EMPLOYMENT TRIBUNALS

Claimant: **Mr N Dunn**

Respondent: **J D Wetherspoon Plc**

Heard at Sheffield **On:** **15, 16 and 17 January,**
14 and 17 March, 2 April 2025
2 May 2025 (in chambers)

Before: **Employment Judge Brain**
Members: **Dr C Langman**
Mr T Fox

Representation

Claimant: **In person**
Respondent: **Mr A Rhodes, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaint that he was subjected to unfavourable treatment for something arising in consequence of disability by being issued with a final written warning and having his appeal against that final written warning refused succeeds.
2. The claimant's complaint that he was subjected to harassment related to disability by reason of comments made by his line manager on 26 September 2023 succeeds.
3. The remaining complaints fail and stand dismissed.
4. The complaints in paragraphs 1 and 2 were brought within the limitation period in section 123 of the Equality Act 2010.

REASONS

Introduction and preliminaries

1. At the conclusion of this six-days' hearing, the Tribunal reserved judgment. The Tribunal now gives reasons for the judgment which we have reached.

2. The respondent (represented by Mr Rhodes, for whose assistance the Tribunal is grateful)) is a well-known purveyor of beers, wines, and spirits. The claimant (who very ably represented himself) commenced what is, in fact, his second period of employment with the respondent on 26 March 2018. A copy of his contract of employment signed by the parties on 4 December 2022 is in the bundle at pages 335 and 336. He commenced his second spell of employment with the respondent working as a shift manager. Between March 2018 and February 2024, his career with the respondent progressed, culminating in him holding the position of duty manager. He was contractually obliged to work 40 hours a week over five days a week (clause 6 at page 335).

3. Between June 2022 and December 2023, the claimant worked at a pub known as Sheffield Water Works Company. Between November 2022 and December 2023, his line manager was Haydn South. Mr South's line manager at the time was Hudson Simmons. As we shall see, in December 2023, the claimant moved from the Sheffield Water Works to the Bankers Draft, also in Sheffield. He worked at the Bankers Draft in a full-time capacity until February 2024. He then decided to pursue a career in a different industry but was retained by the respondent on a zero hours contract. He therefore remains an employee.

4. The case benefited from a case management preliminary hearing which came before the Employment Judge on 16 July 2024. It was identified that the claimant was pursuing complaints brought pursuant to the Equality Act 2010. These were complaints of disability discrimination (by way of unfavourable treatment for something arising in consequence of disability and of a failure to make reasonable adjustments), harassment related to disability, and victimisation. The Tribunal will identify the issues in the case in more detail later in these reasons.

5. At the case management hearing held on 16 July 2024, the relevant disability relied upon by the claimant was identified as mental impairments arising from ADHD, anxiety, and depression. On 5 September 2024, the respondent's solicitors conceded that the claimant was, at the time with which the case is concerned, a disabled person within the meaning of section 6 of the 2010 Act. However, the respondent did not concede that it had actual or constructive knowledge of disability at the relevant times. The question of knowledge therefore remains one for the Tribunal to decide.

6. On 16 July 2024, the Employment Judge directed that the Tribunal will (at the final hearing) deal with remedy as well as merits. This direction was varied on the first morning of the hearing, there having been a material change in circumstance by reason of the volume of evidence presented to the Tribunal. This judgment and reasons therefore deal with merits only.

7. On the first morning of the hearing, after dealing with preliminary matters, the Tribunal adjourned to undertake their reading into the case. With some dismay, the Tribunal encountered a number of redacted documents (particularly between pages 408 and 468 of the bundle). The practice of redacting documents has been deprecated by the senior judiciary- see **R (on the application of IAB and**

others) v Secretary of State for the Home Department [2024] EWCA Civ 66 in which the observation was made that redaction leads to significant practical difficulties and that the routine practice of removing information from documents without the Tribunal's permission should cease. The redactions caused practical difficulties in this case. The redactions rendered the emails copied within this part of the bundle as unintelligible.

8. The respondent did provide replacement pages without the redactions. The unredacted copies were numbered to run sequentially in the bundle as opposed to simply replacing them as originally numbered. This had the unfortunate effect of making the Tribunal's task more difficult than it otherwise should have been because of the need to cross-reference the unredacted copy with the redacted copy. It also made life more difficult for the claimant. His witness statement dated 20 December 2024 had annexed to it a very helpful timeline. The claimant was however left having to make assumptions and surmises within his timeline as to the identity of some of those involved in the redacted documentation.

9. It is unfortunate perhaps that the claimant did not apply to the Tribunal for unredacted copies before the matter came on for the final hearing commencing on 15 January 2025. This is not meant as a criticism of him. As an unrepresented party, he may reasonably have thought there was little that could be done about what must have appeared to him to be an unsatisfactory situation.

10. When the matter went part-heard on 17 January 2025, the Tribunal gave permission for the parties to present supplemental witness evidence following the service of the unredacted documents. The claimant took the opportunity of giving further evidence upon the unredacted documentation in a witness statement dated 28 February 2025.

11. The Tribunal heard evidence from the claimant. He affirmed as to his witness statement of 20 December 2024 and the impact witness statement at pages 195 to 199 of the bundle. When matters resumed on 14 March 2025, the claimant again affirmed and then swore as to his supplemental witness statement (dated 28 February 2025).

12. The claimant called William Elmer to give evidence on his behalf. Mr Elmer was employed by the respondent between September 2018 and September 2023. He held the role of kitchen manager at the Water Works between January 2022 and July 2023.

13. Mr South and Mr Simmons were called to give evidence on behalf of the respondent. Mr South is currently employed by the respondent as a pub manager. He achieved promotion into that position in November 2022. Mr Simmons is employed by the respondent as an area manager. He worked as a pub manager for nearly 12 years before being promoted to the post of area manager in 2015. At the material time with which we are concerned, he was responsible for the Sheffield area which, of course, covered the Sheffield Water Works pub where Mr South and the claimant worked.

Findings of fact

14. We now make our factual findings. The findings focus on events from the early summer of 2023. However, as the respondent's knowledge of the claimant's admitted disability is an issue, we need to make some findings about earlier events.

15. On 20 September 2018, the claimant took a day's absence from the pub in Liverpool at which he was working at the time. The reason given for the absence (as noted in the return-to-work form of 21 September 2018 at pages 719 and 720) is mental health. The claimant declared that he was not seeking medical attention. This was noted to be his only ill health absence in *"the last 52 weeks."* At page 721, it is recorded that the claimant was speaking to his GP and was seeking counselling. He answered *"three months"* to the question as to for how long he had had the condition and for how long he expected to have it. He said that he did not consider himself to be a disabled person for the purposes of the Equality Act. He was not seeking any reasonable adjustments.

16. At pages 677 to 709 of the bundle we find the claimant's work history. This appears to run from 5 August 2019 to 12 January 2025. There is very little in the way of sickness absence prior to May 2023. The Tribunal's attention was drawn only to periods sickness absences on 17 July 2021, 16 October 2021, 31 December 2021, and 13 February 2022. There are others but the sickness absence is infrequent.

17. No sickness absences appear to be recorded for the week commencing 30 August 2021 (page 689). However, during that week, on 3 September 2021, the claimant texted Rebecca Ford who at the time worked for the respondent as a shift manager. The text reads, *"Can you come to the staff room (I [think] I'm having a panic attack".* Ms Ford enquired of the claimant's welfare the next day. On 4 September 2021, the claimant expressed his appreciation for Ms Ford's assistance the previous day. We refer to page 847.

18. The claimant texted Sarah Baxter, another shift manager, on 5 September 2022. He said, *"I'm really sorry but if there is any chance I can be taken off shift I'd really appreciate it, I'm not okay".* It seems that Ms Baxter agreed to step in (page 848).

19. We should observe that pages 847 and 848 were added into the bundle by the claimant during the hearing. He makes no reference to these texts between him, Ms Ford, and Ms Baxter in his witness statement.

20. Upon becoming shift manager at the Water Works, the claimant was given the statement of terms and conditions to which we have already referred at pages 335 and 336. These confirm his continuity of employment as commencing on 26 March 2018.

21. Mr Elmer gave evidence (in paragraph 3 of his witness statement) that *"Based on his stress management, poor time and management at times and at times impulsiveness"* he considered that the claimant may have ADHD. Mr Elmer was also a witness to the claimant having what he (Mr Elmer) described as *"a mental breakdown"* in or around May 2023. He said in paragraph 4 of his witness statement that *"I was unsurprised by this, as he had approached me on several occasions in the build up to his mental health absence. I can confirm the first time we discussed the topic was February 2023, as his mental health flared up after the Christmas period."* Mr Elmer says that the conversations between him and the claimant about the claimant's mental health persisted until the point at which he (Mr Elmer) left the Sheffield Water Works in July 2023.

22. Mr Elmer's account when he gave evidence before the Tribunal was that he passed on his concerns about the claimant's mental health to Mr South. It is surprising that this important information was omitted from Mr Elmer's witness statement. This would have been such a profound and important step that its

omission from his witness statement taints the credibility of Mr Elmer's evidence. The Tribunal can give this assertion little credence.

23. The credibility of Mr Elmer's assertion that he discussed ADHD with the claimant is further cast into doubt by the claimant's omission of any corroborative account in his witness statement of a discussion with Mr South of that condition. Up to around the summer and autumn of 2023, the claimant and Mr South were good friends. Therefore, it would be surprising were there to have been no such conversation. The claimant sought to explain away this omission by contending that he did not believe he was able to put any evidence before the Tribunal which was incapable of corroboration by other evidence. Even then, he said that he had had informal exchanges with Mr South in texts and by Facebook Messenger. However, none of these were in the bundle and the claimant made no mention of them in his evidence in chief (in his witness statement of 20 December 2024).

24. The Tribunal therefore finds it against the probabilities that the claimant discussed his mental health issues with Mr South and with Mr Elmer before May 2023. We can credit Mr Elmer with having some concerns about the claimant's mental health issues but that is a far cry from Mr Elmer having sufficient knowledge that the impairments were a disability for the purposes of the Equality Act 2010, or sufficient to put the respondent's more senior management on notice of a potential issue which warranted further investigation.

25. On 23 March 2023, the claimant emailed Mr Simmons (page 215). He mentioned that he had left the respondent's employment in 2018 (this being a reference to his first period of employment with the respondent) due to a period of poor mental health. He said that he was unaware before he left of the support which the respondent may provide and that none was offered to him. He said he had had a breakdown on shift and was sent home. After a break from employment, he rejoined in March 2018. Mr Simmons acknowledged his email and informed the claimant that it had been passed on to the "*welfare committee."* The claimant did not, in this email, complain of any current serious mental health conditions. This is further corroborative of our finding that there was no issue at the time such as to cause the claimant to raise it with Mr South or Mr Simmons. In these circumstances, it also corroborates our finding that the claimant was not so concerned as to discuss matters with Mr Elmer. Nothing was heard from the welfare committee (at any rate, neither party led evidence that any further action was taken by them). That the claimant did not pursue matters with the welfare committee in the spring of 2023 again points away from there being any serious concerns at the time.

26. In paragraph 4 of his witness statement, the claimant says that on 19 May 2023 he attended a shift at the Sheffield Water Works *"when I was suffering from some severe mental health symptoms such as anxious rumination and executive dysfunction, which I struggled to articulate at the time. I regretfully informed my manager colleague Luke Powell-Pepper that I thought I needed to go home as I was not well, citing mental health difficulties, and that I had tried to overcome the symptoms to continue my shift but failed".*

27. The claimant then took a period of 20 working days' sick leave between 19 May 2023 and 16 June 2023. The return-to-work interview was conducted by Mr Powell-Pepper (pages 509-512). The underlying problem was noted as *"stress/anxiety work related, possibly undiagnosed ADHD."* In answer to the question on the *pro forma* as to how long the claimant had had the condition for

and how long he expects to have it for the reply was noted as *"N/A".* The claimant said on the form that he did not consider the condition to be a disability placing him at a substantial disadvantage in completing his role in comparison with others.

28. An account of this incident was given by Sarah Baxter on 1 September 2023 (pages 530 and 531). She noted that Mr South was on annual leave at the time. (This accounts for the return-to-work interview being done by Mr Powell-Pepper). Ms Baxter says that the claimant admitted to having been drinking on 18 May 2023. He then left his shift. He did not arrive for his next shift, declaring himself unfit to work because of his mental health. We therefore find as a fact that the claimant had a mental health crisis on 19 May 2023.

29. This is further corroborated by the claimant needing to see his GP. A fit note was provided for the period between 19 May 2023 and 1 July 2023 (page 485). The claimant says in paragraph 4 of his witness statement (at page 4) that the fit note was given to him by his GP on 5 June 2023, backdated to 19 May 2023. The note said that the claimant was fit to work with adjustments. It read that "*At some point in coming weeks hoping to return to work with agreed phased return and support and help to avoid stress."*

30. Upon his return to work in the middle of June 2023, the claimant agreed with Mr South that he would work part time. This was in accordance with the claimant's GP's recommendation that he was fit to return to work with adjustments pending investigations into suspected ADHD. The GP's fit note to that effect is at page 486. (This fit note was current for the period between 19 June 2023 and 31 July 2023).

31. The claimant had contacted his GP on 2 June 2023 complaining of suffering from severe stress and anxiety (page 191i). It was this contact which led to the GP providing the claimant with the fit note of 5 June 2023, backdated to 19 May 2023 to which we have already referred at page 485. In a later consultation dated 19 June 2023 (page 191g) it was noted that the claimant was undergoing private therapy *"due to stress and dissatisfaction."* The GP signposted him to "*ADHD links for how to manage*" the symptomology.

32. The return-to-work plan implemented in mid-June 2023 appeared to have been successful. The claimant returned to work full time during week commencing 17 July 2023. Then, he took a pre-booked holiday commencing on 22 July 2023. The claimant gives an account in paragraph 4 (on page 5) of witness statement that he had a mental health crisis whilst abroad. He returned home early from holiday to the consternation of his friends who were very concerned about him.

33. The claimant was scheduled to take a personal licence examination on the morning of 27 July 2023. Unfortunately, he failed the exam. This precipitated him leaving the house and the city. He describes on page 6 of his witness statement that he did this *"in great distress, grabbing only my still unpacked bag from my holiday, my wallet and phone. I left the city [Sheffield] via train and ended up in Manchester."* The respondent does not dispute the claimant's accounts of his holiday and actions on 27 July 2023.

34. The claimant was scheduled to work on 27 July 2023. He was absent from work that day. On 28 July 2023, the respondent wrote to him. The letter is at pages 81 and 82. It was signed by Andy Woolley, pub manager.

35. The letter says that *"You have not attended work since 27 July 2023, and you have made no contact with the pub. I am concerned that you have not responded to telephone calls made by the shift managers (listed below) or made contact with the pub. Please be aware that your continued absence without leave is currently unauthorised (as a result, you are not being paid)."* There is then listed the five attempts made to contact the claimant. The Tribunal accepts that these attempts at contact were made. They are corroborated by the record at page 80.

36. Returning to the letter, it goes on to say that *"Your failure to comply with the company's absence notification procedure is a gross misconduct offence under the company's disciplinary and dismissal policy and procedures. Therefore, you are now invited to attend a disciplinary hearing for being absent without leave (AWOL) as follows..:"* The date time and venue of the disciplinary hearing is then given.

37. Mr Wooley informed the claimant that the chairperson for the meeting was to be Beth Burns, pub manager who was to be accompanied by a witness and note taker. The claimant was warned that the outcome of the hearing may be a disciplinary sanction "*up to and including summary dismissal."* The claimant was notified of his right to be accompanied at the meeting. He was informed that should he not attend the hearing it will be held in his absence and the outcome communicated to him in writing.

38. The claimant's account (at page 6 of his witness statement) is that he came across the letter when accessing public Wi-Fi while away from home on 28 July 2023. He says *"This was extremely distressing to receive in the state I was in and sent me spiralling into further mental injury. I then travelled from Manchester to Glasgow. I spent the night of Friday 28 July and Saturday 29 July in Glasgow. I spent the night of Sunday 30 July in Liverpool, before returning to Sheffield late in the evening on Monday 31 July."*

39. On 31 July 2023, the claimant contacted the Sheffield Water Works (page 217). He apologised and noted that the disciplinary hearing had been scheduled for 2 August 2023.

40. Mr South expressed concerns with the claimant's welfare (page 219). Mr South asked *"What's going off pal? You no showed two shifts now? Tried to call off pub phone and no answer, few other managers have contacted you too with no response? We've emailed and sent you letters too?"* It appears that the claimant had complained to Mr South about the action taken against him by Mr Woolley. Mr South suggested that the claimant raise a complaint with him. Mr South said, *"I did try to get in touch with you to stop all this happening."* The date of the text at page 219 is not apparent from the copy but plainly it was sent around 28 or 29 July given the reference to the claimant having missed two shifts.

