of State for Justice [2019] IRLR 298*** the Court of Appeal held that "it is a condition of liability for disability discrimination under s 15 that the claimant should have been treated in the manner complained of because the 'something' which arises in consequence of that disability". This will typically involve establishing that the disability or relevant related factor operated on the mind of the putative discriminator, as part of his conscious or unconscious mental processes. This is not, in this context, the same as examining 'motive'.

102. In ***Robinson v Department of Work and Pensions [2020] IRLR 884*** the Court of Appeal held it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

103. The EAT overturned a Tribunal's conclusion that the employer had constructive knowledge, because further enquiries could have been made, in ***A Ltd v Z [2019] IRLR 952*.**

Unfavourable treatment

104. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. That was undisturbed by the Supreme Court when it later considered the case. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage." Reference to the measurement against an objective sense of that which is adverse as compared to that which is beneficial was made in ***T-System Ltd v Lewis UKEAT/0042/15.***

Justification

105. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726****,* heard in the Court of Appeal, it was held that the test of justification under the statutory provisions then in force requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14*** applied the test set out in that case to a claim of discrimination under section 15 of the 2010 Act. It held that when assessing proportionality, while an employment tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

106. In ***Chief Constable v Homer 2012 ICR 704*** Baroness Hale emphasised that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

107. The EAT held in ***Land Registry v Houghton and others UKEAT/0149/14*** that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant. That was explained further in ***City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18*** as follows

> "proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment……an employer is not required to prove there was no other way of achieving its objectives (***Hardys & Hansons place v Lax [2005] IRLR 726***). On the other hand, the test is something more than the range of reasonable responses (again see ***Hardys***)."

108. The Supreme Court summarised the law in relation to justification in ***Bank Mellat v HM Treasury (No. 2) [2015] AC 700***, and set four matters to consider – (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right (ii) whether the measure is rationally connected to the objective, (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

109. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the tribunal was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the tribunal. The Court of Appeal in ***Grosset [2018] IRLR 746*** upheld this reasoning.

110. In ***Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918*** the claimant was dismissed for unsatisfactory performance after eight months of absence. He had been in a serious motorcycle accident whilst

responding to an emergency call, and developed post-traumatic stress disorder which had prevented a return to work. The respondent accepted that the officer had been treated unfavourably because of something arising from his disability – namely his absence – but relied on the application of the Police Performance Regulations by way of justification. The EAT held that the Tribunal had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, to cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

111. That may be contrasted with the case of ***Browne v Commissioner of Police of the Metropolis UKEAT/0278/17*** in which the EAT held that the employment tribunal were entitled to find that the individual treatment of the claimant was justified because the employer had given the claimant an opportunity to make representations asking for an extension of sick pay.

112. The Tribunal also had regard to and applied the guidance in relation to justification in indirect discrimination recently issued by the EAT in ***NSL v Zaluski 2024 EAT 8***, a case of indirect discrimination but where the test for justification is essentially the same, which emphasised the importance of carrying out a critical analysis. The Tribunal must form its own view of the working practices and business considerations involved.

113. Guidance on that issue is also given at paragraphs 4.25 onwards in the Code.

(d) Reasonable adjustments

Provision, criterion or practice

114. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should

be widely construed. In ***Hampson v Department of Education and Science*** [***1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558.***

115. In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

116. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

117. What a provision, criterion or practice can be was considered in ***Carrera v United First Partners Research UKEAT/0266/15.*** A liberal rather than an overly technical approach should be adopted.

Substantial disadvantage

118. Guidance is given in ***Sheikholeslami.*** Substantial has the section 212 meaning. It is applied to disabled persons, and the claimant herself, separately. The former is measured on an objective basis by comparison with what the position would be if the disabled person did not have a disability.

What are reasonable adjustments

119. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

120. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

121. In ***Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664*** the EAT held that the failure to carry out an assessment did not of itself constitute a failure to make a reasonable adjustment. If the employer makes such adjustment as in fact is reasonable, then whether that is achieved by

chance or even in ignorance of the relevant legal duty, there is no breach of the law even though there was no assessment.

122. The duty to make reasonable adjustments does not therefore extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

(e) Victimisation

123. There are two key questions – (i) has the claimant done a protected act (ii) if so did she suffer a detriment because she had done so. The first aspect requires an allegation of discrimination, rather than more general comments - ***Page v Lord Chancellor UKEAT/0304/18/LA***. The second aspect is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ 425.*** In determining whether a detriment was because of a protected act, it is important that the protected act is identified with precision and that the relationship between the detriment and that act specifically is examined: ***JJ Food Service Ltd v Mohamud EAT 0310/15,*** Guidance on the issues that arise is in Chapter 9 of the EHRC Code of Practice. The burden of proof provisions apply to the terms of section 27.

