Case No: 6001137/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr Adeel Habib

Respondent: Currys Group Limited

Heard at: Southampton **On:** 3rd – 7th March 2025

Before: Employment Judge David Hughes
Mr Peter English
Mr Mark Richardson

Representation
Claimant: In person
Respondent: Mr Shane Crawford, counsel

JUDGMENT having been sent to the parties on 25.03.2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The parties

1. The Respondent operates a well-known chain of shops selling predominantly electrical goods.

2. Mr Habib was employed by the Respondent from 08.01.2023 to 27.03.2023, as a Credit Support Associate.

Summary

3. As we explain below, Mr Habib made the following claims:

   (a) For unfair dismissal. This claim was struck out, because Mr Habib hadn't worked for Curry's for long enough to be able to claim for unfair dismissal;

(b) For race discrimination. The Tribunal dismissed this claim. We decided that Curry's did not discriminate against him because of his race;

(c) For sex discrimination. The Tribunal dismissed this claim. We decided that Curry's did not discriminate against him because of his race or nationality;

(d) For breach of contract. We upheld one part of this claim. We decided that Curry's should have paid him more notice pay than they did. But we rejected claims for arrears of pay and bonus payments. We decided that Curry's didn't owe Mr Habib these payments.

The Claim

4. By a claim form presented on 28.06.2023, Mr Habib brought complaints of unfair dismissal, discrimination on grounds of race, disability, religion or belief and marriage or civil partnership, and for breach of contract in respect of holiday pay, arrears of pay and other payments.

5. On 09.10.2023, the Tribunal wrote to Mr Habib, indicating that he appeared not to have the requisite minimum service to be able to bring a claim for unfair dismissal. He was given until 16.10.2023 to give reasons why the claim for unfair dismissal should not be struck out.

6. The case came before EJ Smail on 20.12.2023. He decided that there be a preliminary hearing. That was to decide whether one or more of the claims should be struck out, or made subject to a deposit order, and for further case management.

7. It is not clear to us that the claim for unfair dismissal was struck out, but EJ Smail's order included the provision that:

   40. By a claim form presented on 28 June 2023 Mr Habib brought the following complaints ***which go forward***[1]*:*
   (a) Discrimination on the grounds of disability, race and sex;
   (b) Breach of contract

8. The preliminary hearing was heard by EJ Dawson on 14.05.2024. He struck out a claim that the Respondent had discriminated against Mr Habib

[1] Emphasis added

on the grounds of race when his personal possessions were stolen. He made a deposit order in respect of some of the claims.

9. There was a further case management hearing before EJ Midgley, by telephone on 03.12.2024. EJ Midgley included in his order the following:

Deposit Order. I took considerable time to explain to Mr Habib the consequence of his claims of direct discrimination being dismissed on the basis given by EJ Dawson when he made the deposit order. I warned him that he would be treated as having acted unreasonably in pursuing the allegations for the purpose of Rule 76 (costs), and that the threshold for a costs order would have been met. I further explained that it was almost inevitable that a Judge would conclude that it was in the interest of justice to make a cost order in those circumstances (as the failure to do so would undermine the Deposit Order) and that the costs in question would be the respondent's costs from 14 May 2024. I further explained that there is no requirement that the costs claimed have been caused by the unreasonable conduct. Therefore, Mr Habib's risk if he loses those claims may reasonably be estimated to be in region of £25,000; being a realistic cost budget for preparation for and attendance at a 5 day final hearing.

10. EJ Midgley prepared the following list of issues:

1. Time limits

1.1 The claim form was presented on 28 June 2023. Mr Habib commences early conciliation on 23 May 2023 and a certificate of early conciliation was issued by ACAS on 23 June 2023.

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

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

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

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

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

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

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

2. Direct race discrimination (Equality Act 2010 section 13)

2.1 Mr Habib is a British Asian of Pakistani origin.

2.2 Did the Respondent do the following things:

2.2.1 On 7 February 2023 did Mrs Andrews refuse Mr Habib's request for five weeks annual leave (this is admitted see GOR paragraph 24).

2.2.2 In the period from the beginning of March until the 27 March 2023, was Mr Habib made to feel generally unwelcome by colleagues, specifically:

2.2.2.1 Did Miss Benguit criticise Mr Habib for using a Template Mr Habib was advised to use by another colleague

Mr Habib was unable to provide any other specifics at the time of the case management hearing on 3 December 2024 but I note from the Deposit Order Judgment that Mr Habib had provided the following example:

2.2.2.2 a colleague (Amy) had taken him to visit the staff desks in the office and asked staff members individually if they had his stolen items in their possession. .."the above made me feel very unwelcome in the office on the next working day which later got worse every day whenever I attended the office during my scheduled days."

2.3 Was that less favourable treatment?

The Tribunal will have to decide whether Mr Habib was treated worse than someone else was treated. There must be no material difference between their circumstances and those of Mr Habib. Mr Habib identified Aimee and a Data Operation manager as comparators (see the Deposit Judgment at para 27), alternatively he relies upon a hypothetical non-Asian, non-Pakistani comparator.

2.4 If so, was it because of Mr Habib's race or nationality?

2.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to that protected characteristic?

3. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

3.1 Did the Respondent know or could it reasonably have been expected to know that Mr Habib had the disability? From what date?

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

3.2.1 To provide induction training of 1 week only;

3.2.2 To have breaks at lunchtime only;

3.2.3 To expect its workers to work at a minimum speed [This is admitted]

3.2.4 To afford no appeal for termination of probation [this is admitted].

3.3 Did the PCPs put Mr Habib at a substantial disadvantage compared

to someone without Mr Habib's disability, in that Mr Habib found it more difficult to work at speed due to the effects of his diabetes. [He has not identified any disadvantage in relation to the PCPs at 3.2.1, 3.2.2 or 3.2.4]

3.4 Did the Respondent know or could it reasonably have been expected to know that Mr Habib was likely to be placed at the disadvantage?

3.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? Mr Habib suggests:

3.5.1 To provide induction training in excess of 1 week;
3.5.2 To have breaks as and when required;
3.5.3 To be flexible in respect of the speed at which workers are expected to perform;
3.5.4 To provide an appeal for probation failure

3.6 Was it reasonable for the Respondent to have to take those steps and when?

3.7 Did the Respondent fail to take those steps?

4. Harassment related to sex (Equality Act 2010 s. 26)

4.1 Did the Respondent, by Naima Benguit, do the following things:

4.1.1 From 8 January 2023 did Ms Benguit ask Mr Habib:
4.1.1.1 About his previous relationship?
4.1.1.2 Why he had no children?
4.1.1.3 [The other matters detailed in Mr Habib's exchange witness statement, which he could not recall at this hearing]
4.1.2 On or after approximately 16 February 2023 rub her bosom against Mr Habib?

4.2 Was that unwanted conduct of a sexual nature?

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

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

5. Breach of Contract (Extension of Jurisdiction Order 1994)

5.1 Did this claim arise or was it outstanding when Mr Habib's employment ended?

5.2 Did the Respondent do the following, in Mr Habib's final pay (June 2023) did the Respondent:
5.2.1 Fail to pay Mr Habib one or more bonuses
5.2.2 Fail to pay Mr Habib for overtime he had worked;

5.2.3 Pay Mr Habib one week's notice rather than one month's notice – Mr Habib asserts that he was entitled to contractual notice of one month and that his contractual terms were not subject to the shortened notice relating to his probationary period.

5.3 Was that a breach of contract?

5.4 How much should Mr Habib be awarded as damages?

The hearing

Reasonable adjustments

11. The hearing took place before us on the above dates. Despite the carefully prepared list of issues, and the fact that 3 case management hearings had taken place, the hearing was challenging.

12. The parties had been told to prepare witness statements. In the light of issue 4.1.1.1., both parties had prepared supplemental statements.

13. Mr Habib's statements had not been prepared with a proper regard for the case management orders made. Mr Habib is not a lawyer, and this Tribunal is well used to unrepresented people having prepared their own statements. The directions made at case management hearings, are made to help people who represent themselves understand what needs to go into a statement. And Employment Judges and members are used to helping people representing themselves to understand what goes on in a hearing. This we tried to do for Mr Habib, as will be further explained below.

14. Mr Habib's first statement, told us little about the substance of his case. It mentioned an IT system, and problems that he said it caused, and said that what he described as "*outdated*" versions of 3 policy documents – which he did not identify – had been sent to him. But otherwise, his statement consisted largely of communications with the Respondent, the Tribunal, and people whom he hoped might be witnesses.