41. The disciplinary hearing scheduled for 2 August 2023 went ahead. The notes of it are at pages 83 to 87.

42. The notes are signed by Beth Burns and the claimant. We therefore accept them to be accurate.

43. The claimant was asked for an explanation as to his whereabouts at the end of July 2023. He explained that he left his house on 27 July 2023, not returning until the evening of 31 July. He mentioned that he had had "*a month off in June for the same kind of thing."* This was a reference to the absence commencing on 19 May 2023. The claimant mentioned that he had been in therapy. As we have

said, this is corroborated by his GP's notes. The claimant mentioned that this was being undertaken privately. He described his situation as *"quite scary."*

44. Beth Burns asked the claimant for his understanding of the respondent's absence reporting procedure. He admitted to not having followed the procedure, his phone having been turned off on 27 July. The claimant said that he was unsure if he would be able to attend work. He said, *"I'm mentally volatile at the minute."* He attributed the absence in May and June 2023 to work related issues. He said that he had benefited from the phased return to work. The episode at the end of July he said *"stemmed from me being abroad with friends and coming home early. I realise now it's not just work."*

45. After a brief adjournment of around half an hour or so, Beth Burns informed the claimant that the respondent viewed the claimant's actions as gross misconduct and that she was issuing him with a first and final warning. She acknowledged the mental health issues but also noted that the claimant admitted to an awareness of the respondent's absence notification procedures.

46. Beth Burns confirmed the outcome of the disciplinary hearing in writing. Her letter dated 4 August 2023 is at pages 89 and 90. She confirmed the decision to issue the claimant with a first and final written warning. This was for the act of gross misconduct in going on unauthorised absence from work without any contact from Thursday 27 July 2023. She noted the claimant's mitigation by reason of mental health issues. She also noted the claimant's failure to contact the Sheffield Water Works at least two hours before the start of the shift and his failure to comply with the requirement to make contact with the pub each day for each of the first seven days of absence. The warning was to remain on the claimant's file for a period of 12 months after which it was to be disregarded for disciplinary purposes. The claimant was given a right of appeal.

47. The Tribunal did not have the benefit of hearing evidence from Beth Burns. We were informed that she remains an employee of the respondent.

48. On the evening of 2 August 2023, the claimant intimated his intention to appeal (page 88). Attached to this email was a fit note signed by his GP certifying him as unfit to work for a period of two weeks between 1 August 2023 and 14 August 2023. The claimant expressed disappointment that disciplinary action had been taken against him particularly considering his recent time off (in May and June 2023) with mental health issues. The claimant also raised the possibility of raising a grievance. He gave unchallenged evidence in paragraph 6 of his witness statement that he "*found it devastating that after divulging the most unpleasant experience of my life to date, the response from my employer was to hand me a severe reprimand for actions that were direct consequence of mental ill-health…"* In the GP consultation of 2 August 2023 (page 191f) there is a note *"Anything the employer can do to help."* It is not clear if this was said by the claimant or was a suggestion made by his GP. Either way, the prospect of support from the employer was plainly in the claimant's mind.

49. At page 191e, there is a record of four further consultations with the claimant's GP. These concern his mental health issues. At page 191d is an entry dated 12 September 2023. This was a note of a face-to-face consultation. The GP recorded issues with mental health *"for past many months now".* The GP recorded mental health issues and the possibility of a referral to ADHD services. The GP appears to have recorded a diagnosis of depression. He provided the claimant with the details of the crisis team.

50. On 4 August 2023, the respondent's learning and training team contact the pub and Mr Simmons. The claimant had been scheduled to attend training on 4 August 2023. It was recommended that the pub (that is to say, Mr South) or Mr Simmons, as area manager, contact the claimant to confirm him to be safe and well. The same day, Mr Simmons complained to Mr South that this was the second time upon which the claimant had missed training and that the claimant *"should have the decency to let the team know what's going on."* Mr Simmons was then informed that the claimant had received a fit note for stress and anxiety for a two-week period which covered the date of the course scheduled for 4 August 2023. Mr Simmons replied, *"ye but he should be letting the training team know, no excuse really. Please let them know" (p 225).* (The first course which had been missed was scheduled for 28 July 2023. We refer to page 522. That was, of course, during the claimant's period of absence without leave from 27 July 2023).

51. The claimant then obtained a further fit note from his GP. This certified him as unfit for work for the period from 15 August 2023 to 28 August 2023. The note is at page 488.

52. On 7 August 2023, the claimant submitted his appeal against the first and final written warning. This is at pages 94 to 97.

53. In his appeal, the claimant said, *"I stated clearly in my hearing [of 2 August 2023] that I suffered an episode of poor mental health which triggered me to go missing for five days. I now suspect this to have been a nervous breakdown. I disconnected myself from all means of contact and left the city. It was an act of self-harm in which I sabotaged my life by failing to report to work, failing to assure my friends and family I was safe, and created huge financial instability by fleeing city to city, buying train tickets and hotels, ending up 250 miles away in an unfamiliar city alone and vulnerable. I made it clear in my hearing that my absence wasn't just from work, but from my entire life as I effectively ran away in a mentally volatile and vulnerable state. Not that it should matter, but I would like to add this is highly out of character for me. The state I was in has been recognised in my outcome letter. Despite this, I have been reprimanded."*

54. The claimant went on to accept that as a shift manager he understood the 'absent without leave' ('*AWOL')* policy. (This is in the bundle at pages 354 to 355). The claimant went on to say that *"I was incapable of thinking clearly and behaving rationally. Contacting the pub was not something I was capable of doing, my "gross misconduct" was not an act of negligence, but temporary incapability relating to a health issue."* The claimant went on to say that *"For this reason, I'm deeply disappointed with the outcome being one of the most severe outcomes possible. This outcome tells me I am being punished for being mentally unwell."*

55. We should add that, to his credit, the claimant put on record that he found Beth Burns and Mr Costello (her companion and the note taker at the disciplinary hearing) to be pleasant and patient. He goes on to say that *"this does not dismiss the unjustness of the conclusion they came to, which has been upsetting."* The claimant again intimated an intention to raise a grievance.

56. The claimant's ability (or otherwise) to contact the respondent on and after 27 July 2023 very much lies at the heart of the claimant's complaint of unfavourable treatment for something arising in consequence of disability. As we have mentioned, the claimant was in contact with his GP in August 2023. An entry at page 191f records him reporting to his GP that he made no contact with the

respondent for a period of five days during which he "*went missing".* There is no medical evidence from the claimant's GP (or his therapist or other medical attendants) corroborating his case of an inability to make contact for medical reasons as asserted in his appeal at page 95.

57. On 13 August 2023, Anthony Edwards, people operations manager, wrote to the claimant (pages 99 and 100). He invited the claimant to attend the appeal hearing against the first and final written warning. This was to be chaired by Mr Simmons. Mr Edwards suggested that it take place by video on 15 August 2023 at 12 noon.

58. The claimant replied to the effect that he was signed off as unfit to work. He requested a postponement. Mr Edwards agreed and then on 30 August 2023 enquired of the claimant as to whether he was now feeling well enough to attend. The same day, the claimant wrote to Mr Edwards to inform him that he had prepared a grievance letter. He provided Mr Edwards with a brief outline. Mr Edwards then suggested that the two matters run concurrently given that the issues in the appeal and in the grievance appear to cover the same ground. Mr Dunn agreed with Mr Edwards' proposal. The claimant then submitted his grievance on 7 September 2023. The next day, Mr Edwards issued an invitation to the combined appeal and grievance hearing. These back-and-forth exchanges may be found at page 98 of the bundle.

59. On 21 August 2023 Mr South invited the claimant to attend a welfare meeting to discuss his sickness absence. Mr South invited the claimant to meet with him on 25 August 2023 at the Sheffield Water Works. We refer to pages 226 and 227.

60. The notes of the meeting (signed both by the claimant and Mr South) are at pages 229 and 230. The claimant went through the history of matters. He told Mr South, "*It's hard to assess my mental health and the most sensible conclusion is that my therapist reckons I have ADHD."* The claimant informed Mr South that he was attending therapy every two weeks.

61. Mr South then asked the claimant what he could do to facilitate his return to work. The claimant suggested undertaking three shifts a week *"and not doing mad hours. I'd like to make it known that I do want to come back and try to do day shifts/mid shifts for the first week or two."* There was some discussion between them, and an agreement was reached for the claimant to work three eight hour shifts for the first two weeks following the claimant's return to work. This agreement was recorded by Mr South in his letter to the claimant of 25 August 2023 (pages 231 and 232).

62. The claimant returned to work on 31 August 2023. The proposed shift pattern was recorded in the return-to-work form at page 235. This was signed by the claimant and Rebecca Ford. We can see that the claimant was scheduled to work 24 hours per week for the first two weeks, then reverting to a 40-hour week with effect from week commencing 11 September 2023.

63. In his letter of 25 August 2023, Mr South recorded that the claimant had decided to withhold consent for an occupational health assessment. In his closing submissions (on 2 April 2025) the claimant was asked by the Employment Judge why he had declined consent for an occupational health referral at this stage. The claimant said that he felt that one was not needed and as far as he was concerned a mutually satisfactory arrangement had been agreed between him and Mr South.

64. The phased return to work form at page 235 records an intention to conduct a four-weekly review on 18 September 2023. It is not in dispute that this review never took place. The claimant said in submissions that the failure to conduct this review created some confusion around the rotas that were worked out by Mr South for the period from September 2023 to the end of that year. The Tribunal agrees with the claimant that the absence of the formal review as scheduled cannot have helped matters. The claimant in fact complained about this on 29 September 2023 (page 244).

65. The claimant submitted his grievance on 7 September 2023. This is at pages 108 and 109.

66. The claimant said in his grievance that "*There are five primary incidents I wish to raise".* These were:

    66.1. A violation of the AWOL policy. This was around an alleged failure by the respondent to contact the claimant's emergency contacts as part of the policy process.

    66.2. Multiple violations of the mental health and well-being policy. (A copy of that policy is in the bundle at pages 383 to 388). The claimant complained of a failure to establish his welfare prior to issuing a disciplinary invitation, a failure to contextualise his recent history of health-related absences or to recognise mental ill health as the cause of absence when determining the disciplinary outcome.

    66.3. Discrimination under the Equality Act 2010. The claimant said that he met the legal definition of disability under the 2010 Act. He said that his mental health symptoms have been documented in his medical history and his *"health related absences within my five/ten years of service within the company over two different stints."* The claimant's grievance was that he had been subjected to discrimination by *"being treated unfavourably due to disability."*

    66.4. A violation of the dismissal and disciplinary policy. The claimant identified a failure to consider mitigating circumstances and his service record (amongst other things).

    66.5. A violation of the claimant's confidentiality. The claimant complained that matter pertaining to these issues had been discovered on the work PC by a colleague.

67. On 8 September 2023, Mr Edwards issued an invitation for the claimant to meet with him and Mr Simmons. He suggested meeting at the Wagon and Horses public house in Chapeltown near Sheffield on 19 September 2023. The purpose of the meeting was to consider the appeal against the first and final written warning and the claimant's grievance.

68. At page 112, we can see some back and forth between the claimant and Mr Edwards about arrangements. The claimant asked if the meeting could be conducted by video and suggested that the public house of Mr Edwards' choice was not convenient as the Wagon and Horses is outside Sheffield city centre. Mr Edwards said that he would prefer for the meeting to be face-to-face and informed the claimant that there was a regular train service from Sheffield train station to Chapeltown (for the Wagon and Horses). Mr Simmons' account before the Tribunal was that the public house in question was the preferred venue because

it has a good meeting room. In the event, the claimant agreed with the time, date and venue suggested by Mr Edwards. (This is a short train journey which takes around 15 minutes).

69. In the meantime, the claimant was then certified by his GP as fit to work with adjustments. The reason for this was given by his GP as *"mental health issues, under workup for diagnosis [sic]."* We refer to the fit note at page 489 dated 12 September 2023. This certifies the claimant as fit to work with adjustments. The fit note at page 489 coincided with the end of the initial four-week rota agreed and recorded at page 235. There was no fit note then issued by the claimant's GP until 24 October 2023 (page 490). The question therefore arose as to the rota to be worked by the claimant. As we have said already, it would have been helpful for the scheduled review of 18 September 2023 to have gone ahead.

70. In the event, the claimant advanced a proposal on 20 September 2023 (page 246). The claimant noted that Mr Simmons and head office had requested the claimant's consent to an occupational health referral. This was now forthcoming. The consent is at pages 239 to 241. The claimant's signature of 20 September 2023 can be seen at page 241. The referral form is at pages 242 and 243.

71. The claimant (in his email of 20 September 2023 at page 246) requested reasonable adjustments to his shift pattern. He said, *"I am healthiest and most productive working full time, but my ongoing issues of rest and sleep have proved difficult to balance with the intense hours Lloyds provide, on top of my improved but still fragile mental well-being".* He therefore proposed working from 6am to 2pm on Monday (training on stocks), 9am to 5pm on Tuesday, 3pm to 11pm on Wednesday, 11am to 7pm on Thursday, and 7pm to 3am on Friday. The claimant proposed this arrangement for a period of four weeks. (We should clarify that *'Lloyds no. 1'* is a reference to one of the respondent's brands. Sheffield Water Works is part of the Lloyds no. 1 brand. The Lloyds no. 1 brand is that given to the respondent's chain of pubs which offers late night opening). The stocks training was part of the respondent's mandatory management training programme.

72. In reply, Mr South proposed (on 30 September 2023 – page 245) for the claimant to work on Mondays from 2pm to 10pm, Tuesday 10am to 6pm, Wednesday 3pm to 11pm, Thursday 11am to 7pm, and Friday 7pm to 3am.

73. The claimant replied the same day (also at page 245). He acknowledged Mr South's suggestion to be close to his proposal but noted that this would still entail him working three late evenings out of five "*which is obstructive to my well-being."*

74. In fact, the respondent was proposing a shift pattern identical to that suggested by the claimant for three days (Wednesday, Thursday, and Friday) and just one hour later on Tuesdays. The respondent proposed an afternoon as opposed to a morning shift for Mondays. It was left (at page 245) that Mr South and the claimant would discuss matters on 1 October 2023.

75. The claimant's rota for week commencing 25 September 2023 is at page 665. The claimant took a day's annual leave on 25 September 2023. He worked from 6pm to 2am on 27 September, 4.30pm to 11.30pm on 28 September, 6pm to 3am on 29 September and then 2pm to 10pm on 1 October 2023.

76. AS we have just seen, on 30 September 2023 Mr South emailed the claimant with the proposed schedule at page 245. The real issue was Monday working, Mr South proposing that the claimant work from 2pm to 10pm against the claimant's suggestion of 6am to 2pm (training on stocks). The claimant's protest to Mr South that he was "*working three late evenings out of five which is obstructive to my well-being"* was a reference to the hours that the claimant had worked during week commencing 25 September 2023 which, as we have seen, entailed three late shifts (on 27th, 28th and 29th September). It was not in reference to Mr South's proposed rota going forwards which involved only one late shift, those being on Fridays.

77. In evidence given under cross-examination, Mr South explained the difficulties with accommodating the claimant's request to work between 6am and 2pm on Mondays, training on stocks. This entails counting stock and calculating profit and loss from sales. Mr South explained that he had offered stocks training to Holly Blackwell and Nathan Bailey whom at the time worked as shift leaders. Mr South said that he had offered them stocks training for their career development. Mr South also explained that the rotas are published around four weeks in advance. Although not company policy, he prepares his rotas six weeks in advance before announcing them to the staff four weeks ahead the scheduled workdays. Mr South's position therefore was that he only found out that the claimant was fit to work with adjustments when he obtained the fit note for 12 September 2023 at page 489. By this stage, the rotas for September and October had been fixed. Mr South said that in the circumstances it would be unfair and unreasonable to remove the stocks training opportunity from Ms Blackwell and Mr Bailey. Given the date of the fit note at page 489, this presented a difficulty as rotas up to mid-October 2023 would by then already have been published to the staff.

78. In evidence given under cross-examination, the claimant accepted that the rotas were published in advance. He acknowledged the rota publication to be *"weeks in advance"* (as it was put to him by Mr Rhodes). Although the claimant said that it was possible to publish rotas on short notice, he acknowledged that the rota was fixed around four weeks in advance. It was also suggested to him that Mr South would have prepared them six weeks in advance (two weeks before announcing them to staff). The claimant fairly acknowledged this to be the position, saying that he thought that this was the case.