(f) Detriment

124. The key question is - "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" derived from ***Shamoon.*** The House of Lords confirmed the position in ***Derbyshire v St Helens Metropolitan Borough Council 2007 ICR 841***. It was stated that the test is not satisfied merely by the

claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. It is to be interpreted widely in this context – ***Warburton v Chief Constable of Northamptonshire Police EA-2020-000376*** and ***EA-2020-001077***

(g) Burden of proof

125. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or victimisation, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*.**

126. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

127. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is

> what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

128. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

129. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

130. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***

(h) The EHRC Code

131. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, which in addition to the references above includes the following provisions:

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

the difficulties are because of something arising in consequence of a disability…….

Substantial disadvantage

6.15

The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis……

WHAT IF THE EMPLOYER DOES NOT KNOW THE WORKER IS DISABLED?

…….

6.20

The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping the disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

6.21

If an employer's agent or employee [such as an occupational health adviser, a HR officer or a recruitment agent] knows in that capacity of a worker's…..disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfill their duties under the Act…….

Reasonable steps

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:

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;
b. the practicability of the step;
c. the financial and other costs of making the adjustment and the extent of any disruption caused;
d. the extent of the employer's financial or other resources;
e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
f. the type and size of the employer.

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

6.33

[Provides a list of examples of steps it might be reasonable for an employer to take

Observations on the evidence

132. The Tribunal's assessment of each of the witnesses who gave evidence is as follows:

133. The **claimant** was we considered seeking to give honest evidence. She was both articulate and personable, and clearly had been effective in many aspects of the role for which she had been employed. Her belief that she had been discriminated against was we considered genuine.

134. On some points however we considered that the claimant's evidence was less reliable than that of the respondent. There were some disputes on fact with Ms McLaughlin in particular. Some aspects of the claimant's evidence was not reliable. In correspondence with the respondent for example that of 4 October 2023 she had suggested that there were no real issues with her attendance record. There was clear evidence however

that there were and that she had been aware of them. She was absent on 11 September 2023 without giving a reason other than the somewhat vague reference to personal reasons. That was the third period of absence which triggered a review meeting. There were very frequent issues with the claimant taking longer breaks than she had agreed to or was entitled to. It was raised with her on many occasions but continued.

135. The claimant gave evidence that her performance was very good, with few issues. But there was substantial evidence of her having calls transferred to her that she did not answer and instead moved to a new code to avoid doing so. That was documented in emails from managers other than Ms McLaughlin. The claimant's evidence on these points, to the effect that she was not avoiding calls, we did not consider reliable given the body of evidence that there was including contemporaneous records some of which she had signed. It was against that overall background that we considered more specific points of dispute.

136. One issue was whether Ms McLaughlin was at a meeting between the claimant and Ms Burnett, as the claimant argued, or not on which we preferred the evidence of Ms McLaughlin and Ms Burnett who were consistent in stating that Ms McLaughlin was not. We also preferred Ms Burnett's evidence over that of the claimant on there being a second meeting between them, as that accorded with the email of 22 September 2023 and the overall evidence we heard of events around that time. Ms McLaughlin was clear that the claimant had not raised the issues of Ms Francisco and Person X with her as alleged, and on that in light of the evidence overall we preferred Ms McLaughlin. Similarly there was a dispute over whether new headphones had or had not been provided and Ms McLaughlin was very clear in her evidence that they had been which we considered was more likely to be reliable and was therefore preferred.

137. We generally considered that the claimant's evidence was not reliable on factual disputes, on which we preferred that of the respondent.

138. Ms **McLaughlin** we were satisfied was giving honest evidence. There were however some areas of it that caused us to be concerned initially over its reliability, which included the following

(i) The respondent pled that it knew of the claimant's ADHD from 31 August 2023, but there is an email from Ms McLaughlin acknowledging that the claimant had told her of that on 20 June 2023. That disparity was explained as a mistake.

(ii) Ms McLaughlin noted in the probation review form for Mr Whittaker that he fitted in really well with the team. She did not state the same for the claimant, whose performance was at least as good in some respects. There were some concerns over Mr Whittaker's attendance and lateness record although that had not been noticed as much as for the claimant, a matter Ms McLaughlin explained in her evidence and which we accepted. The reference to him fitting in well is contrasted with the absence of comment for the claimant in her own probation review meeting.