15. What the statement did not do was, tell a story.

16. Mr Habib's second statement referred repeatedly to emails that had been sent to the Tribunal. In that second statement, Mr Habib wrote about his

backpack being searched at some point. If this happened, we can understand would have upset Mr Habib, but this allegation was not in the list of issues. Mr Habib wrote about reporting a missing transaction – another incident which did not feature in the list of issues. He described an incident in which a door broke in the workplace – another incident not included in the list of issues. And he mentioned his allegation of harassment against Mrs Benguit.

17. The bundle contained a document headed "*this written submission outlines Mr Habib' arguments, position and to be considered by contrast outlining a witness' recollection of the facts"*. The contents of this document were closer to those of a statement that those of the documents described as statements, and we treated it as a statement. This document was dated 12.02.2025. Counsel for the Respondent was unhappy that this document was prepared after Mr Habib had seen the Respondent's witnesses' statements. We understand his unhappiness, but this document seemed to us to be of more assistance in understanding Mr Habib's claim than either of his statements, and fairness required that we treat it as a statement.

18. The bundle contained yet another document, untitled but extending over 8 pages, containing yet more factual assertions from Mr Habib. We will call this document the "4th Document".

19. Mr Habib is not a native speaker of English. His mother tongue is Urdu. We explained to him that, if he wanted an interpreter, he could be provided with one, free of charge. He insisted that he did not need an interpreter.

20. Although he did not rely upon it in his claim, Mr Habib has a learning disability. He described in a document dealing with impairments, slowness in assimilation of information, problems in concentration, anxiety, low mood, panic in stressful situations. We were mindful of these.

21. Mr Habib's answers to questions on the first day of the hearing caused us some concern about his ability to follow proceedings, and his capacity to litigate. We raised this with the parties on the second day. We were having

real difficulty understanding some of Mr Habib's answers, and how they related to the questions he was asked.

22. However, when we asked Mr Habib to explain the meaning of EJ Midgley's order explaining the deposit order, Mr Habib was able to do so very well.

23. We were mindful that the capacity is issue-specific – in this instance, the relevant capacity is the capacity to litigate. That has been defined as[2]:

> *[75]… whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law whether substantive or procedure should require the imposition of a … litigation friend.*
> *… a person should not be held unable to understand the information relevant to a decision if he can understand and explanation of that information in broad terms and simple language; and that he should not be regarded as unable to make a rational decision merely because the decision which he does in fact make is a decision which would not be made by a person of ordinary prudence. [79]"*

24. The capacity to litigate is itself issue-specific, as was made clear by Munby J in Sheffield CC -v- E & S[3] :

> *The capacity to litigate is not something to be determined in the abstract. One has to focus on a particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to particular proceedings in which he is involved … Someone may have the capacity to litigate in a case where the nature of the dispute and the issues are simple, whilst at the same time lacking the capacity to litigate in a case where the nature of the dispute or the issues are more complex*

25. It is important to remember that capacity is presumed. In Jhuti -v- Royal Mail Group[4], Simmler P said the following at para 39:

> *First and foremost, a person is assumed to have capacity unless it is established that they lack capacity. The assumption of capacity can only*

[2] Masterman-Lister -v- Brutton & Co [2002] EWCA Civ 1889 [2003] 1 WLR 1511 per Chadwick LJ.
[3] [2005] Fam 236 @ 34
[4] [2018] ICR 1077

be overridden if the person concerned is assessed as lacking the mental capacity to make a particular decision for themselves at the relevant time: see the Mental Capacity Act 2005, s.3, which provides a formula to be used in making that assessment….

26. In Stott -v- Leadec[5], the EAT summarised the position helpfully, albeit at some length, as follows:

> *8. Having regard to the authorities and practitioner texts to which Miss Apps referred me, I consider the applicable legal principles to be as follows:*
>
> *(a) In civil proceedings to which the Civil Procedure Rules 1998 apply, an adult who lacks litigation capacity (referred to as a "protected party") must have a "litigation friend" to conduct proceedings on his behalf: CPR Pt 21 .*
>
> *(b) CPR Pt 21 defines lack of capacity to conduct proceedings to mean lacking capacity within the meaning of the Mental Capacity Act 2005 . In Dunhill v Burgin (Nos 1 and 2) [2014] 1 WLR 933 , the Supreme Court, applying the test contained in the CPR , endorsed the approach adopted by the Court of Appeal in Masterman-Lister v Brutton & Co (Nos 1 and 2) [2003] 1 WLR 1511 , indicating that common law principles remain of assistance in applying the statutory test.*
>
> *(c) Any proceedings involving a protected person conducted without a litigation friend will be invalid unless the court otherwise orders: Dunhill .*
>
> *(d) The test to be applied is whether a party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and other experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings: Masterman-Lister .*
>
> *(e) Capacity depends upon time and context: a decision in one court as to capacity does not bind another which has to consider the same issue in a different context. A final decision as to capacity rests with the court, but, in almost every case, the court will need medical evidence to guide it: Masterman-Lister .*
>
> *(f) The question of capacity to litigate is not something to be determined in the abstract. The focus must be on the particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to the particular proceedings in which he is involved: Sheffield City Council v E [2005] Fam 326 , para 39.*

[5] [2020] ICR 1217

(g) As a matter of practice, courts should always, at the first convenient opportunity, investigate the question of capacity whenever there is any reason to suspect that it may be absent. That means that, even where the issue does not seem to be contentious, a district judge who is responsible for case management will almost certainly require the assistance of a medical report before being able to be satisfied that incapacity exists: Masterman-Lister .

(h) Whilst there is no express power in the Employment Tribunals Act 1996 to provide rules for the appointment of litigation friends, the wide drafting of section 7(1) of that Act, which permits the regulation of any aspect of employment tribunals as appears necessary or expedient, provides the power to make rules which enable the appointment of litigation friends for people who lack capacity to conduct litigation. The appointment of litigation friends falls within rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237) ("the 2013 Rules") which empowers employment tribunals to make case management orders at any stage of the proceedings. To continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation would be tantamount to continuing with the hearing in that party's absence and would fly in the face of the overriding objective, in rule 2 , that tribunals should deal with cases fairly and justly and put parties on an even footing. Similarly, it would be incompatible with the common law duty of fairness and the strong interpretive obligation in section 3 of the Human Rights Act 1998 to read section 7(1) of the 1996 Act, or rule 29 of the 2013 Rules, as not empowering employment tribunals to appoint a litigation friend, where a litigant lacks litigation capacity. It would be contrary to the rule of law if access to courts and tribunals were restricted without explicit wording to that effect: Jhuti v Royal Mail Group Ltd [2018] ICR 1077 .

(i) Employment tribunals should tread carefully, if invited to embark down the road of investigating a party's mental capacity, and should only accede to such an approach where there is clear evidence to support it: Jhuti v Royal Mail Group Ltd .

27. The situation before us was one where Mr Habib himself did not question his own capacity to litigate his claim before us. The Respondent did not raise the issue. It was a concern that occurred to the Tribunal.

28. We considered the questions posed by MCA s3.

29. We decided that Mr Habib was able to understand the information relevant to the decisions he had to make in this case. He understood, for example, the implications of the deposit order. He understood that he had to make statements. He had undertaken research signposted in the case management orders, he had read materials at his local library, had attended a tribunal hearing, and said he had found a lot of material.

30. He was able to retain the information. He was able to tell us about things that he said happened.

31. Mindful of the presumption of capacity and the EAT's direction that a Tribunal should tread carefully, we decided that our concerns about Mr Habib did not amount to clear evidence of an inability to weigh that information as part of the process of making a decision. And although Mr Habib was extremely softly-spoken, we were satisfied that he could communicate the decisions he made.

32. We did, however, make adjustments for Mr Habib. To help him to help us understand his case, we took him through the list of issues, asking him to help us understand where he dealt with each issue in his statements. We were mindful of the Equal Treatment Bench Book. We took regular breaks, and encouraged Mr Habib to tell us if he felt he needed a break. This he did several times. On one occasion, when he made some bizarre comments about possible magic in the hearing room and suggested inappropriate behaviour by one of the Respondent's witnesses who was attending the hearing – a suggestion we decided was baseless – we stopped the hearing for a brief period.

33. There were other adjustments. At times, Mr Habib struggled to focus on answering questions that he had been asked, and when this happened, he was reminded of the question and asked to answer it. When questioning the Respondent's witnesses, at times he sought the Employment Judge's help in formulating questions. Indeed, he expressly asked the Employment Judge to question Mrs Benguit. The Employment Judge agreed to put to her, in a neutral manner, questions that seemed essential if Mr Habib's case was to be put. Before doing so, it was explained to Mr Habib that the questions would need to be put in a neutral manner, and the answers would not be probed, to avoid the Employment Judge stepping out of his role and acting more like Mr Habib's lawyer. The agreement of counsel for the Respondent was also sought, and received, to the Employment Judge doing this.