79. Given this evidence, the Tribunal accepts Mr South's evidence as to how he would work out the rotas, how far in advance he would do this and how far in advance he would announce them to the staff. There is therefore much merit in Mr South's position that by the time he found out that the claimant was fit to work full time with adjustments, rotas had already been prepared including the training opportunity for Ms Blackwell and Mr Bailey. Mr South therefore had reasonable concerns and misgivings about the prospect of removing training opportunities from either or both to accommodate the claimant.

80. We shall now turn to the hearing of the claimant's appeal against the first written warning and of his grievance. This took place, as scheduled, on 19 September 2023. The respondent's notes of the meeting are at pages 121 to 126. The claimant took issue with these and prepared amended notes (pages 113 to 120). (The claimant's amendments are in the bold typeface).

81. The hearing was chaired by Mr Simmons. Mr Edwards attended as the *"witness with the company".* It was Mr Edwards who took the notes. These were sent to the claimant on 20 September 2023 (page 128). The claimant was invited to make amendments by way of tracked changes. The claimant returned the minutes with his amendments the same day (page 127).

82. On 27 September 2023 Mr Edwards emailed the claimant (page 246). Mr Edwards took issue with the section inserted by the claimant towards the bottom of (internal) page 7. (This must be in reference to the claimant's version as there is no internal page 7 in the respondent's record). The issue between them centred upon the suggestion of a referral to a medical practitioner (whether occupational health or the claimant's GP). Mr Edwards maintained that this was his suggestion whereas the claimant's record has it as him who suggested it to the respondent.

83. As Mr Rhodes acknowledges in paragraph 92 of his submissions dated 1 April 2025, the respondent raised no other objection to the claimant's amendments. In cross-examination, Mr Simmons confirmed that he took no issue with the claimant's version of the minutes at pages 113 to 120.

84. It seems to us to be a matter of little significance as to whose suggestion it was to obtain medical evidence. In the final analysis, the parties were agreed that this should be done and, as we have seen, matters were put in hand by the respondent straightaway with which the claimant co-operated. If it is necessary to resolve the factual dispute, then we prefer the claimant's account that it was his suggestion. The respondent took no issue with the claimant's amendments, and it logically follows therefore that they accept there to be significant omissions from their own record of the meeting. By that logic, the claimant's own account appears more reliable.

85. On 26 September 2023, Mr Simmons circulated a screen grab of a BBC Radio 5 Live discussion. This is at page 247. We can see that the screen grab features the well-known radio presenter Nicky Campbell. The subject of the discussion was "*are we too quick to be off sick?".* Mr Simmons circulated this to all the public houses within his area with the message "*what you think?".*

86. The claimant fairly accepted in evidence that Mr Simmons would sometimes circulate an article (such as this one) which he considered to be of interest. The Employment Judge asked Mr Simmons to give an example of another instance where had done so. He mentioned circulating an article of interest around financial statements. Given the claimant's acceptance of this being Mr Simmons' practice, and the ease with which he came up with another instance of him doing so when asked, the Tribunal accepts that Mr Simmons' intention was to circulate to all of the 14 pubs within his region the article around fit leave as a genuine point of interest.

87. On the same day (around an hour and a half later) there was a reply from the Sheffield Water Works' email address *("Pub 2196")* which read "*100%. I'm signing off for two weeks".* There is no dispute that this email was written and sent by Mr South. (At this point, it is convenient to mention that all managers have access to the pub email accounts. The email address *"Pub 2196"* may therefore be utilised by any of the managers within the Sheffield Water Works pub).

88. On 28 September 2023, the claimant emailed Mr Simmons (page 247). He drew attention to the remark made by Mr South on 26 September 2023. The claimant said, *"I'd like to bring this to your attention – we can all have a bit of a joke, but joking about long term sickness in the middle of an investigation relating to long term sickness is really inappropriate. I'm passing this on because I'm keen to keep things above board and positive whilst my case is handled but coming across this when I came into work hardly demonstrates a supportive environment whilst I am struggling with my mental health. Do we think this is fair?"* The claimant then went on to say, "*The AM [Area Manager, Mr Simmons] communicating with the area frequently with thought provoking questions relating to running the business is not new and often a good idea. Again, however, whilst in the midst of handling an investigation into long term sickness, querying the parameters in which staff go off sick for work again doesn't fill me with great confidence. I hope this is just down to unfortunate timing and nothing more, but it certainly appears a bit on the nose."*

89. In cross-examination, Mr Simmons denied that his email was directed at the claimant. We accept Mr Simmons' evidence upon this issue. The claimant acknowledged both at the time (as we can see from his email at page 247) and before us that Mr Simmons would frequently circulate articles of interest. He acknowledges this to be the case in the email of 28 September 2023 (cited in paragraph 88).

90. Mr South denied that his reply sent on 26 September 2023 *("100%. I'm signing off for two weeks"*) was directed at or was a dig at the claimant. Mr South said before us that his email was *"not motivated by anything."* It was put to him by the claimant that when sending the email Mr South had him firmly in mind. This Mr South denied. It was suggested that Mr South was mocking the claimant. Again, Mr South denied that accusation adding that he had not deleted or sought to hide the email.

91. On 28 September 2023, the claimant texted Mr South. He asked, *"Was that you that replied to Hudson's email about going off sick?"* Mr South replied, *"What email?"* The claimant then quoted it to which Mr South replied *"Dunno".* The claimant followed up by saying that at the time it was sent he [Mr South] was on duty. It was then put to Mr South by the claimant, *"You sure you don't know? I think I'd remember sending an email like that, was only two days ago."* Mr South replied, *"Been that stressed hard to remember TBH. Might have done."*

92. There was much merit in the suggestion made by the claimant to Mr South in cross-examination that in the texts sent at the time the email at page 247 was sent he (Mr South) was being evasive as he knew the email was inappropriate. Mr South impressed the Tribunal as a very competent manager who goes about his business diligently and conscientiously – witness his efficiency in preparing rotas well ahead of the time required by company policy. It is therefore not credible that when confronted on 28 September 2023 about an email sent just two days prior, Mr South could not recall the email of 26 September. We agree with the claimant that Mr South was feigning ignorance. From this, we infer that Mr South did send the email at page 247 to Mr Simmons with the claimant firmly in mind. This is all the more so given that Mr South was in the middle of dealing with the claimant's return to work after the period of ill health absence on 12 September 2023. As we have seen, Mr South was busy negotiating the claimant's adjusted hours with him around this period.

93. Mr South is right to say that the email *"100%. I'm signing myself off for two weeks"* was not sent directly to the claimant. That said, it must have been readily apparent to Mr South that the claimant was likely to see it. As a manager, the claimant was perfectly entitled to look at the pub2196 email account.

94. Regrettably, the relationship between Mr South and the claimant was becoming strained by mid-to-late September 2023. On 13 September 2023 Mr South had asked the claimant whether he was responsible for an anonymous grievance having been raised against the Sheffield Water Works (page 224). This the claimant denied. When this was raised with him in cross-examination, Mr South said that he had made the enquiry because *"I wanted to know if my friendship had been betrayed."* The Tribunal accepts that the claimant was not responsible for sending an anonymous grievance. The Tribunal did not see the anonymous grievance in question. In any case, there was little reason for the claimant to send a grievance anonymously as he had quite openly raised one to which he did put his name on 7 September 2023.

95. The appeal and grievance hearing outcome were sent to the claimant on 5 October 2023 (pages 130 to 132). This was signed by Mr Simmons.

96. It will be recalled that the claimant's grievance covered the five issues summarised in paragraph 66 above. Mr Simmons' letter was structured under the headings:

- That the AWOL policy wasn't adhered to.
- That the manner in which the management team handled your period of AWOL led directly to you being absent.
- That the AWOL policy should be changed.
- That confidentiality was breached by your disciplinary [letter] left to be found on the PC.

97. It is unfortunate that Mr Simmons took this approach rather than just following the claimant's structure. This led directly to one of the issues in the case (to which we will come in due course). It is unsurprising in the circumstances that the claimant considered that at least part of his grievance was not properly considered.

98. Mr Simmons concluded that there was no breach of the AWOL policy. He mentioned the recorded attempts at contacting the claimant (at page 80).

99. The next issue considered by Mr Simmons was the way the management team had handled the claimant's period of AWOL led directly to him being absent (under the heading *"The manner in which the management team handled your period of AWOL"*). When considering this issue, Mr Simmons referred to the long-term sickness meeting with Mr South which took place on 25 August 2023. In the grievance meeting with Mr Simmons, it was recorded that at the meeting of 25 August 2023 the claimant had described as difficult to pin down the exact cause of his absence. This appears to be a reasonable characterisation. By reference to the record of the long-term sickness absence of 25 August 2023, we see (at page 229) that the claimant commented that, *"It's hard to assess my mental health …"* Mr Simmons acknowledged that during the grievance hearing meeting of 19 September 2023 the claimant had mentioned a possible diagnosis of ADHD or autism. Mr Simmons assured the claimant of the respondent's support.

100. As we have said, it is unfortunate that Mr Simmons did not adopt the same headings as had the claimant in his grievance letter. On a fair reading, however, it does appear that Mr Simmons was seeking to address (under the heading *"The manner in which the management team handled your period of AWOL"*) the claimant's complaint about multiple violations of mental health and well-being policy. Mr Simmons had investigated Mr South's management of the claimant's absence (including at the return-to-work meeting) and noted the claimant's agreement to undergo occupational health assessment.

101. Mr Simmons dealt with the claimant's allegation that there was a violation of the confidentiality policy by leaving the outcome of the disciplinary hearing on the work PC for others to see. Mr Simmons acknowledged there to be merit in the claimant's complaint and assured him that steps had been taken to prevent a recurrence in future.

102. This leaves the claimant's allegations in his grievance letter of a violation of the dismissal and disciplinary policy and discrimination under the 2010 Act. This appears to be basis of the appeal against the first and final written warning as the claimant talks in his grievance letter (at page 109) of a failure on the respondent's part to take into account the mitigating circumstances of his absence being a direct consequence of mental ill health and of a failure to take into account the claimant's years of service, disciplinary record and that this was a first offence. Mr Simmons addressed this towards the end of his letter holding that the sanction was *"within the band of reasonable responses for a gross misconduct offence in line with the company's disciplinary procedure."* He was satisfied that matters had been handled in accordance with the respondent's dismissal and disciplinary policy.

103. Turning to the claimant's allegation of discrimination against him by the respondent under the 2010 Act, the claimant advanced the case in his grievance letter that he was a disabled person within the meaning of the 2010 Act. He complains of being given a first and final warning for conduct which he said was a direct consequence of his ill health. He therefore complained of unfavourable treatment for something arising in consequence of disability.

104. In his outcome letter (at page 131) Mr Simmons acknowledged the claimant having informed him that he believed the cause of his absence to be consequent upon a nervous breakdown *"which had led to you going AWOL and that the final event that led to this was the fact that you failed your personal licence exam".* Mr Simmons concluded that the claimant had offered no substantive evidence that he was treated unfavourably and therefore was unable to accept the proposition that the behaviour of the management team led to him being off sick.

105. This appears to be a different point to that which was raised by the claimant. The claimant's issue was not that the respondent's management prior to the end of July 2023 had led to the claimant going AWOL due to mental health issues but rather that the respondent's management had visited the claimant with a first and final written warning for having gone AWOL which the claimant attributed to mental health difficulties. We conclude therefore that the claimant is correct to say that Mr Simmons did not in fact address the point that the claimant was making of having been treated unfavourably by the respondent's management as something arising in consequence of disability. Mr Simmons seems to have thought that the claimant was contending that it was the respondent's actions

which had caused him to go AWOL at the end of July 2023. This is not what the claimant was in fact saying and is a mischaracterisation.

106. Mr Simmons' failure to properly address the claimant's contentions may, at least in part, be down to the fact that he structured his grievance and appeal outcome letter (at pages 130 to 132) in a different way to that adopted by the claimant in the grievance letter at pages 108 and 109. We can accept that Mr Simmons subjectively may have thought that he was dealing with the claimant's complaints whereas, on a fair reading and objectively, he misunderstood the complaints and overlooked a key point being made by the claimant.

107. On 11 October 2023, the claimant appealed the grievance outcome. (There was no further right of appeal against the disciplinary outcome around the first and final written warning issued by Beth Burns). The claimant's appeal is at pages 133 to 140. The claimant also raised additional fresh grievances.

108. In bold type on the first page of the appeal and grievance document dated 11 October 2023 (at page 134), the claimant says*, "I believe I have suffered discrimination and victimisation in violation of the Equality Act 2010. I believe that I have been discriminated against by being issued with a punishment for suffering an episode of critically poor health which disabled me from fulfilling my duties at work. I believe I have been subjected to victimisation and suffered detriment because I engaged in a protected act by raising an appeal/grievance relating to concerns of discrimination. I believe the incidents of alleged discrimination violate the ACAS Code of Practice."*

109. The claimant then raises the following issues which we summarise as follows:

    109.1. Discrimination against him arising from disability by Beth Burns having issued the first and final written warning of 2 August 2023.

    109.2. Mr Simmons' commenting that the claimant *"lacked decency"* around his failure to attend the training event of 4 August 2023 during a period when he was signed off by his GP as unfit for work.

    109.3. The issue arising out of the BBC Radio 5 Live article circulated on 26 September 2023.

    109.4. That the claimant did not receive a response from Mr Simmons to the email which he sent on 28 September 2023 protesting about Mr South's email sent two days earlier (this being the email in which Mr South commented *"100%. I'm signing off for two weeks."* The email in question to Mr Simmons is the one which we have referred to already and is at page 247).

    109.5. That Mr Simmons attempted to close the grievance hearing of 19 September 2023 without giving the claimant the opportunity of addressing the issue of alleged discrimination under the Equality Act 2010. (On this issue, it will be recalled that there are two sets of meeting notes. Those prepared by the respondent record (at page 126) Mr Simmons asking the claimant whether he had anything else to add regarding the grievance. The claimant replied, *"The only other thing is the discrimination under the Equality Act which shows the severity of what happened. That is explained in my letter."* The respondent's record shows there being an adjournment and then, upon the resumption, a brief summary by Mr Simmons in which he informed the claimant that he would

look into matters further and revert to the claimant with the outcome. The claimant's version (accepted by the respondent as accurate) shows there to be some discussion about the allegation of unfavourable treatment for something arising in consequence of disability after the claimant had reminded Mr Simmons of that as an issue in his appeal and grievance. As we have said, the Tribunal prefers the claimant's version and find his notes to be an accurate record.

109.6. The claimant also raised as an issue the differences between him and Mr Edwards over the contents of the minutes of the grievance and appeal meeting of 19 September 2023. It is right to say that the claimant was anxious to secure an agreed record and in fact had chased Mr Edwards for a reply to the claimant's suggested amendments. The chasing email is dated 4 October 2023 at page 246.

109.7. That there was no return-to-work meeting as scheduled for 18 September 2023. The claimant also complained about a delay between 20 September and 30 September 2023 in Mr South reverting to him about the adjusted rotas.

109.8. That there was *"inappropriate framing"* by Mr Simmons in his grievance outcome letter.

109.9. That the respondent had not complied with a request made about the claimant for CCTV footage of the meeting between him, Mr Simmons, and Mr Edwards of 19 September 2023.

110. The occupational health assessment of the claimant took place on 13 October 2023. The report prepared by Evelyn Mufushwa, RMN/Occupational Health Advisor is at pages 252 to 254. The Occupational Health Advisor recorded the claimant reporting to her a longstanding history of anxiety and depression. He reported to her that the current adjustment to the work pattern of not working nightshifts had been beneficial and a recommendation was made that this continues to support the claimant's mental health. She confirmed that in her clinical opinion the claimant is fit for work with adjustments. She noted the claimant to have reported to her "*that he is finding the current adjustment for work patterns beneficial"* and *"I would recommend you consider continue with the support to help him managing his conditions at work."*

111. Ms Mufushwa then replied to the specific questions raised in the occupational health referral. She confirmed that the claimant *"suffers from longstanding anxiety and depression which flare up now and again and may impact on day-to-day functioning".* She reported that the claimant "*is also waiting for assessment for ? ADHD, the NHS waiting timeframe is long for such assessments."* He was able to fulfil his duties as a shift manager. She then opined that *"In my professional opinion depression and anxiety conditions are likely to be considered a disability under the relevant UK legislation."*

112. The report was sent to the claimant on 18 October 2023 accompanied by a message that it would be released to the respondent on 20 October 2023 (page 252). There appears to be no dispute that the respondent received the report on 20 October 2023. Upon this basis, the respondent accepts that they knew or could reasonably have been expected to know of the claimant's status as a disabled person within the meaning of section 6 of the 2010 Act with effect

from that date. (There is an issue of the respondent's actual or constructive knowledge of disability prior to that date which we shall consider in due course).