(iii) Ms McLaughlin had had training on equal opportunities but when the claimant informed her that she had ADHD and made some comments on its effects did not seek Occupational Health or similar advice either herself or through HR. Nevertheless in emails she did refer to making "reasonable adjustments" for the claimant. They were in relation to unpaid breaks, rather than other issues. The use of the phrase indicates knowledge of disability.

(iv) There was a disciplinary hearing held on 1 September 2023 in relation to lateness arriving, but none held on other matters including before dismissal. Ms McLaughlin accepted that it would have been better to have done so.

(v) Ms McLaughlin said that after Ms Burnett had met the claimant on 5 September 2023 the latter had told her that the claimant had sought paid breaks, and was - using her phrase – "at it". But Ms Burnett did not support that evidence.

(vi) The claimant said on 13 September 2023 that she needed more time to complete the process, but that issue was not investigated at that stage.

(vii) Ms McLaughlin initially thought that she had sent an email to the claimant on 13 September 2023, but it transpired that she was confusing that with her email sent on 20 June 2023.

(viii) Ms McLaughlin said that on 27 September 2023 she had taken a call from the claimant who said that she would be 3 hours late, for a personal reason not specified, and was laughing, after which she spoke to Mr Ramage about terminating her employment. But that call was not put to the claimant in cross examination, nor was it pled.

(ix) Ms McLaughlin said that Ms Burnett and she had discussed the decision on 27 September 2023 before the claimant arrived, but Ms Burnett did not recall any such conversation.

(x) There were some areas of inconsistency in the evidence over the reasons for dismissal, and what had been discussed with the claimant. It had not been put to the claimant that at the meeting that day she had been told that one issue was a potential falsification of retention records, but that evidence was given in chief. A document from Mr Gibbon regarding that had not been put to the claimant in cross examination nor had that issue of potential dishonesty at all, but the document itself indicated that Mr Gibbon, another manager, was satisfied that it was not dishonest although what had been done had not been right.

139. We considered these issues carefully, but concluded overall that Ms McLaughlin was a credible and reliable witness. We were struck by the emails exchanged on 13 September 2023 before the probation review meeting with Ms Burnett, who forecast that the claimant would not survive probation. Even with her own comments as to the claimant continually being late back from breaks, and being given an inch and taking a mile, as well as those of Ms Burnett, she still extended probation. That was not we considered the act of someone seeking to disadvantage someone because of colour or who was disabled. It was the act of a manager hoping that the issues that concerned her could improve sufficiently, but who had a concern such that probation was extended rather than being marked as passed.

140. There were allegations of the claimant being singled out, shouted at and treated more harshly than others. They were denied. We noted Ms McLaughlin's demeanour before us. Conscious that that may not be the

same as someone at work we were still satisfied that the behaviours alleged were unlikely to have been what happened. There had been no complaint at the time, and there was no other evidence before us to support the allegation that the claimant made. If matters had occurred as the claimant alleged we would have expected another member of staff to have noticed, and been able then to give evidence to support the claimant.

141. There were some areas where Ms Burnett supported the evidence given by Ms McLaughlin, such as over there being two meetings with the claimant and that at neither was Ms McLaughlin present, which were we considered matters of fact on which Ms McLaughlin was likely to be correct. Overall we considered Ms McLaughlin more likely to be reliable. Where there were some differences of evidence between Ms McLaughlin and Ms Burnett we were satisfied that that was because of genuine differences of recollection, but that overall Ms McLaughlin was more likely to be accurate in those respects and to be preferred to the evidence of Ms Burnett. Ms McLaughlin had been aware of what may be termed a concern over the question of falsification of retentions, which she says was mentioned at the meeting even though if there truly had been such falsification one would have expected the probation to have been failed well before the review date on 13 September 2023. But we considered her evidence as to that to be honest, even if how she addressed that element was not appropriate in our view. There not having been dishonesty found by the manager one would expect that point not to be raised.

142. Whilst therefore there were some initial concerns as to reliability as set out above, we have accepted Ms McLaughlin's evidence as being credible and reliable.

143. Ms **Burnett** was we considered a credible and most often a reliable witness. She was candid in accepting that matters could have been handled more effectively. It was surprising to us that for someone with over 30 years' experience in HR that after Ms Solley indicated that the issue of disability should be addressed a few days after the first meeting on 5 September 2023 she did not arrange a meeting with the claimant to do so there and then, and when there was a meeting did not record it at all. She said that the claimant had been sent information about what was

sought, that that was in effect approval to obtain a report from her GP rather than a copy of her GP records, and that an email had been sent. The email and information were not before us, nor had that been put to the claimant in cross examination, and we did not consider that suggestion as established in light of that. When the claimant emailed her on 22 September 2023 with documents about her ADHD and stated that she would not release her record Ms Burnett did not go back to her to suggest that they did not seek the records but a report, outlining what that would be on. She claimed that an acknowledgement email had been sent but again that was not before us nor was it raised in cross examination,

144. We consider that it was entirely obvious that the claimant, who had ADHD and difficulties of concentration which Ms Burnett accepted had been raised with her on 5 September 2023, may not have appreciated what was being suggested from the terms of the message on 22 September 2023. It was obvious that a further discussion with her was required on that. That that was not done in a company of the size and resources of the respondent is therefore a considerable surprise.