34. When the time for closing submissions came, Mr Crawford made his on the afternoon of the third day. Save for a brief legal point that was discussed with Mr Crawford the following day, that meant that Mr Habib had the evening to think about what Mr Crawford had said. We explained to Mr Habib that, the following morning, he would have the chance to tell us why he should win his case.

35. On the morning of the fourth day, Mr Habib at first wanted to rely on the 3rd document. We rose for 10 minutes to re-read this, and to give Mr Habib the chance to think about this a bit more. When we started the hearing again, we were worried that Mr Habib's case might not be put before us to its best. So, with the agreement of Mr Crawford, the Employment judge took Mr Habib through the list of issues, asking why he should win on each issue. Mr Habib gave full answers to these questions.

36. We have applied adjustments in our consideration of the evidence we have heard. We have disregarded entirely Mr Habib's demeanour in giving evidence. Mr Habib was polite throughout the hearing. But at times – indeed, quite often – his answers did not address the questions that had been put to him. He tended to go off on tangents. In another witness, this might be thought evasiveness. We do not treat it as such.

37. Mr Habib has told the Tribunal about the conditions he has, and although we have not seen formal diagnoses – understandably, perhaps, as they are not relied upon in his claim - we do not doubt these. He has type-2 diabetes. English is not his mother tongue. Try as one might to limit it, a Tribunal hearing is inevitably stressful to a degree. And the allegations in issue 4.1.2 unsurprisingly appeared to be ones about which Mr Habib felt uncomfortable talking before a panel of 3 men whom he had not met before. The important thing is the substance of what Mr Habib's evidence was, not how he gave it.

38. Reasonable adjustments, however, must be reasonable, and must not turn into unfairness to the Respondent. We consider that we must focus on the substance of Mr Habib's evidence, but that does not mean that we can overlook the task of assessing the reliability of that substance. In closing, counsel for the Respondent – who combined proper advocacy of his

client's interests with a realistic understanding of the need to make adjustments – said that we would have to assess the "credibility" of the witnesses. There are times when credibility may be the appropriate word. But we think the better term is often "reliability".

39. We did so when considering the evidence and making our factual findings. Those findings are, of course, made on a balance of probabilities. A factual finding is when we decided that something did, or did not, happen. When we say that we "find" something, it means that we decided that it did or did not happen.

40. When making factual findings, we attempt to confine ourselves to the facts it is necessary to decide in order to resolve the issues identified by Employment Judge Midgley.

Witnesses

41. At the hearing, we heard live evidence from Mr Habib, from Harriet Andrews and Naima Benguit. Ms Andrews and Mrs Benguit are both employed by the Respondent. Ms Andrews' title is Data and Operations Manager. Before that, she was Commissions and Data Manager. Mrs Benguit's role is currently Operations Specialist. But when Mr Habib worked for the Respondent, her role was Senior Credit Support Associate.

What happened

Mr Habib joins the Respondent.

42. Mr Habib was interviewed by Ms Andrews on 14.12.2022. The bundle contained a document described as "interview notes". This consisted of a series of pre-prepared questions, with space for answers (or a summary of them) to be inserted. The notes include, in a box marked "candidate questions", the following:

I did some research, everting customer can find under one roof. I've had a good experience and like to focus on business side of it.
Phone calls ive done before will really help me.
(hours) I don't mind working from home or office, in terms of hours it didn't specify. Happy with the hours and don't have much commitments.
(notice period) happy to start
No reasonable adjustments stated[6]

[6] Format as per the original.

43. This is a document from the time of the interview, and one that is likely to be reliable. On the basis of this document we find that Mr Habib discussed with the Respondent the hours he could work – indicating no issues in that regard; the reasonable adjustments he might need – none, he said; and that he was happy either to work from home or in an office.

44. At the foot of most of the pages in the interview notes are boxes to be ticked for the presence of "positive indicators" and "negative indicators". None of these are ticked in the notes in the bundle.

45. In the 4th Document, Mr Habib said:

> *My line manager lied in her statement about my planned holiday and not disclosing prior to the commencement. I do remember her wording saying that she needs a maximum of 4 weeks' notice from me to have it approved*.

46. Asked about this by Mr Habib, Ms Andrews said that she did not recall, but that it may be in the interview pack.

47. There is no standard question asking about pre-planned holidays. We were told that another employee, one Aimee Farmer, did tell the Respondent about a pre-planned holiday when she was interviewed, and we find that that is likely to have happened in the part of the interview devoted to employee questions.

48. We find that Mr Habib did not tell the Respondent about any intended holidays in interview. There is no record of him doing so. Had he done so, it would have been significant, and probably have been recorded. And the flights for the holiday that caused contention in the time to come had not yet been booked by Mr Habib.

<u>The contract of employment</u>

49. The contract was included in the bundle. It was submitted to us that it was probably a standard form prepared by the Respondent, and that seems likely to be correct.

50. The parts of the contract discussed before us were:

(a) The start date was given as 08.01.2023, although it came to be agreed that Mr Habib in fact started work 09.01.2023;

(b) Next to "*probation period*" appeared the words "*not applicable"*;

(c) The notice period provided for was "*1 month's notice, except during any probation period, where notice will be 1 week (subject to statutory minimum notice)*";

(d) A bonus clause read as follows:

You will be eligible to participate in the bonus scheme applicable to your job grade, subject to the applicable bonus scheme rules. The terms of the applicable bonus scheme rules will be subject to the sole discretion of the Company. If the Company makes a bonus payment to you in respect of a particular financial year, it shall not be obliged to make subsequent bonus payments in respect of subsequent financial years. The Company may vary, replace or discontinue the bonus scheme at its sole and absolute discretion.

(e) Clause 27 provided for variation of the contract, reading as follows:

We reserve the right to make reasonable changes to any of your terms of employment

51. Other parts of the contract, not discussed before us but of some relevance, were:

(a) That Mr Habib's hours of work were 40 per week, clause 5 identifying the working week as Monday to Friday (although with a possibility of variation);

(b) Mr Habib's place of work was given as Currys Business, Poole;

(c) Clause 5 allowed the Respondent to change the normal place of work to other main locations;

(d) The Respondent's holiday year ran from 1st May to 30th April each year, and the Respondent reserved the right to decline holiday requests due to business need. Untaken holidays were not contractually permitted to be carried forward;

(e) The contract said that Mr Habib had to comply with the Respondent's policies;

(f) The contract contained an entire contract clause.

Mr Habib starts work

52. Mr Habib started work. We don't need to set out exactly what Mr Habib's duties were. They involved dealing with internal communications to the Respondent, and sometimes with business-to-business customers. A big part of Mr Habib's role involved sending emails out.

Probationary period

53. Mr Habib's contract of employment expressly stated that he did not have a probationary period.

54. Despite that, Ms Andrews referred to him as having a probationary period.

55. There was a Teams exchange on 02.02.2023, between Mr Habib and Ms Andrews, which included the following:

Mr Habib: *02/02 13:04 I do not keep probation in my mind when I come to work as it is not part of my contract and I believe I have mentioned this in our first one 2 one in Studlands room, and when you mention it every now and than, it really demotivates me.*

Ms Andrews: *That's correct it's not written into contract, but as i also discussed we plan very robustly around a 3 month plan to support you with everything you need to be successful in the role…*

56. A document dated 16.02.23 included the following:

Adeel believes that bringing up the subject of probation causes him to lose focus. Harriet asked him how he wanted to call it, and he replied, "I don't know."
Harriet asked Adeel what he wanted us to do to help him in his training, and Adeel replied by saying that he would like more training on SAP, and he also added that sometimes emails get too much for him and he would like someone to help him do the inbox. I replied that I always keep an eye on the inbox and that if it gets busy, I will always jump in to help however, it is actually very quiet at the moment and should not feel overwhelming. Adeel can also find lots of information regarding SAP and order releasing on our shared folder procedure, and he was also provided with a printout of the step-by-step guide for order releasing. Adeel rarely uses this and has said he will more

57. In an email of 24.02.2023, Ms Andrews referred to reviewing probation meetings.

58. Mr Habib recognised that Ms Andrews repeatedly stated that he was in a probationary period. We find that she did so. But he insisted that he repeatedly pushed back at this suggestion, and that when he did so, discussion was closed down.

59. We accept Mr Habib's evidence on this point. Ms Andrews was not a lawyer and not in Currys' HR team. She is unlikely to have wanted to get into an involved discussion of the technicalities of whether or not there was a probation period. Mr Habib's scenario of him pushing back at the suggestion of a probationary period is consistent with the evidence we have seen and heard. Currys closing down further discussion seems overwhelmingly more probable than any alternative.