113. It was noted in particular by the Occupational Health Advisor that the claimant had found his current hours to be beneficial. However, there was no recommendation from her that the claimant work only weekday shifts. The recommendation was around avoiding late night working so far as possible. In paragraph 58 of his written submissions, Mr Rhodes observed that *"The claimant's rotas from 25 September 2023 (page 665) show a steady pattern of predominantly weekday working."* We have noted the shift pattern for week commencing 25 September 2023 already (paragraph 75 above).

114. We would agree by and large with Mr Rhodes' characterisation of the claimant's rotas from that 25 September 2023. During week commencing 2 October 2023, he worked Tuesday 3rd, Wednesday 4th, Thursday 5th and Friday 6th October 2023. The only late shift was that on 6 October 2023 where the claimant worked from 7pm to 3am. During week commencing 9 October 2023, the claimant worked on Monday 9th, Tuesday 10th, Wednesday 11th, Thursday 12th and Friday 13th October 2023. Again, only on the Friday was a late shift worked (from 7pm to 3am). During week commencing 16 October 2023, the claimant worked on Monday 16th, Tuesday 17th, Wednesday 18th, and Sunday 22nd October 2023. None of these involved late-night working.

115. On 21 October 2023, the claimant emailed Mr South (page 255). He opened by fairly commenting, *"I appreciate reasonable adjustments being made with my rota the past few weeks. I am noticing the benefit of it and has improved a lot of my issues both in and outside of work."* He went on to say, *"However I'm aware that we still haven't agreed an arrangement for Mondays – I had asked to work an early shift and use it as an opportunity to get trained on stocks but I assume that is not an opportunity at the minute. I picked up your Sunday shift this week but the priority right now is still to keep my weekends free so I have more agency over my work life balance. Can this be looked at? I understand you said that the hours situation at the pub can't accommodate me working Mondays right now, but I'd ask Hudson if an exception can be made as again it is a request designed to promote and maintain my health (I'm happy to ask this question). I'm aware he is still away from the business so I know its difficult but as soon as he's back we can discuss with him if the hours are your concern."* From the claimant's perspective, the wish to work on Mondays had not been resolved. The claimant maintained this to be a reasonable adjustment.

116. The Tribunal notes that the occupational health recommendation does not specifically refer to accommodating this wish on the claimant's part. The occupational health advisor made a general comment that the claimant was feeling the benefit of the adjusted rotas which he had been working following his return to work on 12 September 2023. Mr South's position remained that Mondays were "*a no go"* as he already had *"too many people working them."* We refer to page 479.

117. Mr South did not dispute that he was aware that the claimant wished to work on Mondays during the day as an adjustment. Such could not of course be an issue given the contents of the claimant's email of 20 September 2023 at page 246. Mr South had not put the claimant on the rota to work on Mondays on any of the rotas which he had prepared four to six weeks from the date of the claimant's return to work on 12 September 2023. Mr South's position was that not only

would have this been unfair to Mr Bailey and Ms Blackwell, but he also did not have an occupational health report supportive of such a recommendation. In evidence given under cross-examination, he observed (correctly) that when the occupational health report came to hand, it made no specific recommendation for Monday working.

118. We have seen from the rota for week commencing 16 October 2023 that the claimant was scheduled to work on Sunday 22 October. His hours were between 14.00 and 22.00. He says in his witness statement in paragraph 22 that when he turned up for work *"the pub was in the worst condition I'd ever seen, and it was the most stressful environment I had worked in, so much so we had customer complaints that members of staff were crying on the bar due to the stressful conditions."* The Tribunal accepts the claimant's evidence, it being corroborated by a customer services' complaint of that date.

119. The claimant goes on to say in the same paragraph of his witness statement that, *"I was hungover and acknowledge my mental health was in a particularly vulnerable place. I was incredibly frustrated at the fact that I had been too agreeable with Haydn South and deliberately put myself in harm's way by offering to work this Sunday, notoriously stressful days, trying to appease."* The claimant then recounts a distressing episode that day of attempting self-harm. He said, *"Eventually I took myself upstairs with a steak knife and cut myself in the staff room changing rooms."* He remained in work until relieved by the duty manager. He then left *and "proceeded to walk through town until I reached a quiet spot. I sat and phoned the Samaritans and spoke to them for at least half an hour."* The claimant's account is corroborated by a report from the Sheffield Health and Social Care NHS Foundation Trust Crisis and Emergency Care Network Team (pages 494 and 495).

120. The claimant was certified as unfit to work by his GP for the period between 22 October and 29 October 2023 (page 490). He was then certified as fit to work with adjustments for the period from 30 October 2023 to 18 December 2023 (pages 496 and 497).

121. On any view, the episode of 22 October 2023 was a serious incident, symptomatic of a serious and significant mental health issue affecting the claimant. The claimant emailed the Sheffield Water Works about the matter on 23 October 2023 (at page 258). This appears to be directed at Mr South whom the claimant accused of holding his mental health in contempt. The claimant mentioned that the previous day, 22 October 2023, he *"was so ill I was subjecting myself to self-inflected bodily injury throughout my time on shift."* The claimant also contacted NHS 111 for advice on 25 October 2023 (page 192).

122. On 26 October 2023, the claimant emailed the respondent's "*personnel advisors"* email account to chase progress with his second grievance (about the new matters raised in paragraph 109) and grievance appeal. In response, he received from Alex Smith, personnel advisor a grievance appeal invitation letter (page 143).

123. Although certified as fit to work with adjustments from 30 October 2023, it appears from the claimant's attendance record at page 699 that he was in fact absent from work through sickness for the whole of the week commencing 30 October 2023. This is corroborated by the rota at page 670 upon which the claimant's name does not appear. He then resumed work on Monday 6 November 2023. We can

see from the rota at page 671 that he worked between Monday and Friday (6th to 10th November 2023). Again, the Friday shift was a late one (from 7pm to 3am).

124. On 2 November 2023, the claimant emailed Mr South asking for a *"sit down chat with you [Mr South] and Becky [Ford]".* Amongst other things, he wished to resolve the issue of his rota for the forthcoming weeks. Mr South replied (on the same page 259) that he was happy to speak with the claimant upon his return to work. He mentioned that the rota had been available *"for at least six weeks as I always complete manager rotas way ahead of time and I believe it's more than fair."*

125. On 6 November 2023, the claimant attended the office. The explanation given by him to Mr South (at page 261) was that he had "*been asked to collate evidence for a meeting with HO this Thursday."* (This was in reference to the grievance appeal hearing scheduled for 9 November 2023). It appears from the contents of the email that there was a discussion between Mr South and the claimant as the claimant says, "*I've spoken to you in the office about my discomfort working Saturdays today and how unfortunately I am not willing to risk my health by alternating my shift pattern and putting myself in a high stress and intense scenarios in wake of my last shift".* This was in reference to the incident of 22 October 2023. The claimant said, *"I've recognised my shift adjustments can't be long term. For example, if the next 3/4 weeks go well on my original adjustments, then I will sit down with you and introduce more high demand shifts (granted no further issues occur)."* The claimant also noted that Mr South had not been sent a copy of the occupational health report released to the respondent on 20 October 2023. The claimant said that he had understood that Mr Edwards would forward this to Mr South. Mr Edwards not having done so, the claimant sent it to Mr South himself.

126. On 7 November 2023, Mr South conducted a return-to-work meeting with the claimant. This is at pages 616 to 621. Of note as a *"key action"* was to *"continue the current shift patterns."* Regular shift patterns and less late nights whilst recovering were noted as reasonable adjustments as was the fact that the situation had been ongoing by this stage for approximately four or five months. It was noted that the claimant considered his condition to be a disability placing him at a substantial disadvantage in completing his role compared with others.

127. The claimant followed up on this meeting with an email dated 10 November 2023 to the respondent's personnel advisors raising once again the issue of Monday working and the possibility of doing stock training on Mondays (page 262). The claimant commented that he had been told by Mr South that it was for personnel to deal with any disputes about shift patterns and reasonable adjustments. The claimant reiterated his willingness to work his full 40 hours per week.

128. On 9 November 2023, the grievance appeal hearing took place. This was chaired by Graham McCafferty, regional manager. Mr McCafferty was accompanied by Deborah Walls as the respondent's witness and note taker. The minutes of the meeting are at pages 149 to 158.

129. Mr McCafferty asked the claimant about mental health issues prior to 27 July 2023 (page 151). The claimant mentioned taking two to three weeks away from work in May 2023. This was repeated by the claimant later in the meeting (page 152).

130. Aside from the mention of the prior episode in May 2023, the Tribunal has no record of either party referring the Tribunal to any other excerpts of the minutes of the meeting of 9 November 2023. The claimant made only a passing reference to the minutes in his evidence in chief (in his witness statement). Accordingly, as we shall summarise the appeal outcome shortly, we do not propose to go into any detail about what was said at the appeal hearing of 9 November 2023.

131. On 16 November 2023, the claimant informed Mr South that he was not prepared to work as rostered on Saturday 18 November 2023. We refer to page 273.

132. On 17 November 2023, the claimant complained about additional incidents. This document is at pages 266 to 272. In summary:

    132.1. The claimant complained that Mr South had communicated to the pub management that they should ignore any "*threatening"* and *"demanding"* emails from the claimant.

    132.2. That he had confronted Mr South about the email of 26 September 2023 (page 247) in response to Mr Simmons' circulation of the BBC Radio 5 article.

    132.3. That he had been pressured into working shifts which were unsuitable for him, and that Mr South had refused to schedule him to work on Mondays.

    132.4. That these difficulties put the claimant in a position of not being able to fulfil his 40 contractual hours per week. (We should observe that the claimant acknowledged that nonetheless he was being paid for 40 hours per week notwithstanding that for some weeks he was working less than this due to difficulties with the rotas. To his credit, the claimant acknowledged that the respondent was paying him in full in return for which the claimant wished to work his full contractual hours).

133. On 17 November 2023, Mr South emailed the respondent's personnel department for advice (page 627). He said, *"I really need some advice with how to manage [the claimant]. He's basically stating he won't work weekends (Saturday/Sunday) and is expecting a Monday to Friday role in our industry – it just doesn't make sense. I've even offered in the past easy 12 to 8 shifts on a Saturday and Sunday and this was declined by him. I really don't know how to proceed with this employee. I have to double up every one of his shifts on my rotas as I cannot trust him to turn up. He comes to work as and when it suits him. Lateness is a common occurrence."*

134. On the same day, Mr South emailed Mr Simmons (page 628). Mr South complained, *"I'll be honest. I'm drained with having to keep up with all his emails and I constantly have to double up managers on his shifts in fear of him either not being there, walking out or just generally not being able to manage the shifts*.

135. On 23 November 2023, Mr South emailed the claimant (pages 277 and 278). He informed the claimant that he was expected to work the rota *"that was put up".* He then said that he had changed his shift for the next two weeks *"to get you on the Mondays."* We can see from the rotas for weeks commencing Mondays 27 November, 4 December and 11 December 2023 that Mr South had arranged for the claimant to work on Mondays between 2pm and 10pm. Mr South asked, *"For clarity, can you please send me over the documentation which states from your doctor that you cannot work weekends?"* The claimant replied (pages 276 and 277) that it was*, "Not a very promising trend of me asking for a written record of*

things and whenever there is a verbal agreement there seems to be disagreement." The claimant said that Mr South was *"exhausting my good faith and compromise and assert your refusal to authorise my request in light of my struggles and requests for training, in conjunction with the bad faith you persistently keep demonstrating, is unreasonable."* The claimant went on to say that *"Documentation about my reasonable adjustments relating to weekends can be found in the occupational health report."* As Mr Rhodes observes in paragraph 58 of his closing written submissions, "*Nowhere in the report does it say that the claimant can only work weekday shifts, and in fact the OH report recommends the claimant continue the shifts he has."*

136. On 23 November 2023 Mr South wrote to personnel advisors (pages 632 and 633). It appears that this was in response to the claimant's email of the same date at pages 276 and 277 (and in particular a contention contained within that email about Mr South taking a weekend off). Mr South pointed out to personnel advisors that he was scheduled a weekend off. He went on to say, "*I'm actually working over my contracted hours most weeks covering for this idiot as he chooses as and when he comes to work. My pubs people pack will verify those hours worked. The kid is full of lies! Making up crap about hours, allowances and boh [sic]scores just utter rubbish. I'm having to keep my cool at work with him as I don't want any further issues but he has aggravated half the management team in one way or the other!"*

137. The contents of the email at pages 632 and 633 were discussed during the claimant's cross-examination of Mr South. The claimant asked whether the circumstances warranted Mr South referring to him as *"an idiot".* Mr South did not appear contrite when confronted with this email and commented that there had been numerous times when the claimant had said to senior management that matters had been agreed between them when that was not the case.

138. On any view, by the end of November 2023, the relationship between Mr Dunn and Mr South had broken down. Although both conducted themselves courteously and civilly during the claimant's cross-examination of Mr South, it was clear to the Tribunal that time had not repaired the relationship.

139. On 27 November 2023, Mr South and the claimant conducted a stress risk assessment (pages 635 to 639). The claimant said that he felt adequately supported on, and informed about, work issues (page 636). About work life balance, he said, *"Due to the current shift pattern I've been working, my work life balance has been healthy and proved beneficial to my well-being and getting me faster on track to returning to a more pub-demand dictated rota. However, this is not considering the lack of Monday shifts I have received, which has caused considerable stress."* The claimant's comments within the stress risk assessment were consistent with the general theme running through the events from the claimant's return to work on 12 September 2023. He felt broadly supported at work (as was confirmed in the occupational health report) but still wished to be given the opportunity work on Mondays by way of an adjustment.

140. In the meantime, Mr McCafferty proceeded to investigate the issues arising out of the claimant's grievance and grievance appeal of 11 October 2023 (at pages 133 to 140). To this end, he conducted interviews with Mr South and Mr Simmons.

141. The interview with Mr South is at pages 161 to 165. Mr McCafferty asked Mr South when the claimant had first made him aware of his mental health issues.

Mr South said this was *"In his long-term sick meeting which was after the disciplinary for AWOL".* This was a reference to the meeting of 25 August 2023 (pages 234 and 235). Mr South said that "*that's the first documented stage of the breakdown, he had absences before that."* Mr South then referred to the claimant sending an email in which the claimant asked the respondent to recognise continuity of employment from when he first joined the respondent. This is, we think, in reference to the claimant's email of 23 March 2023 (at page 215) to which we have referred in paragraph 25 above.

142. Mr McCafferty then asked Mr South if he had to deal with any absences prior to that which occurred at the end of July 2023. Mr South mentioned the claimant's absence in May 2023 to which, again, we have referred above (see paragraphs 26 to 29). Mr McCafferty and Mr South then discussed the history of matters generally (including touching upon Mr Simmons' email and Mr South's response of 26 September 2023 (at page 247).

143. Mr McCafferty then interviewed Mr Simmons. The interview notes are at pages 166 to 169. Mr McCafferty first asked about Mr Simmons' decision to reject the appeal against the first and final written warning. Mr Simmons justified his position as, *"It was based around his inaction in terms of communication and to his pub manager and to everyone else."* Mr Simmons also stood by his comment that the claimant ought to have had *"the decency"* to inform the training provider that he was unable to attend the course scheduled for 4 August 2023. Mr Simmons denied that the screenshot of the BBC Radio 5 Live interview (page 247) was directed at the claimant. Mr Simmons also denied failing to address the allegation of discrimination raised by the claimant in his grievance dated 7 September 2023.

144. The meeting then turned to the issues of the claimant's phased return to work. Mr Simmons said that he had left that as an issue between the claimant and Mr South. Mr Simmons added that, *"It was quite mixed and chopping and changing what I understand from Haydn [South]."* Mr Simmons, to his credit, accepted that the claimant had behaved professionally overall albeit he had made some *"personal and offensive"* comments about Mr Edwards and Mr Simmons. Mr Simmons also said that the claimant *"twists and changes things so is hard to follow."*

145. Mr McCafferty also interviewed Mr Edwards (pages 171 and 172). The principal points of discussion with Mr Edwards were around the amendments to the minutes of the meeting held on 19 September 2023 and the issue of the CCTV at the Wagon and Horses public house which hosted the appeal and grievance hearing. Mr Edwards justified the choice of venue for the appeal and grievance hearing upon the basis that it has a good meeting room and was within easy access of the city centre by train. Mr Edwards denied knowing the CCTV wasn't working on the day in question.