145. Mr **Allan** was we considered a credible and reliable witness. He explained that the dismissal letter was a form of template with three options as to reason for dismissal, and that the issue as to "fit" would be appropriate where there could be more than one reason other than skill or time-keeping. We accepted his explanation on that, although the issue of fit can indicate the possibility of discrimination as we address below.

Discussion

146. The Tribunal decision is unanimous. We address each of the issues before us in turn:

(i) Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 ("the Act") on the grounds of her disability or race?

147. In order for there to be direct discrimination because of **disability** the respondent must know that the claimant was a disabled person. We consider that the evidence shows that on the balance of probabilities they

did. Not only was there reference to ADHD on 20 June 2023 in an email but Ms McLaughlin herself used the term "reasonable adjustment" in relation to breaks. That infers that she was aware of the claimant being a disabled person, in our view, as it is a term for disabled persons specifically. Ms Burnett said that it did not fully cross her mind that the claimant was a disabled person, but she was also aware of discussion over reasonable adjustments. We conclude that the respondent did know of the claimant's disability from 20 June 2023.

148. There was not however the link to disability required to establish causation in our view. It is not enough that the claimant is a disabled person and that there were unfavourable steps taken including any that may be said to be unreasonable (although given the performance and lateness issues taking action was in our view reasonable as we address below). There needs to be something more to connect the decision to dismiss in particular, but also anything said to be a detriment, with disability. We did not find that.

149. We did not consider that there was a *prima facie* case established that disability was a not insignificant reason for the matters complained about or dismissal so as to amount to direct discrimination. Mr Whittaker also being a disabled person is not an appropriate comparator. He too had ADHD. There were also in our view several material differences of fact between his circumstances and those of the claimant, such that he does not meet the definition of comparator in section 23. We considered an hypothetical comparator for completeness being someone in the same circumstances as the claimant who was not disabled. We concluded that such a comparator would have been treated in the same manner as the claimant was. There was we considered no evidence to the contrary.

150. Even if we had found a *prima facie* case established, for the reasons addressed more fully as to race below we were satisfied that the reasons for dismissal were the claimant's latenesses including that on 27 September 2023, against the background of other issues including the view that the respondent had as to call avoidance by the claimant, the absences from sickness and the extension of probation which indicated that the claimant's position was a somewhat fragile one. There had been

three separate periods of sickness, as the claimant accepted. That triggered a review under the policy. The evidence was that the sicknesses were not related to disability.

151. In our view the lateness on 27 September 2023 which was without proper intimation and with no particular reason given for it other than personal reasons was for Ms McLaughlin what amounted to a final straw, and led her to dismiss. We did not consider that there was evidence of that lateness either at the start of the day or when returning late from breaks being related to disability. We had no medical evidence from a GP or consultant. There were some documents from those assisting the claimant but in our view they did not amount to sufficient evidence of a causal connection between ADHD and what the claimant characterised as "time-blindness".

152. The claimant argued that such questions were within what she termed basic and practical knowledge, but we do not consider that they fall within judicial knowledge which is the provision we apply to matters that we are able properly to take into account as facts, and the absence of evidence as to why the latenesses occurred that would give a link to disability that would suffice for such purposes is we consider fatal to the argument for the claimant. The same point arises in relation to the matter of performance, when the claimant was she states finishing work on one case and that is why she did not accept a new call, which the respondent characterised as call avoidance. There was no evidence that that was a matter arising from her ADHD. On these points the onus falls on the claimant, and in our view it was not discharged. On some matters there was positive evidence that the issue did not arise from disability, such as the earlier examples of absences from work because of sickness, which the claimant stated at the time was not the result of disability.

153. We therefore dismiss the claim on the basis of disability under section 13.

154. We turn to the position with regard to **race**. Looking at the totality of the evidence and at this stage excluding the respondent's explanation we consider that a *prima facie* case has been made out. There were a number of matters that were not consistent with normal expectation, that in simple

terms looked unusual, and to an extent suspicious. There was a degree of disparity of treatment between the claimant and Mr Whittaker for what were broadly comparable issues to some albeit limited extent. In this respect whilst he was not a comparator directly the evidence about him was relevant to consideration of an hypothetical comparator, which we considered it appropriate to address even although the claimant had not specified that in her pleading or argument. We do so as the claimant is a party litigant.