PCPs

60. Mr Habib's position was that he was given only 1 week's training. In that time, he was trained by Ms Farmer, and was told by her to use particular email templates. After a week, Ms Farmer went on a pre-arranged holiday, and thereafter Mrs Benguit told him to use different templates.

61. Ms Andrews said that all templates were prepared by the relevant team. Templates are standard drafts of emails, into which appropriate details or information can be inserted.

62. As it turned out, in his evidence Mr Habib said that he did not think that the treatment of the template question was related to his race or nationality. We think that that was a wise concession, and it is a pity that it was not made before this hearing. We think that Ms Andrews' explanation of team templates seems likely to be right. It is possible that individuals each had their own views on how to insert whatever needs to be inserted to turn a template into an email that could be sent out.

63. What is an issue before us is, whether Mr Habib was given only 1 week's training, and whether the Respondent had a PCP of providing only one week's training.

64. We find that it did not. The bundle contained an induction training schedule, which covered 2 weeks, starting on 09.01.2023.

65. The bundle also included a document with boxes setting out a series of competences (for example, "*understanding of the process to update data on CASH account*" or "*understanding the Bonus structure and team KPI's & SLA's")*, and columns marked "*month 1*", "*month 2*" and "*month 3*". These boxes could be coloured green – indicating, so Ms Andrews told us, that the required knowledge or competence had been met, yellow, indicating that it was being worked on, or red, indicating that it had not been met, or not gotten around to. These were part of what was termed a 0-90 plan, a plan referred to in documents before us, and which, in an email exchange dated 17.02.2023, Mr Habib acknowledged having read. We interpret 0-90 as a reference to 90 days. This approximates to the 3-month period over which Currys says it trains new employees.

66. It is highly unlikely that either of these documents was invented at some later date. And the bundle contained numerous references to a 3-month "probation period". Whether there was, in law, a contractual probation period is one thing. But the references to a probation period of 3 months indicate, regardless of the contractual position, that Currys viewed the period of 3 months as one in which new employees would be trained.

67. There is also the evidence of home working. We were told, and accept, that there was an understanding that employees would be expected to come into the office 3 days a week (although there was space to accommodate all members of the relevant team every day), but that employees were not permitted to work from home in the first 2 weeks of their employment.

68. We find that induction training was provided over Mr Habib's first 2 weeks, and that training continued over a further 3 month period, with the employee not permitted to work from home in the first 2 weeks. We do not find that Currys had a PCP of providing induction training of 1 week only.

69. Mr Habib's case is that Currys required employees to have breaks at lunchtime only. Currys' position was that Mr Habib and other employees were free to take breaks, whether for a hot drink, to stretch their legs or use the toilet, any time they wished.

70. We believe Currys' witnesses' evidence. Mr Habib worked 2 days a week from home. When he did so, no-one was around to enforce a policy as to when to take breaks. It seems to us to be pointless for Currys to have a policy preventing people who work at screens – as Mr Habib and his colleagues did – and need to concentrate, from stretching their legs, getting a cup or tea or coffee, or using the toilet when they need to. We do not think Mr Habib's evidence on this was reliable.

71. In closing, Mr Habib modified in his position, presenting a case that was quite different, although which was perhaps reflected in the 4th Document. In closing, he agreed that he was allowed to take a short break to make a cup of tea, to stretch his legs, or use the toilet, whenever he needed. His complaint in closing was that only a limited number of employees were allowed on lunch break at any one time, and that sometimes he was not allowed to take his lunch as late as 15:00hrs. The paragraph we have in mind in the 4th Document reads as follows:

My employer only allowed me to have one break during a lunch time which sometimes led to afternoon at 3pm, this is due to the rules set up by my line manager that only one person can go on break at a time due to the volume of workload we have to cover, My eyes need resting due to continuously focusing on three different screen however it was not allowed to have a break except to use WC facility therefore as explained above sometimes I have to wait until 3pm for the break to have my lunch.

72. That is a quite different case from the one we had been given to understand until closing. And the paragraph we have just cited is not the same as the contention made in closing. That paragraph maintains that breaks were not allowed, save to use the toilet. In closing, Mr Habib's complaint appeared to be that he was not allowed breaks of 45 minutes or longer, multiple times a day. This was not put to either of Currys'

witnesses. That said, we accept that he wasn't allowed breaks in excess of 45 minutes, multiple times a day. It would be surprising if he had been.

73. The third alleged PCP in the list of issues was, whether Currys expected its employees to work at a minimum speed. Although noted in the list of issues prepared by Employment Judge Midgley as agreed, counsel for Currys said that the position was more nuanced than that, and we agreed that the position could be disputed.

74. The nuance Mr Crawford referenced was that, he submitted, Currys' approach to productivity was not as simple as just measuring the number of tasks performed. Ms Andrews told us that the focus was primarily on accuracy, rather than speed.

75. It seems that this issue may be more a question of terminology, than of substance.

76. We accept Ms Andrews' evidence that Currys' primary concern in the 0-90 period was accuracy rather than speed. In a note of a "probation review" meeting on 16.02.2023, the following is recorded:

> We shared with Adeel his weekly report. Adeel's volumes are usually half the *work compared to team members completing the same workstream. Adeel takes 40 to 50 minutes to do one email. Harriet explained that he is expected to be slower as is still in training and that if he needs any support with anything, he is always welcome to ask. However, Adeel must work with us to speed things up. Harriet also had to explain the 2-hour SLA is there so that if 10 emails come in at the same time, we still meet SLA's, it's not an individual target for each email but there for when it is very busy. Emails should take between 10-20 minutes whilst you are training.*

77. In an email from Ms Andrews to Mr Habib on 15.03.2023, she included:

> *When looking forward at everything that needs to be completed in month three; Harriet has mentioned Adeel he may not be able to complete the Trevipay medics training to the high standard that we need as he is already behind on Order releasing and Database request knowledge as per his 0-90. Harriet has mentioned there are many mistakes being made and knowledge has not been embedded*

78. The bundle also included tables of activities completed by Mr Habib, Mrs Benguit, Ms Farmer, one Nigel Rouine, and two other employees named

Donna and Ahmed. These were for the weeks commenting 20.02.2023 to 13.03.2023.

79. They show that, in each of those weeks, total tasks accomplished were as follows:

W/c	Ahmed	Donna	Mr Rouine	Ms Farmer	Mrs Benguit	Claimant
20.02.2023	151	445	268	0	434	165
27.02.2023	110	345	211	55	276	203
06.03.2023	93	0	178	478	349	154
13.03.2023	0	383	250	426	341	88
Total over period	354	1,173	907	959	1,400	610

80. The total figures over the period were not produced by Currys. They are the Tribunal's own calculation.

81. The figures must not be approached too simplistically. We were told that Ahmed, for example, works part-time, and Ms Farmer, Donna and Ahmed each appears to have had time off in the period covered by the tables.

82. That Currys didn't do a calculation of the totals over the time period covered tells its own story. It indicates that, whilst Currys was gathering information about the activities each employee completed, it was not treating those numbers simplistically.

83. Currys' figures did not include the calculation over the total period covered by the tables – that is the Tribunal's own calculation. That fact, and the emails cited above, lead us to find that Ms Andrews' account was probably right – that Currys' primary concern was accuracy, at Mr Habib's stage in his employment, rather than simply volume.

84. That is not surprising. Mr Habib was new to the business. If pushed simply to accomplish a particular volume of tasks without regard for accuracy, that would be seeking activity rather than productivity.

85. It would not, however, be correct to say that Currys was oblivious to the volume of activities employees achieved. That is also not surprising. It is perfectly reasonable for Currys to want employees to be productive.

86. We accept Ms Andrews' evidence that what Currys wanted was for each individual to undertake a fair share of the team's overall workload. It is inherent in any sensible understanding of that, that the tasks undertaken would be performed with a tolerable degree of accuracy – otherwise they were of no use to Currys.

87. It would therefore be misleading to say that Currys did not require employees to work at a minimum speed. It would be more accurate to say that Currys required employees to achieve a measure of productivity. Understood in that way, Currys did have a PCP akin to that described in issue 3.2.3, although we agree with Mr Crawford that the position is more nuanced than the framing in the list of issues.