146. Mr McCafferty interviewed Beth Burns. The notes of his meeting with her are at pages 174 and 175. Miss Burns acknowledged the claimant's mitigation around his mental health. She said that *"Given the circumstances he got on a train and disappeared [on 22 July 2023] I think probably and that could have gone to dismissal."*

147. On 5 December 2023, the claimant requested a transfer away from the Sheffield Water Works. The request is at pages 316 and 317. The claimant alleged that there had been a further breach of confidentiality concerning Mr McCafferty's

investigation into the claimant's grievances. He considered that he was being held in contempt by others at the pub. He said that his working relationship with Mr South had broken down beyond repair.

148. Rebecca Ford emailed Mr Simmons on 7 December 2023 (pages 319 and 320). This followed an incident which took place on 5 December 2023 in which the claimant asked her about how Sarah Baxter had come to know *"about the issues we had the other month."* It is not clear to which incident Rebecca Ford is referring. At all events, she complained to Mr Simmons of a *"toxic and stressful atmosphere."*

149. Ms Baxter also raised an issue with Mr Simmons (pages 649 and 650). This too was sent on 7 December 2023. She complained of a breakdown in her working relationship with the claimant.

150. Miss Ford and Ms Baxter's emails of 7 December 2023 were treated by the respondent as grievances against the claimant (page 651).

151. On 11 December 2023, the claimant emailed Mr South (pages 321 and 322). The claimant raised issues with the proposed rota devised by Mr South for the Christmas week. The claimant said that he doesn't *"feel comfortable sitting down with you to [review my stress risk assessment] as many of the issues raised do not seem to have been actioned or considered, and I have concerns about your intentions in work. There is a breakdown in trust here which I'm sure isn't news to either of us but on that basis, I won't be conducting any further reviews with you in person."*

152. With effect from 18 December 2023, the claimant transferred to work at the Bankers Draft pub. We can see his hours of work there from the record within the bundle at pages 677 to 683. In the circumstances, a move away from the Sheffield Water Works appears to have been in the best interests of all concerned.

153. On 23 December 2023, Mr McCafferty sent to the claimant the grievance appeal outcome letter. This is at pages 179 to 186. This was acknowledged by the claimant the same day. He expressed thanks to Mr McCafferty and Deborah Walls (who was the note taker and assisted Mr McCafferty) for the efforts put into investigating his case. We refer to page 187.

154. We shall now summarise the outcome of the grievance appeal:

    154.1. Mr McCafferty concluded there to be no evidence to suggest that discrimination played any part in the decision to apply the sanction of the first and final written warning against the claimant arising from his absence during week commencing 27 July 2023. Mr McCafferty concluded that the reason for the sanction was for not following the respondent's policy and procedure in reporting his absence.

    154.2. Mr McCafferty did not deem Mr Simmons' comment that the claimant had not acted with decency in failing to inform the training team of his inability to attend the training event on 4 August 2023 as harassment. However, Mr McCafferty acknowledged that the claimant had informed the pub of his absence and that he was under no obligation to go further and inform the training team as well.

    154.3. Mr McCafferty concluded that Mr Simmons' actions in circulating the BBC Radio 5 Live article was reasonable given the levels of sickness being

experienced across the area which Mr Simmons was managing. Mr McCafferty concluded that Mr Simmons' actions were not directed at the claimant.

154.4. Mr McCafferty accepted that Mr Simmons had not dealt with the allegation of discrimination for something arising in consequence of disability in the order in which it appeared in the claimant's grievance letter of 7 September 2023. He said that the claimant was being disciplined for not having contacted the pub. He said, *"It may be that [Mr Simmons and Mr Edwards] concluded, like myself that discrimination hadn't played a part in the process. You have been disciplined for not following the reporting of the absence, not for the actual absence itself. Therefore, discrimination on the grounds of mental health may have been deemed extraneous and not worth greater discussion."*

154.5. Mr McCafferty rejected any suggestion that the venue for the appeal and grievance hearing had been chosen because Mr Simmons and Mr Edwards knew that the CCTV was malfunctioning. He acknowledged that the claimant had availed himself of the opportunity afforded by Mr Edwards to correct the minutes. Although Mr Edwards did not agree with the claimant's amendments Mr Edwards did *"keep your notes separately as it was felt you couldn't agree on a final version."* In other words, as we read it, the respondent had no real issue with the claimant's amendments (as was confirmed by Mr Simmons during his evidence before us).

154.6. Mr McCafferty accepted that Mr Simmons had not expressly addressed the issue of discrimination for something arising in consequence of disability in relation to the disciplinary sanction when Mr Simmons conducted the claimant's appeal and grievance hearing. In our judgment, Mr McCafferty was correct, and this very much accords with our own findings upon this issue (see paragraph 104-106 above).

154.7. Mr McCafferty concluded that Mr South's actions on 26 September 2023 (emailing *"100%. I'm signing off sick for two weeks*") may have been said in the heat of the moment. Mr McCafferty fairly recognised this to be ill judged but didn't *"believe the act was intentional in the way you describe to avoid addressing your welfare and therefore victimise you."*

155. The above is a summary of Mr McCafferty's findings. We have not detailed all of them as some have little if any relevance to the issues which the Tribunal must decide.

156. Finally on our findings of fact, an issue arose as to whether the claimant had raised as an allegation that Beth Burns (or others within the respondent) had informed the claimant that he was lucky to have escaped with a first and final written warning. There is no reference within the claimant's own amended appeal and grievance hearing record (at pages 113 to 120) of Mr Simmons making this remark. When this was put to the claimant in cross-examination by Mr Rhodes, the claimant agreed that this had been omitted. He mitigated his position by saying that he had returned the note within 24 hours and *"didn't have much time to ruminate."* This is, respectfully, somewhat unconvincing given the thoroughness with which the claimant approaches matters and his attention to detail. Likewise, there was no such reference in the second grievance/grievance appeal at pages 134 to 140. This was a very detailed document. Had such a

remark been said by Beth Burns or Mr Simmons, the Tribunal would have expected the claimant to have raised it. In submissions, the claimant said that he thought it was Mr Edwards who had made the remark. We can see at page 125 that Mr Edwards did say that the sanction *"could have been more harsh."* This was said in the context of the claimant complaining that his mental health was not taken into account as mitigation.

157. This concludes our findings of fact.

The issues in the case

158. The Tribunal now turns to the issues in the case. These were set out in the record of a preliminary hearing sent to the parties on 24 July 2024 (pages 59 to 70). These are set out here:

The Issues

1. *The issues the Tribunal will decide are set out below.*

1. *Employment status*

No question arises that the claimant has employment status to pursue his complaints as an employee of the respondent within the meaning of section 83 of the Equality Act 2010.

2. *Time limits*

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 24 September 2023 may not have been brought in time.

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

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

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

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

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

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

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

3. *Disability*

3.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The relevant disability relied upon by the claimant is mental impairments arising from ADHD, anxiety, and depression. The Tribunal will decide:

3.1.1 Did he have a mental impairment?

3.1.2 Did the disability have a substantial adverse effect on his ability to carry out day-to-day activities?

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

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

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

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

3.1.5.2 if not, were they likely to recur?

[This issue need no concern the tribunal given the respondent's admission of the claimant's status as a disabled person]

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

4.1 Did the respondent treat the claimant unfavourably by:

4.1.1 Issuing him with a final written warning following a disciplinary hearing held on 2 August 2023.

4.1.2 Dismissing his appeal against the decision to issue him with a final written warning on 19 September 2023.

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

4.2.1 The claimant failing to attend work on 27 and 28 July 2023.

4.2.2 The claimant (during week commencing 27 July 2023) undergoing what he describes in his claim form as "a mental health crisis".

4.3 Was the unfavourable treatment in 4.1 because of the things arising in 4.2?

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

4.4.1 To look after the health, safety, and welfare of employees; and

4.4.2 The need to run an efficient service, which requires employees to attend their rostered shifts?

4.5 The Tribunal will decide in particular:

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

4.5.2 could something less discriminatory have been done instead;

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

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

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

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

5.2 A 'PCP' is a provision, criterion, or practice. Did the respondent have a PCP of requiring the claimant to work a variable shift pattern at The Water Works (involving working weekends and late nights).

5.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the variable shift pattern, the weekend working, and the late-night working created a stressful working environment for the claimant, the pressures of which he was less able to withstand than someone without his disability.

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

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

Between September 2023 (when he was fit to return to work) and around October/November 2023 extending the phased return to work period which was implemented by the respondent by permitting him to work morning and weekday shifts.

5.6 Was it reasonable for the respondent to have to take those steps and when? The claimant says that it would have been reasonable for the respondent to do so in the interests of his health and welfare. In addition, the claimant says that (on an assessment of the reasonableness of such a step) he could have been undertaking the mandatory management academy training while working during the quieter periods and which he was required to undertake in any case.

5.7 Did the respondent fail to take these steps?

6. *Harassment related to disability (Equality Act 2010 section 26)*

6.1 Did the respondent do the following things:

6.1.1 On 26 September 2023, Hudson Simmons (Area Manager) emailed Haydn South (the pub manager) to complain about the claimant's "lack of decency" in failing to let the team know that he was unable to attend an online training course on 4 August 2023. Mr South replied that the claimant had submitted a sick note [properly called a fit note] for two weeks up to 14 August 2023 to which Mr Simmons replied that the claimant should still have let the training team know so there was "no excuse really". (The claimant in fact came across this email on 6 November 2023).

6.1.2 On 26 September 2023, Mr Simmons circulated a screen grab from a BBC News article to all the pubs in his area. The BBC article posed the question "Are you quick to be off sick?" Mr Simmons titled the email "What do you think?" Mr South responded to the email, "100%. I'm signing off for two weeks." The claimant came across this exchange when he logged on to the PC in the pub's office. The claimant's case is that this was directed at him.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to disability?

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

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

7. *Victimisation (Equality Act 2010 section 27)*

7.1 Did the claimant do a protected act as follows:

Raising a complaint that the respondent acted in breach of the Equality Act 2010 in his grievance of 9 September 2023.

7.2 Did the respondent believe that the claimant had done or might do a protected act, in raising the grievance of 9 September 2023.

7.3 Did the respondent do the following things:

7.3.1 Engage only with four of the five issues raised by the claimant in his grievance during the grievance hearing and grievance appeal hearings. The one issue not dealt with was the claimant's complaint of a breach of the 2010 Act.
7.3.2 Refuse to acknowledge the claimant's observation in an email of 20 September 2023 that he had endeavoured to get Mr Simmons to deal with that aspect of his grievance.
7.3.3 Refuse to amend the minutes to reflect that exchange with Mr Simmons in the grievance hearing.
7.3.4 Mr Simmons informed the claimant that he had been fortunate not to have been dismissed arising out of the incidents of 27 and 28 July 2023.
7.3.5 Fail to remedy these matters when the matter reached grievance appeal stage before Graham McCafferty, regional manager.

7.4 By doing so, did it subject the claimant to detriment?

7.5 If so, was it because the claimant did a protected act?

7.6 Was it because the respondent believed the claimant had done, or might do, a protected act?

8. *Remedy for discrimination, harassment or victimisation*

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

8.2 What financial losses has the discrimination caused the claimant?

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

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

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

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

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

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

8.9 By what proportion, up to 25%?

8.10 Should interest be awarded? How much?

The relevant law

159. We now turn to the relevant law. We shall start by looking at the complaint of unfavourable treatment for something arising in consequence of disability.

160. By section 15 of the 2010 Act, a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The employer may also have a defence of lack of knowledge of the claimant's disability.

161. Discrimination by way of unfavourable treatment for something arising in consequence of disability is made unlawful in the workplace by the provisions in Part 5 of the 2010 Act. Section 39(2)(d) provides that an employer must not discriminate against an employee by subjecting the employee to a detriment.

162. The following issues are relevant to a section 15 claim:

162.1. Was there unfavourable treatment.

162.2. Was that because of *'something.'*

162.3. Did the *'something'* arise in consequence of the claimant's disability.

162.4. Did the respondent have knowledge of the disability at the time of the events in question.

162.5. Was the treatment such that the respondent cannot show it to be a proportionate means of achieving a legitimate aim.

163. Unlike with a direct discrimination complaint, no comparator issue arises on a section 15 claim. The question is whether the treatment of the complainant is such that it amounts to unfavourable treatment. Paragraph 5.7 of the EHRC *Code* says that *"This means that [the complainant] must have been put at a*

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."

164. On the question of justification, the role of the tribunal is to reach its own judgment based on a critical evaluation, balancing the discriminatory effect of the act upon the claimant against the organisational needs of the respondent.

165. **MacCulloch v ICI [2008] IRLR 486** sets the legal principles regarding justification (which has since been approved by the Court of Appeal in **Lockwood v DWP [2013] IRLR 941**). These are that:

165.1. The burden is on the respondent to prove justification.

165.2. The classic test is set out in **Bilka-Kaufhaus GmbH v Weber Von Hartz (case number 170/84 [1984] IRLR 317)**. The court or tribunal must be satisfied that the measures must *"correspond to a real need … are appropriate with a view to achieving the objective pursued and are necessary to that end* (paragraph 36)." This involves the application of the proportionality principle. The reference to *"necessary"* means *"reasonably necessary"*: **Rainey v Greater Glasgow Health Board** (HL) [1987] IRLR 26.

165.3. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardy & Hansons Plc v Lax [2005] IRLR 726**.

165.4. It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweighs the latter. There is no *"range of reasonable responses"* test in this context: **Hardy and Hansons Plc**.

166. In the non-employment case of **Akerman-Livingstone v Aster Communities Limited [20015] UK SC** it was held that is for the tribunal to assess whether the objective that the employer was trying to implement was a *"sufficiently important"* one to justify limiting an employee's rights, to consider whether the objective in question was rationally connected to the treatment, that it was no more than necessary to accomplish the objective, and where the the objective was necessary and could not be achieved by alternative means was it nevertheless proportionate.

167. In **Akerman-Livingstone**, reference was made to another non-employment case of relevance on the question of proportionality. This is **Bank Mellat v HM Treasury (No 2) [2013] UK SC 39**. This is authority for the proposition that the tribunal must consider the overall balance between the ends being pursued and the means to achieve them. The disadvantages caused must not be disproportionate to the aims being pursued. The question is whether the infringement of the rights in question is disproportionate to the likely benefit of the measure in question.

168. On the question of knowledge, it is not necessary for the employer to have (actual or constructive) knowledge that the "*something"* arises in consequence of an employee's disability in addition to the employer having actual or constructive knowledge of the disability itself. Authority for this proposition may be found in **York City Council v Grosset** [2018] EWCA Civ 1105.

169. As was said by Sales LJ in **Grosset** at [37], the first issue upon a section 15 claim involves an examination of the state of mind of the putative discriminator. This is to establish whether the unfavourable treatment occurred by reason of the putative discriminator's attitude to the relevant *'something.'* In **Grosset**, the relevant *'something'* was Mr Grosset's actions (as a schoolteacher) of showing an age-inappropriate film to school children. The second issue concerns the objective matter of the causal link between the *'something'* in question and the complainant's disability. The actions of Mr Grosset were because of exceptionally high stress levels arising from the effects of his disability. The Court of Appeal held that it was not necessary to show, in addition to actual or constructive knowledge of his disability, that York City Council also had actual or constructive knowledge that the *'something'* arose in consequence of the disability.

170. At [47] of **Grosset**, Sales LJ commented that *"It is clear as stated in the Explanatory Notes, that section 15 of the 2010 Act establishes a particular balance between a person suffering from a disability and a defendant. The risk of unfavourable treatment because of something that has arisen from the disability is cast onto the defendant rather than the claimant. If the defendant does not know that the claimant suffers from a disability, he has a defence but if he does know that there is a disability he would be wise to look into the matter more carefully before taking unfavourable action. The defendant will also have a defence if he is able to justify the unfavourable treatment under subsection 1(b) [of section 15]."*

171. The pertinent part of the Explanatory Notes being referred to is at [44] of **Grosset**. This says that section 15 *"is aimed at establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability and providing an opportunity for an employer or other person to defend the treatment."*

172. The Equality and Human Rights Commission's *Code of Practice on Employment* (2011) (when dealing with discrimination for something arising in consequence of disability) says at paragraph 5.14 of that, "*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.'"*

173. The *Code* goes on at [5.15] to provide that**,** ***"****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 timekeeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability."