155. The claimant's performance statistically was at least good, if not very good. She was taking in general terms a reasonably high number of calls. Her performance on retentions was at the higher end of the scale, and at times the highest. That particular aspect of performance was therefore good at the least, but that was not the only aspect of performance that the respondent considered.

156. There was one matter that we considered in this aspect of the direct discrimination claim to be particularly significant. That is the difference in wording between the claimant and Mr Whittaker, the latter being someone who was said in his probation review form to have fitted in well with the team, to paraphrase, and for the claimant in the dismissal letter it was stated that she was not a good fit for the respondent. That concept of not fitting in can be redolent of race discrimination, either conscious or unconscious. It was repeated in effect in the dismissal letter.

157. Other matters were in our view potentially significant, for example there was a disciplinary hearing held on 1 September 2023 but not on 27 September 2023, and there were disparities between the evidence and what had been pled in relation to that day as noted above. The claimant provided some evidence on the percentages of black and white females either dismissed or transferred and for related matters, and that there were no black male employees in the department. We took all that into account, although given the numbers of staff involved the evidential value of those statistics is limited.

158. On that basis we considered that the onus shifted to the respondent to prove that race played no part whatsoever in the decisions which led to

the dismissal, as well as the dismissal itself. We concluded that they had discharged that onus. Whilst there were some initial and limited concerns over the reliability of some aspects of the evidence of Ms McLaughlin, overall we considered that the sole reason for the decisions were genuine concerns over the claimant's latenesses, the absence record, and the practice of avoiding answering calls when she did not wish to, culminating in the events on 27 September 2023 which was a final straw as referred to above.

159. The claimant argued that her performance was very good such that there were no performance issues. In some respects, as already stated, particularly the statistics for retention, her performance was indeed very good, and on occasion the best in the department. If that were the sole metric, the claimant's position would have been understandable. We accepted the evidence Ms McLaughlin gave that there were others, however. Lateness on an irregular basis as the claimant demonstrated caused the respondent a significant problem, which continued if not increased in intensity. Calls made by a customer may not be answered because the claimant was not in on time. The same issue arose when she was late back from breaks. That happened latterly on an almost daily basis. There were other points in the background as performance issues, but these were the main ones.

160. This is in the context of the claimant having two formal meetings, one on lateness and the other as to absences for both of which Ms McLaughlin took no action. That not taking action when there might very well have been a basis to do so is not indicative of someone with a discriminatory mindset (consciously or unconsciously) in our view. We accept that the claimant had probation extended because of her otherwise good performance in the hope that the areas of concern could be remedied. Many aspects of her performance were good or very good, but those that were not were a difficulty that either the claimant did not fully recognise or did not take steps to address. That Ms McLaughlin extended the probation in the face of what was a form of contrary advice from HR was another factor that indicated to us a lack of any discriminatory mindset, whether conscious or unconscious.

161. Two weeks later the claimant was about 4.5 hours late. That was in effect the final straw as we have explained. The claimant accepted that she was late to that extent, and that when she had called to inform the respondent of that no real reason had been given other than that it was personal. Given the background that absence of explanation in a clear manner is most likely to have led to any employer becoming concerned, and that is set against the background already described of an extension of probation which had clearly been done in the hope of an improvement over such matters. That improvement did not materialise, rather the claimant had acted in a manner that indicated that it may get worse.

162. It is true that there was no formal disciplinary meeting held, and there had been one held earlier. We concluded however that the earlier meeting was in a different context, with the intention of finding out the reason which led to no action. In our view the intent behind that meeting was to improve matters. Once the claimant, after an extension of probation, did not show the improvement required then given her short service at that time and that the extension had operated as a form of warning to her in an informal sense the failure to hold a formal meeting did not in our view show any evidence of the said discriminatory mindset.

163. The claimant suggested that another black employee Erica Francisco was dismissed when her performance had been good and that supported the claimant's argument that race was the reason for her own dismissal. Ms McLaughlin's evidence, which we accepted, was that Ms Francisco had very low retention statistics, which we understood to be the lowest in the department and the view had been formed by her that she was not able to do the job required. That was the reason for that dismissal, and was one not related in any way whatsoever to race.