88. There is no dispute that Currys did not allow Mr Habib a right of appeal following termination.

Mr Habib's disability

89. It is not disputed that Mr Habib has type 2 diabetes.

90. We have mentioned Mr Habib's statement of impairments – perhaps an indelicate term – above. In that document, he describes:

(a) Car accidents in 2010 and 2012 or 2013;

(b) Type 2 diabetes, diagnosed in 2015;

(c) Learning disabilities, of which he says:

> *I cannot get thing while watching for example when I watch a movie or any you tube video it is difficult for me to get it as my mind is not present there no matter how hard I try but I have tried to work on it by myself and must say it has improved, but is still the case that the very next day I forget what I watch.*
> *I have problem in concentrating which slower the assimilation of information*.
> …

(d) Panic in stressful situations;

(e) A past eating disorder;

(f) PTSD;

(g) Social isolation;

(h) Short-term memory difficulties;

91. We took note of these conditions and their impact, when making adjustments to assist Mr Habib in putting his case before us. However, insofar as the substance of his case is concerned, he relies only on diabetes.

92. Mr Crawford put it to Mr Habib that he had not told Currys about his diabetes, or any need for adjustments that arose from his diabetes, whilst he worked for Currys. Mr Habib said that he did, on multiple occasions.

93. In closing, Mr Habib told us that he told Ms Andrews about his diabetes in a meeting in which the principal topic of conversation was a holiday request, to which we will come later. There is a reference to a meeting in a room known as "Studlands" – a meeting room at the workplace – in a Teams exchange on 02.02.2023.

94. On this point, we find that Mr Habib told Ms Andrews that he had diabetes. She herself in her statement recalls him mentioning it at some point in the course of his employment. It may well have been, as Mr Habib says, during the course of the Studlands meeting referred to in the previous paragraph. However, clear communication is not one of Mr Habib's strengths. We find that, when he mentioned his diabetes, he did so in a by-the-by manner, not in a way that indicated any need for adjustments or accommodations.

95. Mr Habib told us that he had not regarded diabetes as a disability. This is understandable, as we suspect people unfamiliar with the Equality Act wouldn't think of it as a disability. When cross-examined about any disadvantages that flowed from diabetes, Mr Habib emphasised that he was taking pain killers and sleeping tablets, which were causing him problems, and that he told Ms Andrews about these. He said that he was

not taking these medications for diabetes. We accept Mr Habib's evidence on this point.

96. We find that Mr Habib did not tell Ms Andrews, or anyone else at the Respondent, of a need for reasonable adjustments because of his diabetes. Indeed, we find that he actively sought to hide any need for reasonable adjustments that may have existed because of his diabetes.

97. Mr Habib himself did not say that he was disadvantaged because of his diabetes, beyond a general slowness in his work. We heard no expert evidence on the implications of his diabetes. We are left with the information in the Equal Treatment Bench Book, and the sort of (possibly incorrect, almost certainly incomplete) awareness of the implications of diabetes to be found in the community generally.

98. It would not be surprising if someone with type 2 diabetes needed to use the toilet more frequently than someone without that condition. They may need to eat or drink at short notice to manage their blood sugar levels. The timing of meals may be of particular importance.

99. Mr Habib's evidence was that he tried to avoid going to the toilet, because he felt pressure not to do so. We do not accept that Mr Habib was given any reason to feel pressure, beyond a perfectly reasonable wish on the part of Ms Andrews that his performance should improve over the 0-90 period.

100. The PCPs that Currys did have – that relating to productivity, and the lack of an appeal following dismissal – did not put Mr Habib at any disadvantage compared with someone not suffering from diabetes.

101. Whilst it is possible that changeable lunch times might have impacted on Mr Habib because of his diabetes, he did not say that that was so, and has not said that that was so at any point in this case that we have identified. We were told that Mr Rouine also has type 2 diabetes, and still works for Currys. We are confident that, had Mr Habib shared with Currys any need for reasonable adjustments because of his diabetes, these would have been accommodated.

102. We find that the speed PCP – a convenient shorthand, if not taken too literally – did not put Mr Habib at a disadvantage due to his diabetes. Currys' approach was not a simplistic one, and Mr Habib himself says that his concentration difficulties are related to his learning disability, not his diabetes.

103. We find that the lack of an appeal after his dismissal placed Mr Habib at no disadvantage because of his diabetes. He was in exactly the same position as any other employee dismissed in what Currys regarded as a probationary period.

Holiday request

104. On 06.02.2023, Mr Habib messaged Ms Andrews, on Teams, to say that he had added some holidays for that holiday year and the following one. He asked her to let him know if they were approved, so he could proceed with booking them.

105. Ms Andrews responded by seeking confirmation that Mr Habib was requesting 5 weeks off.

106. Mr Habib replied by saying that he was booking 7.5 days of holiday for that year, and 13 days for the next year.

107. Ms Andrews said that Mr Habib was seeking to book off 5 weeks in a row. She explained that that would be too much time in one go. The maximum that the Respondent allowed was 2 weeks in a row, anything over that requiring approval for a specific reason. She asked, "*is there a reason you need that much or is it just capitalising on your holiday and to work the system?"*

108. The last point may be thought to be a somewhat pointed remark by Ms Andrews. But it is right to note that it followed a number of requests about working practices that Mr Habib had made.

109. On 02.02.2023, he had asked if there was extra pay for working from home, to represent electricity charges incurred in so doing. Ms

Andrews explained that there wasn't, that it was a choice and observed that "*…most colleagues actually save on costs without commuting"*.

110. A few minutes later, Mr Habib asked, "*Can I work nights instead of days? as its when I am awake*"

111. The subsequent exchange went as follows:

> Ms Andrews: *not really sure how to answer that one Adeel! ..... have you thought about how that would benefit the business in the role you*
> *currently do?*
>
> Claimant: *Yes , I thought of it and according to my homework , most stores in the Uk closed at 8 pm ,this would benefit the business getting their orders processed the same day.*
> *As sometimes when it is almost 6pm , we get a lot of order left in inbox .c*
> *But I think for that stores also have to open at night time* (followed by a smiling emoji)
>
> Ms Andrews: *think that unfortunately, there might be a lack of understanding to the responsibilities required of you as part of the credit*
> *support team.*
> *If you were to work after 8PM. there would be zero requests because you are quite correct, no one is working. This also includes myself and the team as a point of escalation and also our internal IT support if maginus was to go down.*
> *If the idea is to store up all the requests through out the day to process at night then i'm afraid that would actually be delaying the process for our customers, and we would not meet our SLA's. Orders released in the evening, also do not go anywhere, as the warehouse's and other teams are ALSO not working.*
> *Please remember as well Order Release is only one part of the role, you will be required to support on the database queue which again is time critical and has the same SLA of 2 hours.*
> *Let me know if you would like more information regarding how it all works and whats expected of you in your role, will happily go over it or i'm sure Naima and Aimee will be happy to advise to* (emoji)
> *If i could give you any advise Adee! it would be to really focus on your 0-90 plan and making sure you are able to sign off at each stage of your probation. Learning everything towards this plan will also help you understand the role and the business too*.

112. The request to work nights, soon after Mr Habib had joined the Respondent having indicated no issues with working hours, must have

struck Ms Andrews as bizarre. In her response to Mr Habib, and in dealing with this in her statement, she resisted any temptation to ridicule, instead patiently and professionally dealing with the request. This is, we think, important context to the possibly pointed remark above.

113. Returning to the holiday request, Mr Habib explained that he wanted to go back home – we understand this to mean, to Pakistan – to see family and attend 5 weddings. He said he didn't know about any need for specific approval.

114. Ms Andrews said that, if these were pre-existing arrangements, they should have been declared before he started his employment.

115. The exchange continued, and Ms Andrews sent Mr Habib a link to Currys' holiday policy. She also sent him a screenshot of the contractual provisions. At 16:16hrs, she sent him the following message:

I have reviewed the holiday request and I'm afraid I won't be able to approve that much time off in one go.

There are quite a few reasons for this but the main ones are because March/April are busy times in B2B and it's the end of financial year business peak. In addition to that we have a lot of additional work within the team e.g. end of year appraisals/objective settings that also happen around April/May

Also, looking at the resourcing the team would be a person down for 7 weeks straight which is not acceptable, as it someone were to become ill this would be a risk to the team meeting its workload.

Ahmed has also reduced hours now which means we already have less hours in the team and we would also need to cover bank holidays and weekends too.
…

116. Mr Habib's response was to say that he could skip the last week of the proposed holiday.

117. Ms Andrews unsurprisingly replied that that would still be 4 weeks, or nearly 4 weeks, off.

118. The Clamant asked if there was anyone else to whom he could raise the request. Ms Andrews said that there wasn't, that it was her decision and it was final. A few minutes later, she offered to allow Mr Habib 2.5 weeks.