174. Now, we look at the law as it relates to reasonable adjustments. Section 20 of the 2010 Act provides:

'(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.' [The second and third requirements are omitted as they are of no relevance to this case].

175. Thus, employers are required to take reasonable steps to avoid a substantial disadvantage where a provision, criterion or practice applied to a disabled person puts a disabled person at a substantial disadvantage compared to those who are not disabled. A failure to make reasonable adjustments is made unlawful in the workplace by section 39(5) of the 2010 Act. The word "*substantial"* in this context means *"more than minor or trivial".*

176. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that the particular provision, criterion or practice disadvantages the disabled person. Accordingly, there is no requirement (as there is in a direct or indirect discrimination claim) to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances. A comparison can be made with non-disabled people generally.

177. The phrase "*provision, criterion or practice"* is not defined by the 2010 Act. It broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices, or arrangements.

178. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled and that they are placed at a substantial disadvantage by the application to them of the relevant provision, criterion, or practice. The words *"could not reasonably be expected to know"* encompasses the concept of constructive knowledge. The question of whether the employer had or ought to have knowledge of the disability in question is one of fact for the Tribunal. There is, however, no remit for a requirement for employers to make every possible enquiry where there is little or no basis for so doing.

179. The duty to make reasonable adjustments requires employers to take such steps as is reasonable to have to take to alleviate the substantial disadvantage caused to the disabled person by the application to them of the relevant provision, criterion, or practice. There is no onus upon the disabled person at the time of the events in question to suggest what adjustments should be made. However, by the time that the matter comes before the Employment Tribunal, the disabled person ought to be able to identify the adjustments which they say would be of benefit.

180. The claimant bears the burden of proof to establish a *prima facie* case that the duty has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. There is no requirement for the disabled person to show that on balance the adjustment would ameliorate the disadvantage. There merely must be a prospect that the adjustment may benefit the disabled person. As was said by Elias P (as he then was) in **Project Management Institute v Latif** [2007] IRLR 580 (at paragraph 54):

> *"… the claimant must not only establish that a duty has arisen, but there are facts from which it could reasonably be inferred, absent an application, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made."*

181. The following are some of the factors which, according to the ECHR *Code,* might be considered when deciding what is a reasonable step for an employer to have to take. These are set out in paragraph 6.28 of the *Code*:

- Whether taking any particular step would be effective in preventing the substantial disadvantage.
- The practicality of the step.

- The financial costs of making the adjustments and the extent of any disruption caused.
- The extent of the employer's financial or other resources.
- The availability to the employer of financial or other assistance to make an adjustment.
- The type and size of the employer.

182. Ultimately, the test of reasonableness is an objective one and will depend upon the circumstances of the case. Adjustments may include measures such as allocating some of the employee's duties to another worker, transferring the disabled person to fill an existing vacancy, altering the disabled person's working hours, providing them with training, assigning a disabled person to a different place of work or arranging home working.

183. We now turn to the complaint of harassment. Section 26 of the 2010 Act provides:

'(1) A person (A) harasses another (B) if –

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

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

(a) The perception of B;

(b) The circumstances of the case;

(c) Whether it is reasonable for the conduct to have that effect

(5) The relevant protected characteristics are-

…disability".

184. Thus, section 26(1) makes clear that there are three essential elements: unwanted conduct; that has the proscribed purpose of effect; and which relates to the relevant protected characteristic. In many cases, there will be considerable overlap between these elements. For example, the question of whether the conduct complained of was unwanted will overlap with the question of whether the conduct created an adverse environment for the employee.

185. Langstaff P (as he then was) observed in **Betsi Cadwaladr University Health Board v Hughes and ors** *EAT 0179/13* that *"the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."*

186. A standalone claim of harassment does not require a comparative approach (in contrast to direct and indirect discrimination). It is not necessary therefore for the claimant to show that another person was or would have been treated more favourably. Instead, it is simply necessary to establish a link between harassment on the one hand and, in this case, the claimant's disability on the other.

187. Unwanted conduct can include a wide range of behaviour including spoken or written words or abuse. It can include (per the EHRC's *Code* at [7.7]) spoken or written words or abuse, mimicry, and jokes.

188. The word "*unwanted"* is not defined in the act but is essentially the same as *"unwelcome"* or *"uninvited".* This is confirmed by the EHRC's *Code* (at paragraph 7.8). Whether the conduct *is "unwanted"* should largely be assessed subjectively from the employee's point of view. The conduct does not have to be directed specifically at the complainant for it to be unwanted by them. The employee does not have to be present when the words or actions occur. There may still be unlawful harassment where the employee finds out about the impugned conduct later.

189. The second limb of the definition of harassment requires that the unwanted conduct in question has the purpose or effect or violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Accordingly, conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect. Conduct that in fact does have that effect will be unlawful even if that was not the intention.

190. Therefore, a claim brought on the basis that the unwanted conduct had that purpose involves an examination of the perpetrator's intention. A claim brought upon the basis that that was the effect of the alleged perpetrator's behaviour involves a consideration of the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect. The test for *'effect'* cases as opposed to *'purpose'* cases therefore has both subjective and objective elements to it. The objective aspect of the test is primarily intended to exclude liability where a claimant is hypersensitive and unreasonably takes offence. Importantly, however, the Tribunal must consider whether it was reasonable for the conduct to have the effect on that particular claimant.

191. Finally, in order to constitute unlawful harassment, the unwanted and offensive conduct must be related to a relevant protected characteristic which in this case is, of course, disability.

192. Harassment is made unlawful in the workplace by section 40 of the 2010 Act. Section 40(1)(a) provides than an employer shall not harass an employee of theirs.

193. We now turn to the relevant law upon victimisation complaint. By section 27 of the Equality Act 2010:

"(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 —

…

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

194. Victimisation is unlawful in the workplace by section 39(4) of the 2010 Act. This provides that:

"(4) An employer (A) must not victimise an employee of A's (B) —

…

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

195. The respondent does not dispute that the claimant did a protected act in raising his grievance on 7 September 2023. *(This was mistakenly said to be dated 9 September 2023 in the case management minute's list of issues).*

196. To succeed in his claim of victimisation the claimant must show that he was subjected to the detriments and the dismissal of which he complains listed in paragraph 158 because of the protected act. Where there has been detrimental treatment and a protected act, but the detrimental treatment was due to another reason then, a claim of victimisation will not succeed.

197. The essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the respondent to subject the claimant to the detriment? In most cases, this will require an inquiry into the mental processes of the respondent's decision makers. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

198. The test is not precisely one of causation. In **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL**, the Court of Appeal held that the Chief Constable's refusal to give a reference to the police force to which the complainant had applied for a post was because of the fact that he had brought proceedings, in the sense that had he not brought the proceedings he would have been provided with a reference. However, the House of Lords rejected this *"but for"* approach to victimisation. While it was true that the reference was withheld by reason that the complainant had brought the race discrimination claim in the strict causative sense, it was held that the focus must be upon *"the real reason, the core reason, the causa causans, the motive"* for the treatment complained of. The real reason for the refusal to provide the reference was that the provision of a reference might compromise the Chief Constable's handling of the case being brought against West Yorkshire Police which was a legitimate reason for refusing to accede to the request. The complainant had not been refused a reference because he had done a protected act. Rather, the refusal was to protect the Chief Constable's position in the litigation.

199. The word *'detriment'* is not defined in the 2010 Act. The Equality and Human Rights Commission's *Employment Code* contains a useful summary of treatment that may amount to a detriment in the context of victimisation. It is a similar concept to that which was looked at in the context of the section 15 claim (paragraph 163). The EHRC say in paragraphs 9.8 and 9.9 that:

> "*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance related awards … a detriment might also include a threat made to the complainant which they take seriously, and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment."*

200. The detriment can encompass a range of treatment from general hostility to dismissal. The position must be considered from the point of view of the claimant. As was said by the House of Lords in **Khan**, it suffices if the complainant can reasonably say they would have preferred not to have been treated differently.

201. Following **Khan**, **Shamoon v Chief Constable of The Royal Ulster Constabulary [2003] ICR 337, HL** established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The House of Lords felt that an unjustified sense of grievance could not amount to a detriment but did emphasise that whether a claimant has been disadvantaged is to be viewed subjectively. In **Derbyshire and others v St Helens Metropolitan Borough Council and others** [**2007] ICR 841, HL**, Lord Neuberger said that the test is not satisfied merely by the claimant showing that they had suffered mental stress. It has to be objectively reasonable in all the circumstances for there to be a sense of grievance. As had been said in **Shamoon**, an unjustified sense of grievance is insufficient. Accordingly, the test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view, but the claimant's perception must be reasonable in the circumstances.

202. In **Nagarajan v London Regional Transport [1999] ICR 877, HL** it was held to be sufficient to make out a claim if the protected acts had a significant influence on the employer's decision making. In **Igen Limited (formerly Leeds Careers Guidance and others) v Wong and others [2005] ICR 931** it was clarified that for an influence to be *'significant'* it must be more than trivial.

203. Detriment cannot be because of the protected act in circumstances where there is no evidence to the person who allegedly inflicted the detrimental treatment, or the dismissal of the employee knew about the protected act. Knowledge of the protected act is a pre-condition of a finding of victimisation.

204. It is not necessary for the Tribunal to distinguish between a conscious and a subconscious motivation when determining whether a complainant has been victimised. The key question is, why did the complainant receive less favourable treatment? If it was because of the doing of protected acts, then the victimisation claim will be made out even if the discriminator did not consciously

realise that they were prejudiced against the complainant because the latter had done a protected act. There can therefore be liability for victimisation even where the motive for the detrimental treatment is benign.

205. Claims under the 2010 Act are subjected to the *"shifting burden of proof"* in section 136. This provides that the initial burden is on the claimant to prove facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has contravened a provision of the 2010 Act. If so, then the burden passes or shifts to the respondent to prove that discrimination or victimisation did not occur. If the respondent is unable to do so, the Tribunal is obliged to uphold the complaint of victimisation or discrimination.

206. Section 136 is designed to help claimants since discrimination, harassment and victimisation is notoriously hard to prove. However, it is still for the claimant to show a *prima facie* case for the respondent to answer. It is insufficient for the complainant to simply to make allegations of discrimination, harassment, or victimisation. The establishment of a *prima facie* case will often rely on inferences drawn from the facts.

207. In **Hewage v Grampian Health Board [2012] ICR 1054** at [32], Lord Hope suggested that it is appropriate to go straight to the reason why an alleged discriminator or harasser (as the case may be) acted as they did unless there is room for doubt. He *said "… it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the Tribunal is in a position to make positive findings on the relevant evidence one way or the other."*

208. In **Shamoon** Lord Nicholls said (at [8]), *"No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."* He went on to say at [12] that, *"There will be cases where it is convenient to decide the less favourable treatment first … When formulating their decisions Employment Tribunals might find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they had decided why the treatment was afforded to the claimant."*

209. In **Efobi v Royal Mail Group Limited [2021] UK SC 33**, the Royal Mail did not call evidence from anyone who had actually been responsible for rejecting any of the claimant's job applications. The witnesses who were called sought to explain the likely reasoning processes of the recruiters but could not say what the actual reasons for the relevant decisions were.

210. Lord Leggatt said (at [40] and [41]) that, "*At the first stage the Tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. This 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. It follows [that] no adverse inference can be drawn at the first stage from the fact that the employer has not provided an*

explanation. In so far as the Court of Appeal in Igen Limited v Wong at paras 21 to 22 can be read as suggesting otherwise, that suggestion must in my view be mistaken. It does not follow, however, that no adverse inference of any kind can be drawn at the first stage from the fact that the employer has failed to call the actual decision makers. It is quite possible that, in particular circumstances, one or more adverse inferences could probably be drawn from that fact.

So far as possible, Tribunals should be free to draw, or decline to draw, inferences from the facts of the case before them using their commonsense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the points on which the witness could potentially have given relevant evidence, and the significance of those matters in the context of the case as a whole. All these matters are interrelated and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

211. Finally on the law, we look at the issue of jurisdiction. By section 123 of the 2010 Act proceedings upon a complaint within section 120 (being complaints to an Employment Tribunal relating to a matter for which the Tribunal is afforded jurisdiction) may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable. By section 123(3), conduct extending over a period is to be treated as done at the end of the period.

212. To determine whether a claim has been brought in time, the particular act complained of must be identified. For example, where the alleged discriminatory act is dismissal then the relevant date is when the notice expires.

213. In **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**, the Court of Appeal said that the test to determine if a complaint was part of an act extending over a period is whether there was an ongoing situation or continuing state of affairs in which the claimant was treated less favourably. Tribunals need to look at the substance of the complaints in question – as opposed to the existence of a policy or regime – and determine whether they can be said to be part of one continuing act by the employer. The concept of a policy, rule or scheme are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of what is meant by an act extending over a period. The issue essentially was whether the Police Commissioner (in that case) was responsible for the ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably.

Discussion and Conclusions

214. We now turn to our conclusions. We shall apply the relevant law to the issues in the case to arrive at our conclusions. We shall start with the claimant's complaint brought under section 15 of the 2010 Act of unfavourable treatment for something

arising in consequence of disability. This is at paragraph 158. 4.1 and centres upon the disciplinary process.

215. There is no dispute that the respondent issued the claimant with a final written warning following the disciplinary hearing held on 2 August 2023. The factual findings are at paragraphs 41 to 47. There is also no dispute that the claimant's appeal against dismissal was refused. The factual findings are at paragraphs 52 to 55, 80 to 84, 95, 103 and 104 and 143.

216. The list of issues identifies that the dismissal of the appeal against the decision to issue the claimant with a final written warning took place on 19 September 2023. In fact, it was the appeal hearing which occurred on that date. The outcome was not communicated until 5 October 2023.

217. It follows that the Tribunal has jurisdiction to consider this aspect of the claimant's claim. He commenced the early conciliation process on 23 December 2023. That was within three months of the end of the course of conduct relating to the respondent's decision to issue the claimant with a final written warning. The disciplinary process was, in our judgment, a continuing act which ended when the claimant received the disciplinary appeal outcome. In reaching this conclusion, we have applied the *ratio* of **Hendricks** (in paragraph 213 above). We need not, therefore, be concerned with any issue of extending time on just and equitable grounds to vest the Tribunal with jurisdiction to consider this aspect of the claimant's claim.

218. Returning to the substantive issue upon the section 15 claim, the Tribunal has little hesitation in finding that issuing him with a final written warning and dismissing his appeal against that warning are acts of detriment. On any view, the respondent's decision making was disadvantageous to the claimant per paragraph 5.7 of the EHRC Code cited in paragraph 163. In accordance with the *ratio* of **Shamoon** (mentioned in paragraph 201) issuing a worker with a final written warning is something which the worker may reasonably view as being to his disadvantage. The same applies to the decision to dismiss the appeal against that warning.

219. The respondent fairly and properly accepts (in paragraph 41 of Mr Rhodes' submissions) that the claimant's failure to attend work on 27 and 28 July 2023 and him going through what he described *as "a mental health crisis"* are things which arise in consequence of his disability. As noted in paragraph 5, the respondent's solicitors conceded on the respondent's behalf that the claimant was, at the time with which the case is concerned, a disabled person within the meaning of section 6 of the 2010 Act by reason of mental impairments arising from ADHD, anxiety, and depression.

220. Applying the principles set out in paragraph 162, it follows that there has been unfavourable treatment of the claimant and that the failure to attend work during week commencing 27 July 2023 was for something arising in consequence of disability. However, the respondent's case is that the reason for the disciplinary action was not because the claimant failed to attend work during week commencing 27 July 2023 (accepted to be for something arising in consequence of disability) but rather because of his failure to contact the respondent to let them know that he would not be attending work (which the respondent contends was not something arising in consequence of disability).

221. The Tribunal accepts the respondent's case that the disciplinary action taken against the claimant was not because he was absent from work as such but rather was because he was absent without making contact with the respondent. Hence, the absence was unauthorised.

222. The Tribunal is able to make this finding without hearing evidence from Bethany Burns. Her letter makes quite clear her thought process that the principal concern was the failure to contact the pub regarding the absence between 27 July and 31 July 2023 (page 90 of the bundle). In the disciplinary hearing, she focused upon the absence reporting procedure and told the claimant that breach of that was gross misconduct (pages 85 and 86).

223. Applying the principal in **Hewage** and **Shamoon** (paragraphs 207 and 208) the Tribunal is satisfied that we can identify the reason why Beth Burns issued the claimant with a final written warning. The Tribunal therefore does not need to be concerned with the two-stage approach in section 136 of the 2010 Act. The Tribunal would have been helped by hearing from Beth Burns. However, by applying the principles in **Efob**i (at paragraphs 209 and 210) the Tribunal is satisfied that from the material available we can find with confidence what was in the mind of Beth Burns as decision maker. Accordingly, no adverse inference shall be drawn against the respondent arising from the failure to call her to give evidence.