164. Given the evidence we heard we are satisfied that the claimant's material and continued failure to be at her desk to work when required was the reason for the dismissal, the event on 27 September 2023 being that final straw on top of a series of other matters that had earlier arisen. Race played no part whatsoever in the decision in our view. Looking at that in another way, had either Mr Whittaker or an hypothetical comparator in the same position who was white and had acted in essentially the same way

as the claimant, they too would have been dismissed in our view. That conclusion was supported by the evidence we heard from Ms McLaughlin and accepted of white persons being dismissed during probation or otherwise if that was merited by performance or attendance issues. On that basis the claim under section 13 on the protected characteristic of race is also dismissed.

(ii) When, if at all, did the respondent know or ought reasonably to have known that the claimant was a disabled person under the Act?

165. We consider that there was sufficient disclosed by the claimant on 20 June 2023 that the respondent did know, and separately if not that ought reasonably to have known, that the claimant was a disabled person. If the position was not clear then, and we consider it was, it became clear on 22 September 2023 when the claimant sent some documents including reference to a diagnosis of moderate ADHD, that she was struggling, and that medication was to be addressed and with her covering email stating that she was receiving medication. We have addressed above the evidence about the discussions with Ms Burnett. The respondent ought to have checked with the claimant about the position after her email of 22 September 2023 because it was apparent from it that the claimant thought that she was being asked for access to her medical records, not that a report was to be sought from her GP. In our view the obvious step for the respondent to have taken, if not to obtain an Occupational Health report, was to inform the claimant that it wished to ask questions of the GP and set out what those questions were. Matters were however in effect superseded by the events on 27 September 2023 only five days later.

(iii) Did the claimant suffer unfavourable treatment under section 15 of the Act by dismissing her?

166. The answer is clearly yes.

(iv) Was the claimant's "time blindness" something arising out of her disability under section 15(1) of the Act?

167. This was the claimant's evidence, on which she was not cross-examined, but there was no other evidence to support it. It is a matter on which the

claimant has the initial onus. We address the issue of judicial knowledge separately, and as a matter of evidence we did not consider that there was sufficient led on which we could answer this question in the affirmative, but we shall proceed on the hypothesis that it was for completeness.

(v) If so was the unfavourable treatment "because" of disability?

168. The issue of lateness, both for starting her shift and returning from breaks, was a not insignificant factor in the respondent's decision to dismiss, and was the final straw given the events on 27 September 2023. It was not the sole reason but that is not required. We conclude that the answer is yes.

(vi) If so, was a proportionate means of achieving a legitimate aim of managing sickness absence and ensuring satisfactory client care established under section 15(2) of the Act?

169. The onus is on the respondent to prove this defence. We consider that it has done so. The aim set out above is we consider established, in the sense that those were the aims that the respondent had, and they are legitimate ones. The issue becomes one of proportionality as the dismissal was clearly in our view directed to achieving that aim.

170. Calls to the Retentions Department were from customers considering leaving. Not answering such a call has an obvious risk for the respondent. Whilst the claimant's performance overall on retentions was broadly good and her retention statistics for the calls she took were on occasion the highest in the department that is not the only consideration. She was late regularly either at the start of a shift or when on a break, and she had a tendency not to answer a call when that was required of her. There were various discussions about that, including on 13 September 2023 when the probationary period was extended with the issues referred to and an improvement expected. That improvement did not materialise. There had been other steps taken to change the shift arrangements. On 27 September 2023 she was late to a material extent without providing details as to why. She arrived 4.5 hours late. It meant that the claimant had not demonstrated an ability to be present to do the job required of her on a regular basis, which had the effect that calls that could have been answered by her had she been at work when required were not. We have

concluded that in light of the strong evidence of such very regular non-compliance, the failed attempts to remedy that, and the lack of any real prospect of improvement to the levels that the respondent reasonably required, coupled with the lack of any evidence of a solution as we address below, that the respondent has discharged the onus on it. The defence is therefore established, and the answer is yes. The claim under section 15 is therefore dismissed.

(vii) Did the respondent apply a provision, criterion or practice under section 20 of the Act to the claimant in relation to (a) fixed start times and (b) a no missed calls criterion?

171. We consider that the claimant did prove that there were fixed start times, being either 8am or 8.30am and for all material purposes for her the latter time, and also that the respondent operated a PCP of not missing calls.

(viii) If so did doing so put disabled persons at a substantial disadvantage compared to those who are not?

172. There was very little evidence on this point other than the claimant stating that disabled people would be disadvantaged substantially without explaining that in any detail. On this there was no real cross examination, and we have concluded that the claimant has proved that there was such a substantial group disadvantage.

(ix) Did doing so put the claimant at a substantial disadvantage?