119. Mr Habib protested that this was not enough time. However, he appeared to accept this, although requiring clarification that the period allowed was from half a day on 19th April, to 8th May. After further pushing for 2 days unpaid leave – which Ms Andrews pointed out that she had declined – Ms Andrews wrote:

No Adeel, I have declined that. You have not been with the business long, you have more than enough holiday to give you sufficient breaks. It is your choice to store this up and use at the end of the year so you can use additional holiday from next year.

Again, I've said it before and I think Naima will probably mention it in your 121, but your focus really should be very much around your performance and learning the role.

That is where I would love to see all this energy and enthusiasm.

120. Mr Habib contends that the denial of the holiday leave he sought was an act of direct race discrimination.

121. We will deal with the law below.

122. As comparators, Mr Habib relied on Ms Farmer, and an unnamed Data Operations Manager. In cross-examination, Mr Habib said that he did not identify the comparators, but then proceeded to say that he had named Ms Farmer and one Lauren Wright.

123. In closing, Mr Habib could not identify why he says the denial of holiday leave was because of his race or nationality.

124. Whether or not the comparators were appropriate, was not explored fully before us. We were told that Ms Farmer is of mixed-race, but apart from that were told nothing to assist us with whether they are appropriate comparators or not.

125. This is not really a disadvantage in this case, because we consider that we are well able to answer the question, why was the holiday leave request denied? It was because Currys had a policy of generally not allowing more than 2 weeks' holiday leave. The business case for this is obvious.

126. Mr Habib was aggrieved that Ms Farmer had been allowed 4 weeks leave. But we were told, and accept, that she was a particularly strong candidate for employment whom Ms Andrews was keen not to lose, that she had pre-booked a 4 week holiday before joining Currys, had told Currys about this at interview, and – contrary to Mr Habib's belief – had not been working there for about the same time as him.

127. As for Ms Wright, Ms Andrews told us that Mr Habib's belief that she had been given a long period of leave was wrong. We accept Ms Andrews' evidence on this. With all the reasonable adjustments that were made to enable him to take part fairly in the hearing, we find that Mr Habib was often simply not a reliable historian. He said, as noted above, that he had not suggested the comparators identified in Employment Judge Midgley's order – only then to say that he had – and any notion that Employment Judge Midgley would have made up comparators is simply unbelievable. Despite having been told, on day 1 of the hearing, that he would have the chance to question Currys' witnesses and having it explained to him what was involved in that, in closing Mr Habib said that he had not known he could ask them questions. The adjustments to which we have referred above lead us not to make a finding that these were lies. But all the adjustments in the world cannot make Mr Habib a reliable historian.

128. In contrast, we found Ms Andrews to be an impressive witness. She did not require the adjustments that Mr Habib did, and in that it is unsurprising that she should be more superficially impressive. However, we noted that avoided some of the behaviours sometimes seen in witnesses; she did not seek to argue Currys' case, she was frank where she did not remember things, offering us such assistance as she could without pretending that informed conjecture as to what she is likely to have done or said, was something more solid.

129. Mr Habib was asked about the Respondent's holiday policy, which includes the following provisions:

> *We normally ask that you take no more than two weeks off a time, but sometimes we might be able to approve longer leave. Your head of department will decide whether or not to approve leave that's longer than two weeks*
> *…*
> *We expect to be busier at certain times of the year than others, depending on what our customers need. So, we might sometimes put a restriction in place that means you can't take time off.*
>
> *You might not be able to take time off during the Christmas trading period, for example. Your head of department will let you know in advance if there are any holiday restrictions coming up.*
> *…*
> ***8. What happens if I take holiday without my line manager's approval?***
>
> *Your absence will be treated as unauthorised, and you'll lose any pay that you'd be entitled to if your line manager thinks you've taken time off without their approval.*
>
> *Your absence will also be investigated as outlined in our unauthorised absence procedures and this could lead to disciplinary action.*
> *…*

130. Mr Habib queried the applicability of this policy. The policy stated that its last review date was 29.08.2022, and that it was effective from 30.08.2022. After some confusion, we were able to ascertain that Mr Habib believed the policy to be applicable up to the date of review. He therefore contended that it was not in force at the time of his holiday request.

131. This argument does not make sense. The policy cannot be in force from the day after which it ceased to be in force.

132. We find that Mr Habib was denied his requested holiday leave on a reasonable application of Currys' policy and practice. The denial of holiday leave, we expressly find, had nothing whatsoever to do with Mr Habib's race or nationality.

<u>Mug incident</u>

133. The third incident said to constitute direct race discrimination concerned a mug belonging to Mr Habib. It, and some other kitchen items, went missing. This upset Mr Habib greatly.

134. Ms Andrews told us in her supplemental statement that the understanding in the workplace was that all mugs are communal if left in the kitchen. An employee who wants to use a mug as their own, is expected to wash it and take it to their desk. Mr Habib had left his mug in the kitchen.

135. Ms Farmer explained this to Mr Habib, and observed that, if he had left the mug in the kitchen, someone had probably used it.

136. Later on that day, Ms Farmer offered to go around the office with Mr Habib and ask colleagues if they had seen the mug. Contrary to Mr Habib's contentions, Ms Andrews does not recall Ms Farmer using the word "*stealing*".

137. Mr Habib says that, after this, he was cold-shouldered by colleagues. Ms Andrews disputes this, saying that he joined the team for after-work drinks one evening and continued to take part in the WhatsApp group chat.

138. Ms Andrews' account was not challenged by Mr Habib in cross-examination. However, it would not be right to simply accept her account on that basis. Although the lack of challenge impacts on our ability to assess what happened, we must still carry out that assessment.

139. We find that Mr Habib was probably very upset about his mug. Just how upset he was probably seemed to his colleagues to be out of proportion to the loss of a mug. We have seen the tenacity with which he approached the question of holiday leave. It seems likely that he took a similarly tenacious approach to the mug. Ms Farmer's offer to accompany him around the desks of others was a well-meant gesture, intended as much to placate Mr Habib as to find the mug. We find that it is unlikely that she would have used the word "stealing", which she would have appreciated would cause ill-feeling. Mr Habib, on the other hand, can use

language that is apt to strike others as confrontational, even if he does not intend to be. We find that he probably did give his colleagues reason to believe that he viewed the loss of the mug as stealing. We find that this is likely to have caused some resentment towards him.

140. If Mr Habib did receive any cold-shouldering, it was because of that, rather than anything for which Ms Farmer or Ms Andrews (who did not direct Ms Farmer to make her offer) are responsible. We remind ourselves, also, that Mr Habib has said himself that he experiences social isolation.

141. Social isolation is a terrible thing. Sad though it is to have to say this, it seems to us to be likely that Mr Habib is, unfortunately, ill-equipped to cope with the nuances of social interaction in the workplace, and lacks the sort of social skills that might have eased tensions that arose around the mug incident.

142. What we find to be plain, is that Ms Farmer's actions concerning the mug incident had absolutely nothing to do with Mr Habib's race or nationalty.

Sexual harassment

143. Mr Habib's case was that Mrs Benguit had asked him about his previous relationship, and asked him why he did not have children. More seriously, he said that she rubbed her bosom against him, his contention being that this was with a clear sexual intent.

144. In the hearing, Mr Habib said that Mrs Benguit was in the habit of leaving a drink bottle on his desk and conveniently forgetting that she had left it there as a pretext for returning to his desk. The drink bottle would be one named "*juice burst*". Mr Habib considered this to have a sexual connotation.

145. Although the list of issues identifies a single date on which the unwanted contact is said to have occurred, Mr Habib in the hearing said it happened regularly. He explained that, at his desk, he had a laptop computer, plus a separate keyboard and two further screens. He said that, when she needed to assist him with some task, Mrs Benguit would

deliberately position herself so as to make contact with him. This was contact with a sexual purpose, not the sort of contact that is part and parcel of everyday life.

146. Mrs Benguit denied any unwanted sexual touching of Mr Habib. She denied any sexual interest in Mr Habib, pointing out that she is a married woman. She says that it was Mr Habib who asked her if she was married, to which she replied that she was, with two children. In the same conversation, she asked if he was in a relationship. She didn't ask him if he had children, or why he did not.

147. Mr Habib's behaviour towards Mrs Benguit in the hearing became bizarre. She was in the hearing throughout the evidence. She had heard what Mr Habib claimed about her behaviour towards him. At one point in his evidence, he claimed that she was behaving inappropriately in the Tribunal, including an allegation that she was praying.

148. None of the panel noticed any untoward behaviour from Mrs Benguit. Some reaction to what Mr Habib was alleging may not have been surprising, but Mrs Benguit showed commendable restraint. She was certainly not obtrusive, and any prayer she may have said was of the silent type unaccompanied by any noticeable gesture.