224. Mr Simmons' decision to uphold Beth Burns' sanction was based upon the failures to contact the pub on 27 July 2023 and in the subsequent days. We refer to paragraph 143. In evidence before the Tribunal, Mr Simmons several times said that he could not understand why the claimant could not telephone or send a text message in circumstances when he was able to travel around the country and book himself into hotels. We are therefore satisfied that Mr Simmons, like Ms Burns, was not so much concerned about the claimant's absence due to mental health issues but rather the failure to communicate with the pub.

225. The Tribunal is therefore satisfied that the *"something"* which led to the disciplinary sanction (and the maintenance of it by Mr Simmons) was the failure to contact the pub and not the period of ill-health absence itself. The unfavourable treatment in imposing the disciplinary sanction upon the claimant (and refusing to overturn it) was, accordingly, because of the failure to contact the pub. The crucial question is whether the failure to make contact with the pub (being the relevant *'something'*) arose in consequence of the claimant's disability.

226. As noted in paragraph 56, there is no medical evidence from the claimant's GP or any other medical practitioners concerned with his care corroborating his case of an inability to make contact as asserted in his appeal at page 95. Ultimately, however, the decision is one for the Tribunal to take after considering all of the evidence available to us. The availability of supportive medical evidence would no more compel the Tribunal to find in the claimant's favour upon this point than does the absence of it compel a finding in favour of the respondent.

227. The claimant's conduct around the end of July 2023 was on any view irrational. We refer to paragraphs 32 and 33. The claimant suffered a mental health crisis while on holiday abroad. He curtailed the holiday without informing his friends who were worried for his welfare. After suffering the set back of narrowly failing the personal licence examination, he picked up the unpacked holiday suitcase and left Sheffield. He had no plans and ended up aimlessly travelling around Scotland and England.

228. As he mentioned to Beth Burns at the disciplinary hearing held on 2 August 2023 (page 85) he was on airplane mode for five days. He was effectively incommunicado. He put himself out of contact with others.

229. The events of July 2023 followed hard on the heels of a 20 days' absence in May 2023 during which time the claimant sought the assistance of his general practitioner. We refer to paragraphs 27 to 32. The episodes in May 2023 and July 2023 followed what had been by and large around five years of reliable service. As we noted in paragraphs 14 to 20, there had been a mental health episode in 2018 which caused only a one-day absence from work but otherwise, there was very little in the way of sickness absence. There had been a short break in continuity due to mental health issues during 2018 (paragraph 25). That cannot detract however from the Tribunal's finding that on the whole the claimant had provided effective and reliable service for some years prior to the summer of 2023.

230. It follows therefore that what happened in May 2023 and in particular in July 2023 was out of character. The claimant deciding to take himself off without informing anyone of his whereabouts and going incommunicado such that attempts to reach him failed are the actions of an individual behaving irrationally and not thinking straight. Not contacting the pub or the respondent is of a kind with that irrational behaviour. An ability to book train tickets and hotel accommodation on the one hand while not contacting the respondent on the other made no sense to Ms Burns and Mr Simmons. Indeed, it does make little sense. It makes little sense because it is irrational behaviour from a hitherto reliable employee. As the claimant said in his appeal letter (paragraph 53) his conduct was "*highly out of character for me."*

231. The Tribunal therefore concludes that the claimant's failure to contact the respondent and with the pub was part of the irrational behaviour displayed by him in the last week of July 2023. It is fairly accepted by the respondent that the claimant's failure to attend work that week and the mental health crisis which he was undergoing are things arising from his disability. As the Tribunal finds that the failure to contact the respondent was of a kind with that conduct, it follows that that act (or more accurately failure to act in not making contact) was also something arising in consequence of disability.

232. It follows therefore in our judgment that the unfavourable treatment (of issuing the final written warning and then refusing to overturn it on appeal) was because of the failure to contact the pub, which failure was something which arose in consequence of disability. The claimant has therefore established, subject to the respondent's defences, that he was unfavourably treated for something arising in consequence of disability.

233. The Tribunal finds that the respondent had constructive if not actual knowledge of disability. We agree with Mr Rhodes' submissions that the matters prior to May 2023 were insufficient to put the respondent on notice of a disability issue. Those matters are referred to in paragraphs 15 to 25 above. The occasional days of absence, the claimant playing down the significance of the day's absence taken on 20 September 2018 (paragraph 15), the requests for help made by the claimant of Ms Ford and Ms Baxter on isolated occasions, and the circumstances prior to May 2023 were in our judgment insufficient to cause the respondent to make enquiries about the claimant's mental well-being. We have also found that the claimant did not confide in either Mr Elmer or Mr South anything serious with

his mental health which is surprising given the close nature of their relationships at the time.

234. There was nothing to put the respondent on notice of an issue to cause them to make enquiries. The email to Mr Simmons of 23 March 2023 was likewise insufficient to put the respondent on notice. Alluding to a period of poor mental health in 2018 given his good service after then is insufficient to put Mr Simmons on notice of a potential problem. There was no basis for him to take any action *per* the principles in paragraph 178.

235. This finding is something of a double-edged sword from the respondent's perspective. The marked deterioration in the claimant's mental health in the summer of 2023 was, in our judgment, sufficient to alert them to the possibility of issues connected to a disability. The example given by the EHRC in their *Code* (cited at paragraph 173) above is pertinent. As we have said, the claimant by and large provided reliable and effective service for several years before the summer of 2023. Then, he was absent from work in May 2023 for 20 days. The information which the claimant divulged to the respondent during and shortly after the May 2023 absence is recorded in paragraphs 27 to 31. The claimant then returned to work on a return-to-work plan implemented in mid-June 2023.

236. There was then the absence during week commencing 27 July 2023 during which time the claimant was incommunicado and the respondent was unable to contact him. The claimant mentioned to Beth Burns at the disciplinary hearing his mental volatility and that he had returned from a holiday abroad early. Beth Burns acknowledged the claimant's mitigation by reason of mental health issues. In the appeal letter (referenced in paragraph 53 above), the claimant again mentioned his poor mental health which triggered him going missing for five days. He said that he suspected this to be a nervous breakdown leading him to disconnecting himself from all means of contact. He made reference to self-sabotaging his career with the respondent. He said that he had run away from his entire life in a mentally volatile and vulnerable state (we refer to paragraph 53).

237. The claimant also mentioned to Mr South the mental health issues during the return-to-work discussion of 21 August 2023 (paragraphs 59 and 60). The claimant's grievance complained of a violation of the mental health and well-being policy and the lack of support for his mental health (paragraph 66). He returned to work on a phased basis. The claimant referred to his mental health issues at the grievance and disciplinary appeal hearing before Mr Simmons and Mr Edwards on 19 September 2023 (paragraph 99).

238. On these findings, there were a number of red flags over the course of the disciplinary process sufficient to put the respondent on notice to do what they could to find out if the claimant had a disability for the purposes of the 2010 Act. As the EHRC *Code* provides (as quoted in paragraph 173 above) it would have been reasonable to expect the respondent to explore with the claimant the reason for the marked changes in his behaviour and whether the difficulties arose because of something arising in consequence of disability. This should have extended to an enquiry as to whether the failure to make contact (and put himself out of contact) arose because of the disability. There was certainly good cause to do so. Indeed, the respondent encourages its managers to look out for such matters. The mental health and well-being policy provides that line managers *"have a pivotal role in creating a working environment which is conducive to the well-being of all employees and to spot changes in behaviour or performance*

which could indicate an underlying mental health issue." At page 385, the policy goes on to provide that the respondent "*will provide support to employees in the following ways."* A number of supportive measures are then listed. The failure to adhere to the policy led to missed opportunities to detect the issues affecting the claimant. Such is sufficient to constitute constructive knowledge.

239. It follows therefore that the respondent's defence of lack of constructive knowledge (if not an actual knowledge) of disability must fail).

240. As Sales LJ commented in **Grosset** (cited in paragraph 170) the respondent would have been wise in these circumstances to look into matters carefully before taking the impugned action against the claimant. There was plainly good cause to do so.

241. We find that the claimant was treated unfavourably (by being disciplined and refusing to overturn the sanction on appeal) for something (failing to contact the respondent). That *'something'* for which he was disciplined (the failure to contact the respondent) was irrational behaviour arising from the admitted disability. The respondent had constructive knowledge of the disability. (The respondent does not need to have actual or constructive knowledge that the *'something'* arose in consequence of the disability. However, for the reasons given in paragraphs 226 to 231, the Tribunal finds that the '*something'* did arise in consequence of the disability).

242. This then leaves the question of justification. The aims relied upon by the respondent were (per paragraph 158.4.4) firstly, to look after the health, safety, and welfare of employees, and secondly the need to run an efficient service which requires employees to attend their rostered shifts. These are of course legitimate aims. There is nothing unlawful about them. They are perfectly proper.

243. The legitimate aims find their expression in the mental health and well-being policy (pages 383 to 388) and the '*absent without leave'* policy (pages 354 and 355) respectively.

244. The absent without leave policy makes it clear that unauthorised absence and being absent without leave is considered as a gross misconduct offence to be managed under the disciplinary policy and procedure. The policy provides that once employees have returned to work, an investigation should be carried out regarding their absence. This should be done before making a decision about whether a disciplinary sanction needs to be applied.

245. The mental health and well-being policy provides, as we have already noted, that line managers *"have a pivotal role in creating a working environment which is conducive to the well-being of all employees and to spot changes in behaviour or performance which could indicate an underlying mental health issue."* At page 385, the policy goes on to provide that the respondent "*will provide support to employees in the following ways."* A number of supportive measures are then listed.

246. The non-legal members have many years of industrial relations practice between them. They have never seen a stand-alone absent without leave policy. This must therefore be indicative of a problem within the respondent of employees going absent without leave.

247. The threat of disciplinary action (including the ultimate sanction of dismissal) is set out in the policy. The aim, plainly, is to ensure attendance. Being short-

staffed can lead to significant problems within the respondent's sector. The consequence of being short staffed will result in poor service, additional pressure upon those and members of staff who have turned in for their shifts. An example of the distress that could be caused may be seen by reference to the incident of 22 October 2023 (paragraph 118).

248. Where an individual fails to turn in for no good reason, then the absent without leave policy is on any view apt. The difficulty arises of course where there is a good reason for absence, particularly one concerning mental health. There is, in the Tribunal's judgment, something of a tension between the hard but reasonable line taken in the absent without leave policy on the one hand and the empathetic approach of the mental health and well-being policy on the other. The approach taken by the decision makers dealing with the disciplinary issue in Mr Dunn's case was to prioritise business needs over the claimant's welfare.

249. Upon this issue, the Tribunal must apply the principles around justification in the jurisprudence referenced in paragraphs 165 to 167. An objective balance is to be struck between the discriminatory effect of the measure (infringing the claimant's right not to be discriminated against for something arising in consequence of his disability) and the needs of the respondent's undertaking. The more serious the disparate adverse impact, the more cogent the justification which is needed for it. It is for the Tribunal to weigh the reasonable needs of the respondent's undertaking against the discriminatory effect of the measure and to make our own assessment of whether the respondent's needs outweigh the discriminatory effect of that measure.

250. Imposing a final written warning upon an employee is a serious measure. It is one step short of the ultimate sanction of dismissal.

251. Imposing a final written warning upon an employee who has undergone or is undergoing an acute mental health crisis goes nowhere, in our judgment, to achieving the first pleaded legitimate aim of looking after the health, safety, and welfare of employees. Adopting the punitive mindset taken by the respondent upon this issue was inconsistent with the mental health and well-being policy which encourages the provision of a supportive working environment for the mental well-being of employees.

252. It is open to the Tribunal to make its own assessment of whether the discriminatory impact of the measure (the final written warning and the refusal of the appeal) and the needs of the respondent's undertaking. Before taking such a strong measure, the respondent ought to have taken steps to ascertain the issue which prevented the claimant from contacting the pub during the last week of July 2023. Were it to be found that mental health was the underlying cause of that failure, then supportive measures as may have been recommended by occupational health could then have been taken. (Of course, if such enquiries revealed that the employee in question had no medical justification for their absence then application of the absence without leave policy may well then be justified).

253. The means adopted of issuing the claimant with a final written warning in the circumstances appears to contribute little to the aim being pursued of supporting the claimant to return to work. No one from the respondent gave evidence to explain how the stance the respondent took which had a serious discriminatory impact on the claimant was efficacious in achieving the aim of safeguarding the health, safety, and welfare of the claimant. The claimant was plainly aggrieved

at the respondent's actions, and he was looking for support from the respondent (paragraph 48). Less punitive and more productive means could and should have been adopted to achieve that aim. Something less discriminatory cuold have been done to achieve the aim and indeed was done by implementing a phased return to work and altered working hours for the claimant.

254. The second pleaded legitimate aim was the need to run an efficient service, requiring employees to attend their rostered shifts. That is essentially the aim pursued by the absent without leave policy. Objectively, issuing the claimant (who had undergone a mental health crisis) with a final written warning for something arising in consequence of disability (as we have found) was a significant limitation upon the claimant's right not to suffer such treatment. It is hard to see how administering a first and final written warning and then upholding it upon appeal was proportionate to the likely benefit of that measure.

255. The measure in question had a significant impact upon the claimant's well-being. He plainly felt extremely aggrieved about it (and still does to this day). The measure was not going to achieve the aim of the claimant's return to work immediately in any case as he was signed off by his GP as unfit to work when the first and final written warning was administered. A more productive way of procuring the claimant's return to work would have been to implement the supportive measures in the mental health and well-being policy. Indeed, the respondent did so by offering him a phased return to work with effect from 31 August 2023 (at paragraph 62). Mr South plainly felt that a phased return to work policy was a more productive way forward as he attempted to stop matters reaching the disciplinary stage (paragraph 40). He gave no evidence to justify why and how the issuing of a first and final written warning was a proportionate means of achieving the aim. Indeed, his evidence on this appears to be to the contrary. Mr Hudson was of the view that the sanction was *"within the band of reasonable responses"* but did not explain in the relevant part of his evidence how the sanction went to achieve the aim in the claimant's case.

256. In these circumstances, it is difficult how the application of the first written warning achieved anything and went towards the respondent's aim of procuring the claimant's attendance at work. Something less discriminatory could have been done instead by allowing a phased return to work and an altered work rota. Indeed, the claimant responded positively to the reasonable adjustments which were made for him by the respondent. We refer for example to paragraphs 115 and 139. Occupational health was supportive of the adjustments which had been made (paragraphs 110 and 113). The administration of the first and final written warning and its maintenance by Mr Simmons was damaging of the claimant's morale while doing nothing to encourage his return to work. The latter was achieved by the implementation by Mr South of reasonable adjustments for which generally the claimant was appreciative and plainly was a less discriminatory way of achieving the aim of securing the claimant's attendance at work. A first and final written warning may be apt where an employee fails to attend work for no reason, but not so where disability is the reason for absence, and which engages rights afforded to the employee by Parliament in the Equality Act 2010. Infringement and restriction of such rights requires coherent justification which is absent in this case.

257. We find that the decisions of Beth Burns and Mr Simmons were the result of a muddle created by inconsistent policies and prioritisation of business need over employee welfare. We have determined that the disadvantages caused by the

disciplinary sanction taken by the respondent against the claimant was disproportionate to the aim being pursued of the maintenance of an efficient service. That aim was in fact achieved by the far less draconian steps taken by the respondent of making reasonable adjustments for the claimant. It follows therefore that the justification defence fails. The respondent has not discharged the burden of proof upon it to show that the disciplinary sanction was a proportionate means of achieving the pleaded and legitimate aims. Accordingly, the claimant succeeds with his claim that he was unfavourably treated for something arising in consequence of disability.

258. We now turn to the reasonable adjustments claim. The first issue which arises is whether the respondent knew or could reasonably have been expected to know that the claimant had the disability and if so from what date.

259. Given the conclusions in paragraphs 232 to 235 above, it follows that the respondent had constructive knowledge if not actual knowledge of the claimant's disability prior to the date of the claimant's return to work on 31 August 2023.

260. It is not in dispute that the respondent applied to the claimant a provision, criterion, and practice of requiring him to work a variable shift pattern at the Water Works (involving working weekends and late nights). The respondent also accepts that the variable shift pattern would place him at a disadvantage compared to non-disabled persons. This concession was subject to the caveat that the respondent did not accept that weekend working specifically would place the claimant at such a substantial disadvantage. This reservation is well-founded. We refer to paragraph 135. As Mr Rhodes observed in paragraph 58 of his closing written submissions*, "Nowhere in the occupational health report is mention made of the fact that the claimant can only work weekday shifts".* On the contrary, the occupational health report had recommended the claimant to continue the shift pattern which he was working which included shifts at weekends.

261. The respondent does not concede that they knew or could reasonably have been expected to know that the claimant was likely to be placed at that disadvantage prior to 20 October 2023. The Tribunal has of course found that the respondent could reasonably have been expected to know that the claimant was a disabled person prior to the date of his return to work on 31 August 2023. There were sufficient pointers by that date to put the respondent on constructive notice of the claimant's disability status by that date.

262. The question therefore arises as whether between 31 August 2023 and 20 October 2023 there was sufficient to put the respondent on notice of the disadvantage in question. (We are not concerned with the period prior to 31 August 2023 because the claimant was not fit for work from the end of July 2023 until then. The reasonable adjustment provisions are of course aimed at reducing barriers to disabled people in the workplace).

263. In our judgment, there was sufficient to put the respondent on notice of the disadvantage in question. In the return-to-work meeting of 25 August 2023, the claimant said that he wished to avoid doing *"mad hours",* suggested a phased return to work and undertaking day shifts/midweek shifts for the first couple of weeks (paragraph 61). This was in the context of him informing Mr South of a possible diagnosis of ADHD. The claimant's GP certified him as fit to work with adjustments – we refer to the GP fit note of 12 September 2023 at paragraph 69.

Mr South accommodated the majority of the claimant's requests as we noted in paragraphs 72 to 74.

264. The issue therefore becomes that of the steps which could have been taken to avoid the disadvantage and whether it was reasonable for the respondent to have to take those steps. The steps in fact taken by the respondent were recorded in paragraphs 71 to 76. To return to paragraph 58 of Mr Rhodes' submissions, occupational health recommended the continuation of the shift pattern which Mr South had made available for the claimant's benefit. We have noted the claimant's expression of appreciation in the email of 21 October 2023 (at paragraph 115). The real bone of contention as far as the claimant was concerned was Mr South's unwillingness (as he saw it) to accommodate the claimant's wish to work on Mondays training on stocks as a reasonable adjustment.

265. In our judgment, objectively the respondent had done what was reasonably required to accommodate the claimant's needs. This had enabled the claimant's return to work. By and large, he was working his full-time hours (and where he was not the respondent was paying him his full salary).

266. Mr South highlighted the difficulties of accommodating the claimant's request to work on Mondays. We refer to paragraphs 77 to 79. It would have been inconvenient for Mr South to have to change the rotas in circumstances where he had planned them weeks in advance. That of course is not an unassailable answer to the reasonable adjustments complaint. However, on the facts of this case, it is something which the Tribunal takes into account. Shunting an employee to accommodate a disabled employee is a step which an employer might reasonably take as a reasonable adjustment. It presents obvious industrial relations issues. It is not a measure to be taken lightly. Occupational health was supportive of the measures which the respondent had implemented following the claimant's return to work at the end of August 2023. Doubtless, the claimant would have preferred to have worked on Mondays. However, it is a question of what is reasonable.

267. The employer's duty is only to make reasonable adjustments. In our judgment, they had done so in an efficacious way to facilitate the claimant's return to work. The measures taken had succeeded. It follows therefore that the respondent did not fail to make reasonable adjustments for the claimant which had a prospect of alleviating (and indeed did to a large degree) alleviate the disadvantage caused to him by requiring him to comply with the PCP. This complaint therefore fails.

268. We now turn to the harassment complaint.

269. The first issue (in paragraph 158.6.1.1) is about Mr Simmons' email of 26 September 2023 complaining about the claimant's *"lack of decency"* in failing to let the training team know that he was unable to attend an online training course of 4 August 2023. Even when it was pointed out to him that the claimant had submitted a sick note to cover that absence, Mr Simmons had replied to the effect that he should still have let the training team know so there *was "no excuse really."* The factual findings in paragraphs 50, 143 and 154.2.

270. As we noted in paragraph 183, upon a harassment claim there are three essential elements. The first is that there must be unwanted conduct. The second is that this must have the proscribed effect of being done for the purpose or must have the effect of violating the claimant's dignity or creating an intimidating etc

environment for him. The third essential criterion is that the impugned conduct must relate to the protected characteristic (in this case of disability).

271. As noted in paragraph 187, the conduct does not have to be directed at the complainant. The complainant does not have to be present when the words or actions occur.

272. We find that there was unwanted conduct when the claimant came across the emails in question on 6 November 2023. From the claimant's perspective, this clearly would be unwelcome (per the EHRC's Code at paragraph 7.8 referred to in paragraph 188 above).

273. The impugned conduct of Mr Simmons relates to the claimant's disability. On any view, the communication was about a disability related absence and the claimant's conduct during it.

274. We have little hesitation in finding that Mr Simmons did not make these remarks with the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. It was not directed at the claimant. Mr Simmons may have foreseen that the claimant may come across it but that is not the same thing as directing a comment at him with the proscribed purpose.

275. The real issue therefore is whether Mr Simmons' conduct reasonably had the effect of violating the claimant's dignity or creating an intimidating etc environment for him. From the perspective of the claimant, it did have the proscribed effect. However, in our judgment it was not reasonable in the circumstances for the conduct to have that effect. As was said in the **Betsi Cadwaladr University** (cited in paragraph 185) the proscribed conduct is defined in the legislation using strong words. The effect of them should not be cheapened by crediting lesser consequences with having those proscribed effects. It is difficult to see how coming across an unfortunate but mildly expressed and casual observation by a busy area manager can reasonably be said to be a violation of the claimant's dignity or such as to create an intimidating etc environment for him in the workplace. Upon this basis, this limb of the harassment complaint stands dismissed.

276. We now turn to the second limb of the harassment complaint. This again concerns events arising on 26 September 2023 and centres upon the screengrab circulated by Mr Simmons of the BBC Radio 5 Live article about sickness absence. This was followed up by Mr South's email which read *"100%. I'm signing off for two weeks."* The factual findings are in paragraphs 85 to 93, 154.3, and 154.7.

277. As far as Mr Simmons' conduct is concerned, we find that this harassment allegation fails at first base because it was not unwanted conduct. The claimant fairly recognised that it was Mr Simmons' practice to circulate articles of interest from time to time. The Tribunal accepts that it was Mr Simmons' practice to do so.

278. The Tribunal takes a different view about Mr South's comment. In our judgment, the respondent is correct to say that Mr South's comment was not directed at the claimant. However, it was certainly about him. The claimant read it and took issue with Mr South about it at the time. Mr South feigned ignorance that it was he who had sent the message which caused the claimant offence.

279. We therefore accept that Mr South's comment was unwanted in the sense of being unwelcome or uninvited. It was an unfortunate, unnecessary, and snide remark on Mr South's part at a difficult time for the claimant. While the Tribunal can understand the difficulty which Mr South had in managing the claimant, it is unfortunate that on this occasion his actions fell short of his usual professionalism.

280. We accept that the remark was related to the claimant's difficulty. This is an inevitable finding. It was about the claimant's disability related absence.

281. We accept that Mr South's email was not done for the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. We can credit Mr South with this being a somewhat misguided attempt at humour. However, we find that the email reasonably had the proscribed effect. The claimant was clearly upset about it as he took issue with Mr South upon it straightaway. Objectively, in our judgment, it was reasonable for the claimant to have perceived Mr South's conduct to have that effect. The sentiments expressed in the email of 28 September 2023 at paragraph 88 are well-founded and well-expressed. To find that his line manager was making such an unprofessional remark to his area manager reasonably would have the effect, in our judgment, of being a violation of the claimant's dignity and of creating an intimidating etc environment for him. Knowing that remarks such as this were being made moved the claimant to record his well-founded observations in the email referenced at paragraph 88.

282. Accordingly, the claimant's complaint of harassment related to disability succeeds in part. The allegations of harassment which she makes as against Mr Simmons fail. That which he made against Mr South succeeds.

283. We now turn to the victimisation complaint. There is no issue that the claimant did a protected act. The respondent accepts the grievance of 7 September 2023 to be a protected act. This, on any view, is a concession properly made as the grievance raises (amongst other things) complaints about a breach by the respondent of the 2010 Act.

284. We must therefore turn to the question of whether the claimant did the impugned acts listed in paragraph 154 (at sub-paragraph 7.3). The first of these is that Mr Simmons and Mr McCafferty engaged only with four of the five issues raised by the claimant in the claimant's grievance during the grievance hearing and the grievance appeal hearing respectively. The claimant says that they omitted to deal with the complaint of a breach of the 2010 Act. The factual findings are at paragraphs 95 to 103 and 154.4.

285. Closely linked to this issue is that at sub-paragraph 7.3.2 being the refusal to acknowledge the claimant's observation in his email of 20 September 2023 that he had endeavoured to get Mr Simmons to deal with the allegation of a breach of the 2010 Act. The factual findings are at paragraphs 103 to 106, 109.5 and 154.6.

286. We agree with the claimant that Mr Simmons only discussed the allegation of a breach of the 2010 Act at the grievance hearing because the claimant reminded him so to do (paragraph 109.5). We also agree with the claimant that Mr Simmons failed, at the grievance hearing, to engage with the claimant's point that the respondent was in breach of the obligation not to treat him unfavourably

for something arising in consequence of disability. We refer to paragraphs 103 to 106. Mr Simmons' failure was accepted by Mr McCafferty (paragraph 154.6).

287. We find that Mr McCafferty fairly acknowledged Mr Simmons' omission to deal with the point. He then dealt with it himself, concluding (wrongly as we find) that the claimant was not treated unfavourably for something arising in consequence of disability (page 179).

288. We conclude that Mr Simmons' failure to deal with that complaint was a detriment. Plainly, a reasonable worker would take the view that a failure to deal with a substantive aspect of a grievance was to his or her disadvantage.

289. The issue then is whether that was because the claimant did the protected act. As we said in paragraph 200, it is sufficient to make out this claim if the fact that the claimant did a protected act had a significant (that being a more than minor or trivial) influence on Mr Simmons' decision making.

290. We are in a position, applying **Shamoon** and **Hewage** to move straight to the reason why the respondent acted as they did. In our judgment, although the claimant was subjected to a detriment by not having this aspect of the grievance dealt with by Mr Simmons, it was unconnected with the fact that he did a protected act. It was entirely due to Mr Simmons misunderstanding the point that was being made by the claimant. As we have observed, this may well have been the result of Mr Simmons adopting a different structure to the disciplinary and grievance outcome letter than that adopted by the claimant. Such an approach certainly did not help matters and increased the risk of Mr Simmons overlooking a point raised by the claimant. In any case, as we say, in so far as Mr Simmons endeavoured to deal with it he misunderstood what it was that the claimant was trying to say. That was the reason why Mr Simmons did not deal with the issue of an alleged breach of the 2010 Act.

291. We do not find that Mr McCafferty's acts were a detriment. Mr McCafferty did deal with the point raised by the claimant about alleged unfavourable treatment for something arising in consequence of disability. It may not have been the reply which the claimant wanted. On our findings, Mr McCafferty was in any case incorrect. However, the victimisation allegation is that the respondent did not engage with the allegation of a breach of the 2010 Act during the grievance or the grievance appeal. Mr McCafferty plainly did so.

292. As further point, the claimant complains that Mr Simmons did not engage at the grievance hearing with the claimant's 2010 Act complaint. It is right to say that the claimant had to prompt him to deal with it. That said, Mr Simmons did then engage with the issue. He did not try to shut the claimant down. He took no issue with the claimant's minutes of the grievance and appeal hearing which went into some detail about the claimant's allegation of a breach of the 2010 Act. Mr Simmons did then engage with the issue in the grievance and disciplinary appeal outcome letter albeit that he missed the claimant's point. The Tribunal therefore cannot accept that there was a wholesale failure by Mr Simmons to deal with that aspect of matters.

293. We then turn to the third allegation of victimisation which is the refusal to amend the minutes to reflect exchanges with Mr Simmons in the grievance hearing. The factual findings are at paragraphs 109.6, 145, and 154.5.

294. This was a difficult allegation to understand. As we have said, no real issue was taken by the respondent about the claimant's amendments to the minutes. It is

difficult, frankly, to see this as anything other than an unjustified sense of grievance on the claimant's part. The respondent's actions were not to subject the claimant to a detriment. On the contrary, they effectively noted the claimant's amendments and did not take issue with them.

295. The next victimisation allegation is that Mr Simmons informed the claimant that he had been fortunate not to have been dismissed arising out of incidents of 27 and 28 July 2023. A remark along these lines was made by Beth Burns (paragraph 146) and by Mr Edwards (paragraph 156). No such remark was made by Mr Simmons and therefore this allegation must fail on the facts.

296. The Tribunal can accept that the remarks made by Beth Burns and Mr McCafferty (to the effect that he was lucky to escape dismissal) constitute detrimental treatment of the claimant. Any reasonable employee may consider that such remarks changed their position for the worse or put them at a disadvantage. It may make the employee feel targeted in some way. It would certainly reasonably make them less secure in their role.

297. However, we are satisfied that these remarks had nothing to do with the protected act. In the case of Beth Burns, the remark was made before the claimant did the protected act. That cannot therefore have been causative of her remarks.

298. The claimant had done the protected act prior to Mr Edwards' remark. Indeed, the impugned remark was said at the grievance hearing to discuss the grievance and the disciplinary appeal. The two were intertwined as the claimant was (justifiably) complaining in his disciplinary appeal of a breach of the 2010 Act. We are satisfied however that Mr Edwards made the remark not because the claimant had done the protected act but rather as part of the appeal process against the disciplinary sanction warning. What needs to be considered is Mr Edwards' mental processing. He was effectively advancing the respondent's case that the sanction was appropriate. The context was the claimant's remark that his mitigation had not been considered. Mr Edwards' comment was to the effect that it had been, hence the respondent had not applied the ultimate sanction. Applying **Khan,** this was the reason why Mr Edwards said what he did. It was not said with the purpose or motivation of subjecting the claimant to a detriment for doing the protected act.

299. The tribunal would have benefitted from hearing evidence from Mr Edwards. It is surprising that he was not called to do so. He was present at the hearing for at least some of the time. However, as with Beth Burns, the Tribunal has applied **Efobi** and concluded that a common-sense view can be taken of matters as to what lay behind the remark from the contemporaneous notes. No adverse inference shall be drawn from the respondent's failure to call him as a witness.

300. The final allegation of victimisation is that the respondent failed to remedy these matters when the matter reached grievance appeal stage.

301. The Tribunal has found that Mr McCafferty did address the outstanding allegation which Mr Simmons failed to deal with. To that extent, therefore, the fifth allegation of victimisation fails on the facts. We find that in reality there was nothing to correct about the amendment to the minutes given that the respondent's approach was to note the claimant's observations in any case and upon which no real issue was taken by the respondent.

302. There was nothing to correct around Mr Simmons informing the claimant that he had been fortunate not to have been dismissed arising out of the incidents of

27 and 28 July 2023 as it was not Mr Simmons who made the remark. In so far as this allegation touches upon Beth Burns' conduct, no corrective action was required because her remark was made prior to the protected act anyway.

303. In any case, the claimant accepted in evidence that he had not raised the allegation that Mr Simmons had said that he was fortunate not to have been dismissed. He raised no such allegation against Mr Simmons (or anyone else for that matter) in the grievance appeal letter at pages 134 to 140 or in the grievance appeal meeting (pages 150 to 158). Therefore, there was nothing for Mr McCafferty to deal with or correct.

Summary and case management

304. In conclusion, therefore, the claimant has succeeded upon the allegation that he was subjected to unfavourable treatment for something arising in consequence of disability and on one allegation of harassment related to disability. Both of those complaints were presented within the limitation period in section 123 of the 2010 Act. The harassment allegation arose out of a comment made by Mr South on 26 September 2023. The course of conduct consisting of the disciplinary process concluded, as we have said, on 5 October 2023. Both of those dates were after the claimant commenced early conciliation on 24 September 2023.

305. The Tribunal will now list the case for a remedy hearing. The parties are directed to write to the Tribunal within 28 days of the date upon this judgment is promulgated (as set out below) with dates to avoid for a one-day remedy hearing over the next four calendar months. If the parties consider that the case would benefit from a further case management preliminary hearing before the Employment Judge, then they shall say so when they write to the Tribunal.

Approved by Employment Judge Brain

Date 20 May 2025