173. We consider essentially for the same reasons of lack of cross examination that this has also been proved. The claimant clearly found difficulty in always attending for work on time, or returning from a break on time, as that happened as spoken to in the evidence. She took breaks for longer than had been agreed with her on a very regular basis. When she was working on documentation for a call that had finished she took longer than the respondent wished or generally allowed, and when she was being expected to answer calls she did not, which led to the dismissal in part. Whilst there was limited evidence we are satisfied that these points have been proved.

(x) Did the physical feature of open tables with minimal divisors put the claimant at a substantial disadvantage compared to those who are not disabled?

174. There was very little evidence on this point, and we did not consider that this matter had been proved. It is linked to the issue of headphones, on which we did not accept the claimant's evidence. We answer this point in the negative.

(xi) Did the respondent know or ought it reasonably to have known of the disadvantages?

175. We consider that it did. Firstly the claimant stated on a form dated 31 August 2023 that she needed more time to complete process, secondly the respondent had been aware of her ADHD since 20 June 2023 and thirdly the issues over lateness generally was clearly known as set out above. The respondent knew of what the claimant's position on these matters was from that. The substantial disadvantages caused by the two PCPs we consider both were known, and separately in any event ought reasonably to have been known, by the respondent.

(xii) If so, did the respondent not take any step that was reasonable to take to avoid the disadvantage under the terms of section 20 of the Act, in (a) allowing flexible working or (b) providing noise-cancelling headphones?

176. The claimant argued that in simple terms she should have been allowed to work flexibly by working the lateness back after the end of the shift at 5pm if she came in late. The respondent's reply was that there was no call to answer then as the calls ended at 5pm. We accepted the respondent's evidence on that. The claimant argued that she could have been transferred as others had. On the issue of transfer we also accepted the respondent's evidence that there were no other positions that reasonably could accommodate the claimant's latenesses, with that of web working which the claimant referred to requiring a manager to remain after 5pm. We did not consider that reasonable and accepted the evidence to the effect that that web work finished around 4.30pm each day, and that attendance and time-keeping were issues of importance across the

respondent. It provides a service to customers, and the roles are for responding to that. The claimant's record of attendance and time-keeping was a poor one, and it was in our view reasonable not to pass that problem on to another part of the same organisation.

177. Another person was referred to in evidence Ms Lewis, but she had applied for transfer to an HR role and the claimant had not done so.

178. We considered ourselves whether there was any other adjustment that might have been reasonable. For guidance on whether an adjustment would be reasonable we took into account the Code of Practice. The respondent is a reasonably large organisation which is one factor. But one aspect of what is reasonable is that there is a prospect of success for it. We did not have evidence that there was something as an adjustment that could succeed for the claimant in this regard. There are some businesses, and the respondent is one, which require staff to be present at set times in order to do what is required. The essential purpose of the role is to take calls from customers who are considering ceasing to be so. Answering those calls when made is obviously necessary to do. Staff planning requires a sufficient number of staff present and answering the calls when made.

179. If a staff member is not present, for reasons of sickness, lateness in arrival, lateness in returning from breaks, or if the staff member is allocated calls and refuses to answer them, either the service given fails or other staff have to cover and that takes them from their own work such that what could and should be done is not. If not addressed such issues cause an effect on staff morale for those who are not taking such additional breaks, as was stated in evidence. As also stated whilst being late at the start of a shift can mean an effect on pay, being late back from a break does not.

180. The claimant was given time to demonstrate an improvement, and alterations to the shift and related arrangements were made, but there was no evidence we heard to suggest what could have worked in securing a reasonable level of attendance both at the start of shifts and after breaks.

181. We were concerned that the respondent had not followed up on the claimant's email of 22 September 2023. It did not assess itself what

adjustments might be reasonable from a position of understanding of the impact of the PCPs. Put simply, it ought to have done so at the least by proposing questions to ask the GP. But there was no evidence before us of what any report from the GP, or Occupational Health, or otherwise, would have shown. We are not entitled ourselves to seek evidence, nor can we speculate by guessing what such evidence might have been. We must assess matters on the basis of the evidence put before us.

182. We took into account the comments in ***Latif*** but from all that we heard we did not consider that there was any adjustment the claimant proposed that had a realistic prospect of leading to the claimant's attendance at work being timeous, her return from breaks timeous, or the issue of her answering calls. That included a later start time, which the claimant argued for under reference to another employee names only as Suzie being allowed to start at 9.30am. We did not consider that to be a reasonable adjustment as in our view it would not have remedied the lateness on 27 September 2023, nor the issue of late returns after breaks which happened effectively daily during the latter period of employment nor the issue of call avoidance.

183. We then considered whether a reasonable adjustment was simply to tolerate the attendance levels, returns after breaks and performance including by avoiding calls when she wished, turning a form of deliberate blind eye to the issues that being late or not answering calls regularly created. We considered that that fell outside what could properly be regarded as a reasonable adjustment. The fundamental point of the department was to answer calls from customers who were thinking of leaving, and try to persuade them not to. Calls were more likely not to be answered if the claimant remained in employment which would have affected the performance of the department as a whole detrimentally. Calls were liable to be made in the morning, when the line opened, as well as during the course of the day and not having someone there when expected created the obvious risk of the call not being answered and the customer leaving. Whilst the respondent is a large organisation taking account of the Code of Practice guidance we did not consider that simply not dismissing the claimant and tolerating how she wished to manage matters from her own perspective was a reasonable adjustment.

184. Some of the adjustments proposed by the claimant in submission had not been foreshadowed in the pleadings, or the list of issues based on the pleadings, and had not been explored entirely fully in evidence, but for essentially the same reasons as given above on the view we formed that none of the adjustments proposed would have in our view led to any change in outcome we did not regard them as reasonable.

185. We concluded therefore that there was no reasonable adjustment that we could identify from the evidence before us having regard to the statutory provisions, the Code of Practice, and the authorities above which the respondent should have taken to avoid the disadvantage but did not. We also accepted the respondent's evidence that they did provide noise-cancelling headphones for the claimant, such that there is no basis for this proposed adjustment not having been undertaken.

186. For completeness we shall address authorities to which the claimant referred in her submission (adding the citations we have traced). The first is ***Hinsley v Chief Constable of West Mercia Police UKEAT/0200/10.*** That case raised a short point on competency under statutory provisions applicable to the police. The second is ***Gallop***, referred to above. The third is ***Patterson v Chief Constable of the Metropolitan Police [2007] IRLR 673,*** which concerned the definition of disability, not an issue in this case. The fourth is ***Linsley v Commissioners for HMRC UKEAT/0150/18*** which raised materially different issues to those in this case. We did not consider that the cases established the principles the claimant referred to in her submission, and we did not consider that they affected the decision that we have reached.

187. The claimant also referred to the cases of ***Shamoon, Igen***, and ***Efobi*** which are addressed above, and ***Barton v Investec Securities Ltd [2003] IRLR 332,*** an earlier authority later approved in ***Igen*** and ***Hewage***.

188. The claim under sections 20 and 21 is therefore dismissed.

(xiii) Did the claimant do a protected act under section 27 of the Act when speaking with Martha McLaughlin in September 2023 about possible race discrimination involving Erica Francisco and that the claimant was a witness to sexual harassment towards Person X?

189. We were not satisfied that the claimant had proved that the alleged comments were made. The claimant's evidence on this was we considered unclear at best in her evidence in chief, but also it was not accepted by Ms McLaughlin in her evidence, which we preferred for the reasons given above. We did not find that the claimant had made the comments she alleged. We separately concluded that even if her evidence on that was accepted the claimant had not made it sufficiently clear that there was an allegation of breach of the Equality Act so far as Ms Francisco was concerned, or that the claimant was a witness in relation to Person X who had alleged sexual harassment. We concluded that the claimant had not proved that she had done a protected act. The claim under section 27 is therefore dismissed.

(xiv) If so did the respondent subject the claimant to a detriment because she had done so under section 27 of the Act, in respect of (i) the frequency and intensity of shouting at the claimant increasing, (ii) increasing disciplinary or absence and lateness documentation and (iii) the dismissal.

190. Even if a protected act had been established we did not consider that there was adequate evidence to support the argument that any detriment had been because of the acts. There was no sufficient evidence as to that causal link, and other evidence excluded that possibly in our view, such as that the probation was extended on 13 September 2023, which was after the alleged disclosures, and if there was to be victimisation for that it was far more likely that the route to do so was stating that probation had not been passed at that meeting. The reason for dismissal was as above being the background to concerns followed by the claimant intimating on 27 September 2023 that she would be late again for 3 hours or so and without a reason given for that beyond that it was personal. We did not accept the claimant's evidence of shouting at her as we preferred the evidence of Ms McLaughlin that she had not done so. The increasing of the documentation referred to was because issues arose with absence and lateness, and the dismissal was because of the matters set out above. The reasons for what was done by the respondent were in no way whatsoever because of any protected act if such act were held to have

taken place. The claim under section 27 would therefore have been dismissed on that separate basis.

(xv) If any claim succeeds to what remedy is the claimant entitled, including

(a) what sum for injury to feelings is appropriate and

(b) what were the claimant's losses?

191. This issue does not now arise.

Conclusion

192. In light of the findings made above, the Tribunal must dismiss the claim.

Original Date sent to parties 20 February 2025

Amended Judgment sent to parties 27 March 2025