149. We find Mr Habib's account simply incredible. His suggestion that the juice burst bottle has some sexual connotation was absurd. The parties agreed that we could look up what the bottle looks like on the internet, it being a product with which the Employment Judge and the members of the panel were not familiar. It is a conventional plastic drink bottle.

150. If the unbelievable nature of Mr Habib's evidence on this point were not enough, Mrs Benguit was an impressive witness. We have already mentioned the commendable restraint with which she listened to what must have been unpleasant accusations to hear. Her evidence, and in particular her denial of any sexual interest in Mr Habib, were given without any hint of excessive drama.

Contract claim

151. The issues on this element of the claim are largely legal.

152. Insofar as the bonus is concerned, it is not in dispute that Mr Habib was paid this in February, but not in January or March. Ms Andrews said the following:

> I deny that Currys unlawfully failed to pay Adeel a bonus. We operate a local based plan – for Credit Support, colleagues are eligible if they have worked that full month and the team and individuals hit their performance levels (and were not on performance review). The bonus was for up to 10% of basic salary for the month. While we paid Adeel a bonus for his first full month (February 2023 [p.364][7]) (which we offered as a goodwill gesture as he had only just started), his performance issues meant he did not receive any further bonus payments. His employment contract outlined that any bonus was at Currys' discretion [p. 166]. Based on Adeel's performance, I did not think he merited any bonus payments and, in any event, he did not work a full month in either January 2023 or March 2023.

153. This account was not challenged.

154. Insofar as the overtime claim is concerned, this likewise is admitted, but Currys says that overtime was usually unpaid.

155. The success or otherwise of Mr Habib's claim on these will turn on the interpretation of the contract.

Law

Contract of employment

156. The provisions of the contract of employment have been set out above.

157. The contract says plainly that Mr Habib did not have a probationary period. Currys' contention that there was a probationary period is framed in two ways:

(a) That the clause permitting reasonable variations was exercised, and;

(b) That Currys communicated to Mr Habib that it considered there to be a probationary period, which Mr Habib accepted by his conduct.

[7] A reference to the page in the bundle.

158. The variation clause only allows variations that are reasonable. Braganza -v- BP Shipping[8] was mentioned in the course of submissions, but this decision goes to the need for contractual discretions to be exercised not arbitrarily, capriciously or irrationally, rather than to whether a particular change to a contract was reasonable.

159. We do not consider that a variation to insert a probation period was reasonable. The Respondent prepared the contract document, and chose not to provide for a probation period. That may be a surprising decision, but that does not, we think, help the Respondent.

160. The inclusion of a probation period would be a significant diminution in Mr Habib's rights. It would reduce his notice period from one month, to one week. We do not think it is a reasonable variation to reduce his notice period in this way, when Currys itself chose not to include a probation period.

161. Was the probationary period inserted by a conventional offer and acceptance? As we have set out above, Currys repeatedly referred to a probationary period, and Mr Habib repeatedly pushed back at the suggestion that there was a probationary period. We have accepted that further discussion of the subject was foreclosed. We do not find that Mr Habib accepted the inclusion of a probation period expressly.

162. Did he do so by conduct? The authors of *Chitty on Contracts*[9] write that:

> …*conduct will only amount to acceptance if it is clear that the offeree's alleged act of acceptance was done with the intention (ascertained in accordance with the objective principle) of accepting the offer. Thus, a buyer's taking delivery of goods after the conclusion of an oral contract of sale will not amount to his acceptance of written terms which differ significantly from those orally agreed, and which are sent to him by the seller after the oral contract was made but before taking delivery*[10]*. That conduct is then referable to the oral contract rather than to the later attempted variation. Nor is a company's offer to insure a car accepted by*

[8] [2015] UKSC 17 [2015] 1 W.L.R. 1661

[9] 35th edition incorporating 1st supplement

[10] Citing Jayaar Impex Ltd v Toaken Group Ltd [1996] 2 Lloyd's Rep. 437.

taking the car out on the road, if there is evidence that the driver intended to insure with another company[11]. Nor is a managing director's proposal of an employment contract accepted by the company paying him at the stated rate, if there is doubt over whether the company accepted the other terms[12][13]

163. We do not consider that Mr Habib continuing to work for Currys amounts to acceptance of a variation to include a probation period. He made plain that he did not accept that variation, and continuing to work did nothing to undermine that position.

164. It may be that Currys was careless in excluding the probationary period from the contract. But that is the bargain that it made with Mr Habib. It must comply with that bargain.

165. Regarding the bonus scheme, the contract provides for eligibility to participate in a bonus scheme. It refers to the applicable bonus scheme rules. Those rules are at Currys' discretion. Currys has a discretion to vary, replace or discontinue the bonus scheme.

166. This is not, we find, a simple discretion as to whether or not to make a bonus payment. Mr Habib was eligible to take part in the scheme, and to benefit from whatever rules the scheme provided, until Currys decided to change those rules.

167. It is unfortunate that no-one has put the rules of the scheme before us. The best we have is Ms Andrews' description of the scheme's rules. She isn't a lawyer, and the interpretation of the rules of the scheme would be a matter of law, for us.

168. That said, her account is the best we have. It is unchallenged, although that counts for less in this case than it would in others. It is also plausible, although, given Currys' decision not to include the probation clause it so clearly wishes it had included, that plausibility too may count for less than it would in other cases.

[11] Citing Taylor v Allon [1966] 1 Q.B. 304
[12] Citing Arley Homes North West Ltd v Cosgrave unreported 14 April 2016, EAT.
[13] @4-036

169. On balance, we accept Ms Andrews' account as being a fair representation of what the rules mean. With all the above caveats, we find that she was an honest witness.

170. The contract is silent on the question of overtime. It seems to us that the substance of Currys' position is that it was implied by conduct that the question of overtime was dealt with by Currys allowing any additional time worked on one day, to be reduced from another working day. The evidence suggesting that was unchallenged, and we accept that that was the position.

Equality Act 2010 ("EA")

171. EA s123 provides as follows:

> ***123 Time limits***
> *(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it*.

172. EA s13 provides as follows:

> ***13 Direct discrimination***
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
(6) If the protected characteristic is sex—
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy, childbirth or maternity.
(8) This section is subject to sections 17(6) and 18(7).

173. EA ss 20 & 21 provide as follows:

20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature 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.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.
(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.
(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

	Part of this Act	***Applicable Schedule***
	Part 3 (services and public functions)	*Schedule 2*
	Part 4 (premises)	*Schedule 4*
	Part 5 (work)	*Schedule 8*
	Part 6 (education)	*Schedule 13*
	Part 7 (associations)	*Schedule 15*
	Each of the Parts mentioned above	*Schedule 21*

21 Failure to comply with duty
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

174. EA s23 provides as follows:

> ***23 Comparison by reference to circumstances***
> *(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include a person's abilities if—*
> *(a) on a comparison for the purposes of section 13, the protected characteristic is disability;*
> *(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.*
> *(3) If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married is not a material difference between the circumstances relating to each case.*
> *(4) If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is married to, or the civil partner of, a person of the same sex while another is married to, or the civil partner of, a person of the opposite sex is not a material difference between the circumstances relating to each case*.

175. A person can be an appropriate comparator even if the situation is not precisely the same as C. It is a question of fact and degree – see Hewage -v- Grampian Health Board[14].

176. In Shamoon -v- Chief Constable of the RUC[15], Lord Nicholls of Birkenhead said:

> *11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was….*

177. EA s26 provides as follows:

> ***26 Harassment***
> *(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*

[14] [2012] UKSC 37 [2012] ICR 1054
[15] [2003] UKHL 11 [2003] ICR 337

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

178. EA s136 provides as follows:

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to—
(a) an employment tribunal;
(b) the Asylum and Immigration Tribunal;

Employment Act 2002

179. S38 of the Employment Act 2002 provides as follows:

38 Failure to give statement of employment particulars etc.

(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change) or (in the case of a claim by an employee) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday) ,

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the [worker]5 and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996[or [(in the case of a claim by an worker under section 41B or 41C of that Act

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of a worker shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c. 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

(6A) The provisions referred to in subsection (6) shall apply for the purposes of that subsection—

(a) as if a reference to an employee were a reference to a worker; and

(b) as if a reference to an employee's contract of employment were a reference to a worker's contract of employment or other worker's contract.

(7) For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be—
(a) if the worker was employed by the employer on the date the proceedings were begun, that date, and
(b) if he was not, in the case of an employee, the effective date of termination as defined by section 97 of that Act or in the case of all other workers the date on which the termination takes effect.
(8) The Secretary of State may by order—
(a) amend Schedule 5 for the purpose of—
(i) adding a jurisdiction to the list in that Schedule, or
(ii) removing a jurisdiction from that list;
(b) make provision, in relation to a jurisdiction listed in Schedule 5, for this section not to apply to proceedings relating to claims of a description specified in the order;
(c) make provision for this section to apply, with or without modifications, as if—
(i) any individual of a description specified in the order who would not otherwise be an employee for the purposes of this section were an employee for those purposes, and
(ii) a person of a description specified in the order were, in the case of any such individual, the individual's employer for those purposes.

180. Schedule 5 provides as follows:

Section 145A of the Trade Union and Labour Relations (Consolidation) Act 1992 (inducements relating to union membership or activities)
Section 145B of that Act (inducements relating to collective bargaining)
Section 146 of that Act (detriment in relation to union membership and activities).
Paragraph 156 of Schedule A1 to that Act (detriment in relation to union recognition rights)
Section 23 of the Employment Rights Act 1996 (c. 18) (unauthorised deductions and payments)
Section 48 of that Act (detriment in employment)
Section 111 of that Act (unfair dismissal)
Section 163 of that Act (redundancy payments)
Section 24 of the National Minimum Wage Act 1998 (c. 39) (detriment in relation to national minimum wage)
Sections 120 and 127 of the Equality Act 2010 (discrimination etc in work cases)
The Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 (S.I. 1994/1623) (breach of employment contract and termination)
The Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994 (S.I. 1994/1624) (corresponding provision for Scotland)
Regulation 30 of the Working Time Regulations 1998 (S.I. 1998/1833) (breach of regulations)

Regulation 32 of the Transnational Information and Consultation of Employees Regulations 1999 (S.I. 1999/3323) (detriment relating to European Works Councils)
Regulation 45 of the European Public Limited-Liability Company Regulations 2004 (S.I. 2004/2326) (detriment in employment)
Regulation 33 of the Information and Consultation of Employees Regulations 2004 (S.I. 2004/3426) (detriment in employment)
Paragraph 8 of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (S.I. 2006/349) (detriment in employment)
Regulation 34 of the European Cooperative Society (Involvement of Employees) Regulations 2006 (detriment in relation to involvement in a European Cooperative Society)
Regulation 17 of the Cross-border Railways Services (Working Time) Regulations 2008 (breach of regulations)

Employment Rights Act 1996

181. S1 of the ERA provides as follows:

1.— Statement of initial employment particulars.
(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.
(2) Subject to sections 2(2) to (4)—
(a) the particulars required by subsections (3) and (4) must be included in a single document; and
(b) the statement must be given not later than the beginning of the employment.
(3) The statement shall contain particulars of—
(a) the names of the employer and worker ,
(b) the date when the employment began, and
(c) [in the case of a statement given to an employee,]5the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—
(a) the scale or rate of remuneration or the method of calculating remuneration,
(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
(c) any terms and conditions relating to hours of work including any terms and conditions relating to—
(i) normal working hours,
(ii) the days of the week the worker is required to work, and
(iii) whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined,
(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay,

(iia) any other paid leave, and

(iii) pensions and pension schemes,

(da) any other benefits provided by the employer that do not fall within another paragraph of this subsection,

(e) the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

(f) the title of the job which the worker is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(ga) any probationary period, including any conditions and its duration,

(h) either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,

(k) where the worker is required to work outside the United Kingdom for a period of more than one month—

(i) the period for which he is to work outside the United Kingdom,

(ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(iv) any terms and conditions relating to his return to the United Kingdom,

(l) any training entitlement provided by the employer,

(m) any part of that training entitlement which the employer requires the worker to complete, and

(n) any other training which the employer requires the worker to complete and which the employer will not bear the cost of.

(5) Subsection (4)(d)(iii) does not apply to a worker of a body or authority if—

(a) the worker's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and

(b) any such provision requires the body or authority to give to a new worker information concerning the worker's pension rights or the determination of questions affecting those rights.

(6) In this section "probationary period" means a temporary period specified in the contract of employment or other worker's contract between a worker and an employer that—

(a) commences at the beginning of the employment, and
(b) is intended to enable the employer to assess the worker's suitability for the employment.

182. S234 of the ERA provides as follows:

234.— Normal working hours.
(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.
(2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours.
(3) Where in such a case—
(a) the contract of employment fixes the number, or minimum number, of hours of employment in a week or other period (whether or not it also provides for the reduction of that number or minimum in certain circumstances), and
(b) that number or minimum number of hours exceeds the number of hours without overtime,
the normal working hours are that number or minimum number of hours (and not the number of hours without overtime).

Conclusions on the issues

183. The first issue relates to time. The Tribunal has a wide discretion to allow a claim to continue, even if it is prima facie out of time. In order to decide whether or not to exercise that discretion, we would need to make factual findings. Whilst not making any concession on the point, Mr Crawford sensibly recognised that it was more economical not to make submissions on time. If our factual findings were favourable to Currys, the time point would be pointless. If our factual findings on the Equality Act claims were favourable to Mr Habib, Mr Crawford recognised that he might have an uphill task to persuade us not to exercise our discretion to allow a claim we had found to be, in substance, well-founded, to continue.

184. Issue 2: there is no dispute as to Mr Habib being a British Asian of Pakistani origin.

185. Ms Andrews did refuse Mr Habib's request for 5 weeks annual leave. This had nothing to do with Mr Habib's race or nationality.

186. Issue 2.2.2.1 was withdrawn.

187. We have found that Ms Farmer did accompany Mr Habib to the desks of other staff members and asked about the missing mug. She did not use the word “stolen”. She did this in a genuine attempt to be helpful. It did result in some resentment of Mr Habib, but this was because of Mr Habib’s conduct, rather than that of Ms Farmer.

188. We do not consider that any of the above was less favourable treatment.

189. We consider this case is one in which we should follow the Shamoon approach. We have identified why the Respondent did what it did. It was for reasons wholly unconnected to Mr Habib’s race or nationality.

190. Issue 3, reasonable adjustments. We have found that Currys did not have the PCPs alleged in issues 3.2.1 or 3.2.2. It did have a PCP similar to that described in issue 3.2.3, and that in issue 3.2.4 is admitted.

191. Neither of those PCPs placed Mr Habib at a substantial disadvantage because of his diabetes.

192. It follows that issues 3.4 to 3.7 fall away.

193. Issue 4 sexual harassment. Mrs Benguit did ask Mr Habib about his previous relationship. She did so in what was, on her part, a wholly innocuous attempt at polite workplace conversation, the question of her marital status having been raised initially by Mr Habib.

194. Mrs Benguit did not ask why Mr Habib did not have children.

195. Mrs Benguit did not engage in any inappropriate touching of Mr Habib, whether as described in issue 4.1.2 or otherwise.

196. Issues 4.2 to 4.4 therefore fall away.

197. Breach of contract claim: we find that the non-payment of the bonuses, and of the alleged overtime, was not a breach of contract.

198. We find that the failure to pay Mr Habib one month's notice pay was a breach of contract. He was not on a contractual probation period. We therefore ordered that he should be paid one month's notice pay, less the week's notice pay he had already received.

199. This claim arose when Mr Habib's employment ended.

Post-liability finding matters

200. Although the list of issues does not identify s38 of the Employment Act 2002 for consideration, the statute requires the Tribunal to make an award under it, in certain circumstances. That means that we have to consider whether we should do so, regardless of whether it features in the list of issues.

201. There is no dispute that Mr Habib's claims is of a type listed in Schedule 5 to the 2002 Act.

202. There is also no dispute that the Tribunal has found for Mr Habib on one part of his claim, and made an award in his favour.

203. The question is therefore, was Currys in breach of its obligations under s1 of the ERA 1996, when Mr Habib presented his claim?

204. Discussion of that focussed on the question of his working hours.

205. The Tribunal's initial view was that the hours each day did need to be stated. It is one thing to say 40hrs per week, but many businesses do not work a traditional 9-5 working day. Simply to give the weekly hours does nothing to tell an employee when they will have to work, even if stating those could be made meaningless by including a provision for flexibility.

206. Mr Crawford drew our attention to ERA S234, and in particular to sub-section (2). Although in a different context – reference to overtime – this does provide a definition of normal working hours. Normal working hours is the exact phrase used in (c)(i).

207. Although this interpretation would be open to criticism, in that it does not tell someone when their normal working day will start, it does not seem right to ignore the definition provided for by 234(b). We therefore find that Currys was not in breach of the requirements of s1(1) ERA and no additional payment under EA s38 is required.

208. Although a deposit order had been made, the Respondent elected not to pursue a costs order.

Employment Judge David Hughes
Date 08.04.2025

REASONS SENT TO THE PARTIES ON
14 April 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE