EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102676/2023

Held in Glasgow on 27-30 January and 14-17 July 2025 and in Chambers on 18 July 2025

Employment Judge Murphy
Tribunal Member N Elliot
Tribunal Member A McFarlane

Ms N Saini	**Claimant** **Represented by** **Ms A Bennie,** **Advocate,** **(at the first diet)** **and thereafter by** **Mr T Merck,** **Advocate,** **(at the second diet)**
Community InfoSource	**Respondent** **Represented by:** **Mr M Briggs,** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

Harassment related to race

1. The complaint of harassment related to race is time barred. It is not just and equitable to grant the extension necessary for this complaint to be brought under s.123(1)(b) of the Equality Act 2010 (EA). The Tribunal lacks jurisdiction to decide this complaint which is dismissed.

Harassment related to gender reassignment

2. The complaint of harassment related to gender reassignment is time barred. It is not just and equitable to grant the extension necessary for this complaint

to be brought under s.123(1)(b) of EA. The Tribunal lacks jurisdiction to decide this complaint which is dismissed.

Failure to make reasonable adjustments

3. The complaints of failures to make reasonable adjustments are time barred. It is not just and equitable to grant the extension necessary for any of these complaints to be brought under s.123(1)(b) of EA. This applies to each of the alleged failures, namely:

    a. the alleged failure to allow the claimant to work from home;

    b. the alleged failure to institute an agreed arrangement for the frequency and manner of feedback and supervision;

    c. the alleged failure to provide mediation and counselling in connection with the claimant's relationship with their line manager, Ms Wilson.

4. The Tribunal lacks jurisdiction to decide any of the complaints alleging failures to make reasonable adjustments which are all dismissed.

Victimisation

5. The following victimisation complaints are time barred. It is not just and equitable to grant the extension necessary for these complaints to be brought under s.123(1)(b) of EA. The Tribunal lacks jurisdiction to decide each of the following victimisation complaints which are dismissed.

    a. the complaint about the alleged acts or omissions of C's line manager as set out in paragraph 14 of the ET1;

    b. the complaint about the alleged failure by R to make reasonable adjustments;

    c. the complaint about the alleged failure by R act on C's request for workplace mediation;

    d. the complaint about alleged unsupportive, hostile, interrogative and combative conduct by Ms N Gordon on 1 November 2024;

    e. the complaint about Ms Gordon's alleged failure to investigate C's allegations about gender reassignment reported to Ms Gordon by C on 1 November 2024;

    f. the complaint about the respondent's alleged failure to support or protect the claimant from alleged bullying, aggression and abuse from C's line manager, Ms Wilson;

g. the complaint about the respondent's alleged failure to remove Ms Wilson as the claimant's line manager in light of the OH recommendations.

6. The Tribunal has jurisdiction to decide the following victimisation complaints which are not time barred. In each case, the Tribunal finds that the victimisation complaint is not well founded and is dismissed:

a. the complaint that the respondent sought to hold a 'protected conversation' with the claimant on 14 November 2024 and sought protection to which it was not entitled in relation to the claimant's claims of discrimination;

b. the complaint that the respondent presented the claimant with a settlement agreement on or about 14 November 2025, pursuant to which C's employment was to be terminated;

c. the complaint that the respondent placed the claimant on garden leave from 14 November 2024, said to have been as a punitive measure;

d. the complaint that the respondent revoked the claimant's access to emails and internal systems on 14 November 2025;

e. the complaint that the respondent failed to provide redress of grievances; and

f. the complaint that the respondent failed to investigate and respond to the claimant's grievance in a reasoned, measured and accurate manner, but produced an outcome to a grievance not properly formulated.

Constructive dismissal amounting to an act of victimisation

7. The Tribunal has jurisdiction to decide this complaint of victimisation which is not time-barred. The claimant's complaint that the respondent victimised the claimant by constructively dismissing the claimant pursuant to section 39(4) of EA is not well founded and is dismissed.

REASONS

Introduction

1. This final hearing took place as an in-person hearing at the Glasgow Tribunal. The claimant (C) gave evidence on C's own behalf and led evidence from Daniel McMahon, C's trade union representative. The respondent (R) led evidence from Gillian Wilson, Chief Executive, Elizabeth Dudley, Board Member, and Natasha Gordon, External HR Consultant. Evidence was taken

orally from the witnesses, with the exception of the claimant whose evidence in chief was provided in a written witness statement with supplementary oral evidence. The witnesses were referred to bundles of productions in 5 separate volumes running to well in excess of 1,000 pages (though we were taken only to a small minority of these).

2. The following abbreviations are used in relation to individuals referred to in this judgment.

DM	Danial McMahon, C's TU rep
DS	Duncan Sim, Vice Chair of R at the material time
ED	Elizabeth Dudley, Board Member and Volunteer at R
GW	CEO of R
NG	Natasha Gordon, External HR Consultant
SA	Sheila Arthur, Board Member of R

Issues to be determined

3. Remedy has been hived off to be determined at a subsequent hearing in the event C succeeds in some or all of the complaints. Before the January diet, there had been a process of particularisation and amendment following a preliminary hearing on case management (PH). Having regard to the case management order and note and the further particulars pursuant thereto, the issues are identified as follows:

Time limits

4. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 November 2022 may not have been brought in time.

5. Were the discrimination, harassment and victimisation complaints made within the time limit in section 123 of the EA? The Tribunal will decide:
    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    b. If not, was there conduct extending over a period?
    c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

d. If not, were the claims made within a further period which the Tribunal thinks is just an equitable? The Tribunal will decide:
    i. Why were the complaints not made to the Tribunal in time?
    ii. In any event, is it just and equitable in all the circumstances to extend time?

Harassment related to gender reassignment

6. Did R do the following things?
    a. On 1 March 2022, at a meeting with C, after C told her that C identified as non binary, did GW comment: " *I don't understand transgender identity*," and "*when I was growing up there were only two genders and it feels ridiculous to say otherwise*."
7. If so, was that unwanted conduct?
8. Did it relate to gender reassignment?
9. Did the conduct have the purpose of violating C's dignity or of creating an intimidating, hostile, humiliating or offensive environment for C?
10. If not, did it have that effect? The Tribunal will take into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.

Harassment related to race

11. Did R do the following things?
    a. On 10 October 2022, at a weekly team meeting, did GW say 'let's not be conflictual to C' in circumstances where C had reiterated during that meeting concerns raised earlier in the meeting by C's white colleague, JB, that because of the size of the WASH project it was hard to find cover to take holidays. Was GW's response of 'Let's not be conflictual' to C saying words like: "It's all well and good to say that we can take holidays whenever we want, but it still creates feelings of guilt if we know our co-workers are already over capacity but we're still being told to ask them to cover for us in meetings"?
12. If so, was that unwanted conduct?
13. Did it relate to race?
14. Did the conduct have the purpose of violating C's dignity or of creating an intimidating, hostile, humiliating or offensive environment for C?
15. If not, did it have that effect? The Tribunal will take into account C's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.

Disability discrimination (failure to make reasonable adjustments)

16. C has been ruled to have been a disabled person for the purposes of section 6 of the Equality Act 2010 (EA) by virtue of the condition Attention Deficit Hyperactivity Disorder (ADHD) at all material times pursuant to the Tribunal's judgment dated 15 December 2023.

17. A 'PCP' is a provision criterion or practice. Did R have the following PCPs:

    a. a requirement to work in the office within a fixed pattern?

    b. a practice of feedback and supervision at a frequency and manner at the discretion of management?

    c. A practice of having no particular mechanism to manage relationships with one's senior?

18. Did the PCPs put C at a substantial disadvantage compared to someone without C's disability in that:

        i. C struggles to regulate their attention flexibly because of ADHD and C's wellbeing and productivity suffered substantially in consequence of PCPs (a) and (b); and

        ii. C struggles to regulate C's focus spontaneously because of ADHD and is less able to manage relationships with C's senior such that the relationship with C's senior suffered substantially in consequence of PCPS (b) and (c)?

19. What steps could have been taken to avoid the disadvantage? C suggests:

    a. Allowing C to work from home;

    b. Agreeing with C the frequency and manner of feedback and supervision; and

    c. A bespoke solution to manage C's relationship with C's senior involving mediation and/or counselling.

Victimisation (complaints about alleged individual acts/omissions)

20. Did C do the following things:

    a. On 1 March 2022, after an alleged comment from GW that she did not understand transgender identity and that it was ridiculous to say there were more than two genders, did C suggest to GW that R would benefit from equality and diversity training?

b. On 2 March 2022, during a team meeting held via Zoom, did C suggest that R should implement training in equality issues around gender and race and did C offer to facilitate such training?

c. On 16 March 2022, did C point out to GW that an interview candidate could be autistic following a comment from GW that she didn't like the candidate because they wouldn't look her in the eye?

d. On 16 March 2022, did C tell GW, ED and DS that C was really concerned about a hiring decision made by R of an ESOL teacher and that R seemed to think this was ok? Did C say this following R Henderson having told C that he had hired a Russian ESOL teacher who held stereotypes about the refugees being 'uneducated, not well kept and sleazy'?

e. On 28 April 2022, at a team social attended by board members SA, ED and colleagues J Strauss, C Chinongo and J Baldyga to welcome new team member, J Strauss, did C say that C felt there was a lot of implicit bias around the way that R worked and that certain members of staff were not willing to see it or address it?

f. On 4 May 2022, during a debrief between C and GW, following an informal meeting attended by C, J Strauss and others, did C tell GW that C was frustrated that when C made suggestions they were declined but when white members of staff made the same suggestions, they would be accepted? Did this follow a suggestion made by J Strauss for managing workload being accepted at a meeting earlier that day attended by C, J Strauss and others, in circumstances where C had previously made the same suggestion but it had been declined?

g. On 27 September 2022, at a lunch attended by C and GW, did C say to GW that C felt that racism, ableism and other types of discrimination were part of R's organisational culture which allowed people to be discriminatory?

h. On 27 September 2022, on the way back to the office from lunch, did C tell GW that the OH doctor had suggested reasonable adjustments and had made R aware that ADHD was covered by the Equality Act 2010?

i. On 1 November 2022, during a meeting with NG, did C make the allegation that on 1 March 2022, GW had told C that she did not understand transgender identity and that it was ridiculous to say there were more than two genders? At the same meeting, did C also tell NG

that C was concerned that C's offer to deliver equality and diversity training to deal with the issue had been rejected?

j. On 7 November 2022, did C (as well as JB) say that C felt that R needed to go back to basics and relearn racism 101 and anti-oppression 101 more broadly?

21. If so, did any of these things amount to a protected act for the purposes of section 27 of the EA? The Tribunal will decide:

a. Was C doing a thing (apart from bringing proceedings under EA or giving evidence or information in connection with proceedings under EA) for the purposes of or in connection with the EA?

b. Was C making an allegation (whether or not express) that R or another person has contravened the EA?

22. Did R do the following things?

a. Did GW subject C to undermining, micromanagement, undue scrutiny, unrealistic deadlines, setting C up to fail, nitpicking and microaggression, gaslighting, bullying and harassing C while on sick leave? Did GW remove opportunities for C's career development, refuse annual leave request or make agreement conditional on C finding a substitute? Did GW fail to support C and fail to provide C with a safe working environment?

b. Did R fail to make reasonable adjustments for C as specified at paragraphs **[19(a) to (c)]?**

c. Did R fail to act on C's request for workplace mediation?

d. On 1 November 2022, was NG's conduct towards C during a Zoom meeting unsupportive, hostile, interrogative and combative?;

e. Did NG fail to investigate C's allegations about GW's comments on gender reassignment which C reported to NG on 1 November 2022;

f. Did R fail to support or protect C from bullying, aggression and abuse from C's line manager, GW?

g. Did R fail to remove GW as C's line manager despite it being a recommended adjustment by OH?

h. Did R seek to hold a 'protected conversation' with C on 14 November 2024 and seek protection to which it was not entitled in relation to C's claims of discrimination?

i. Did R present C with a settlement agreement on or about 14 November 2022, pursuant to which the employment was to be terminated?

j. Did R place C on garden leave from 14 November 2024 as a punitive measure?

k. Did R revoke C's access to emails and internal systems on 14 November 2025;

l. Did R fail to provide redress of grievances; and

m. Did R fail to investigate and respond to C's grievance in a reasoned, measured and accurate manner, but instead produce an outcome to a grievance not properly formulated?

23. By doing any or all of these things, did R subject C to a detriment?

24. If so, was it because C did a protected act or acts?

Victimisation: (Constructive Dismissal (s.39, EA))

25. Did R do the things set out in paragraph **[22(a) – (m)]** above, or any of them?

26. By doing any or all of these things, did R subject C to a detriment?

27. If so, was it because C did the protected acts set out in paragraph **[20(a) to (j)]** above, or any of them?

28. If so, did R's acts or omissions set out in paragraph **[22(a) to (m)]** (or any of them), individually or cumulatively, breach any of the following (asserted) contractual terms:

a. the implied term of trust and confidence;

b. an implied term that R should provide redress for grievances;

c. an obligation on R to provide a safe working environment;

d. an obligation on R to provide work;

e. an obligation on R to provide 'the tools of the job.'

29. In relation to the asserted breaches of the trust and confidence term, the Tribunal will need to decide:

a. whether R behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between C and R; and

b. whether it had reasonable and proper cause for doing so.

30. Did C resign in response to a breach or breaches of contract? If so, were all or any of those breaches fundamental? The Tribunal will need to decide whether the breach of contract was an effective reason for C's resignation.

31. Did C affirm the contract before resigning? The Tribunal will need to decide whether C's words or actions showed that C chose to keep the contract alive even after the breach(es).

Findings in fact

32. The following facts, and any further facts set out in the 'Discussion and Decision' section, are found to be proved on the balance of probabilities or were agreed by the parties. The facts found are those relevant and necessary to our determination of the issues. They are not intended to be a full chronology of events.

Background

33. R is a small, registered charity. It was founded around 2006 and works with marginalised people in Glasgow, focusing specifically on asylum seekers and refugees. R employed somewhere between 10 and 14 employees at the material time (between January and December 2022) and is assisted in its work by a further 60 or so volunteers. C was employed by R from 17 January 2022 until C's resignation with immediate effect on 19 December 2022. C was employed as Women and Asylum Seeker Housing Project Coordinator (WASH Coordinator). C's line manager was GW, the CEO of R. C was employed to work 21 hours per week on a 12-month fixed term contract. Some if not all of R's projects are funded annually. C's project was subject to annual funding which was why she was employed on a 12 month fixed-term.

34. C is an American national of Punjabi Sikh ethnicity. At all material times C was a disabled person by virtue of Attention Deficit Hyperactivity Disorder (ADHD). C is a highly educated individual. C has qualifications including but not limited to: Associates of Applied Science in Paralegal Studies, a BA in Interdisciplinary Studies (focused on English and Psychology), two masters degrees (an American qualification in Social Work and a Scottish qualification in International Relations). At the time when C applied for their role with R and throughout the period of C's employment, C was also studying part time towards a PhD in International Relations and Politics.

35. C was proficient in online internet based research.

36. Before being employed by R, C completed a job application form in which C was asked the question, 'Do you consider you have a disability?' C replied

'YES' on the form. The follow up question was 'If yes, are there any arrangements that we should make for you if you are called for interview?' C replied, 'No, there are no arrangements that need to be made should I be called for interview.' The question of C's disability was not discussed at interview and the nature of it was not disclosed.

37. R had a published 'Statement of Terms and Conditions'. It is a lengthy document adopted from an organisation called Employers in Voluntary Housing (EVH). It included Absence Procedures which contained the following text:

> "***1. Keeping in Touch***
>
> *The onus is on the employee to inform their manager in person of the reasons for and progress of any absence. If you're unable to get to a telephone on day one of your absence, you should ensure that someone else is calling on your behalf. Thereafter, you should maintain regular contact with your manager, by calling at least once a week.*
>
> *Where employees fail to keep in touch, the Association/Cooperative reserves the right to withdraw the company sick pay and also initiate the contact with absent employees where appropriate or necessary. Where a meeting is required to discuss their health and their return to work, employees will be given notice in writing a week in advance.*"

38. The document also contained a grievance procedure. It included the following terms.

> "***INFORMAL STAGE***
> *Any employment related concern should be discussed in the first instance with your immediate Line Manager.*
>
> *If the matter cannot be satisfactorily resolved at this stage, the following formal procedure will apply.*
> ***FORMAL PROCEDURE***
> ***Stage 1***
> *Any employee who has a grievance relating to their employment should raise the matter in writing to his/her Line Manager, who should try to resolve the matter within 2 working days. A written record of grievance and any proposed solution/agreement will be recorded in personal file.*"

39. The document also provided for further Stages 2, 3 and 4, under which the grievance could be escalated to the Director, a staffing sub-committee of the board and ultimately to a JNC appeals panel.

C's employment: 17 January to 27 May 2022

40. Ten days before C's employment began in January, another employee of R named Andrew had died unexpectedly in post. Andrew's death came on the back of the death of another colleague employed by R around 10 months earlier. At the time when C joined the organisation, staff members were grieving the loss of both of these colleagues. Andrew's loss had left capacity challenges within the staff team carrying out the work of R's projects. From the beginning of the employment C found the workload associated with her role to be challenging and to be too substantial to complete in the three days of working time per week. R also faced other challenges at the time when C's employment began. COVID 19 restrictions were still in place and C and C's colleagues were working from home due to these restrictions. It was understood at the outset of C's employment that this would be temporary and that, when the restrictions were lifted, there would be some requirement to attend R's premises for at least part of C's working time.

41. It was GW's practice to hold an 'in-person' support and supervision meeting with staff she managed once a month. The purpose was to check on the progress of the individual's work as well as to discuss any issues or problems where the employee may need additional support. The meetings were monthly and generally were scheduled one month in advance. They were structured according to agenda topics and GW's practice was to produce notes after the meeting which she shared with the employee.

42. GW arranged and attended a support and supervision meeting with C on 1 March 2022.

43. There was no discussion of C's gender identity or of gender identity issues more generally during this meeting or any meeting on 1 March 2022 (or at all). There was no discussion about C providing equalities training at a meeting on 1 March 2022.

44. On 1 March 2022, C did not disclose to GW that C identified as non binary. C did not disclose this to GW at all. C did not disclose this until 8 months' later during a Zoom meeting with NG on 1 November 2022 (see below). On 1 March 2022, GW did not say to C: "I don't understand gender identity, " or ""when I was growing up there were only two genders and I feel ridiculous to say otherwise." There was no discussion on 1 March between GW and C where C offered or tried to educate GW and Stuart Radose on gender identity issues or equality and diversity issues generally. C did not tell GW and Stuart Radose that they (or others) would benefit from Equality and Diversity training

on 1 March 2022, or offer to provide R with training on such issues or on gender identity issues.

45. C raised no grievance, formal or informal alleging GW had made comments about transgender identity on 1 March in the ensuing period. C wrote emails containing a number of complaints about GW and/or R between 1 March and 1 November 2022. However, none of these alleged an exchange with GW about transgender issues said to have taken place on 1 March, or at any time.

46. On 2 March 2022, on a meeting on Zoom with all staff, C pitched the idea of providing equalities training. C specified that C was thinking about anti-racism training. C did not specify that C envisaged training on gender or gender identity issues. GW said words to the effect that C would be stepping on the toes of Hasan, the training officer. He had the role of coordinating R's training.

47. On 16 March 2022, during interviews for the ASH post, Ryan Henderson, ESOL Teacher, shared a time where in an interview for an ESOL teacher, the candidate shared she was uncomfortable working with Arab men because she believed the stereotype. RH told those present that the stereotype was that Arab men were 'uneducated, not well kept, sleazy etc'. During post interview discussions at which ED, DS and GW were present, C stated that this was a huge red flag and that C was alarmed that nothing was done about the ESOL teacher. GW after the interview had a private conversation with RH to establish whether the Russian ESOL teacher had been appointed to work on the project and RH confirmed she had not.

48. On 29 April 2022, at a team social, C did not say C felt that there was a lot of implicit bias around the way that R worked and that certain members of staff were not willing to see it or address it.

49. On 4 May 2022, C did not say to GW, following a meeting earlier that day between C and Jan Baldygo, that C was frustrated that when C made suggestions they were declined but that when white members of staff made suggestions they would be accepted.

50. On 8 May 2022, C sent a WhatsApp message to SA saying words along the lines that C was having a hard time at work. C did not complain specifically about GW or any incident involving GW. SA offered to meet C for a walk to chat but C was unable to do so, due to other commitments.

51. In May 2022, C told GW that C believed they had ADHD or symptoms consistent therewith. C told GW that C was seeking a diagnosis from a private psychiatrist. In or around mid-May 2022, C told GW that C's partner was

unwell with severe illness. C told GW that C was experiencing extreme stress related to C's partner's poor health and a forthcoming operation C's partner was due to have.

52. In the period from 17 January to 27 May 2022, C had a friend called D McMahon (DM). DM was at that time a certified Trade Union Representative for certified Trade Union, Industrial Workers of the World (IWW). C had first met DM in early 2021 when C had applied to volunteer at a charity where DM worked. When C later left and began work for R, C and DM stayed in touch as friends and former colleagues. Throughout this period, C did not consult with DM about any concerns in relation to C's employment with R. In this period, C was also a member of UNITE the union and of IWW. C did not contact either union for advice or guidance in relation to any concerns about C's employment with R. During this period, C was aware of the existence of the Equality Act 2010, though not familiar with the specific details of the legislation including those relating to time limitation periods. C did not in this period seek to acquaint herself with the procedure for raising claims under the Equality Act in the Employment Tribunal. C did not raise any complaints to R about the allegations referred to in paragraphs **[43, 44 or 47],** whether formally or informally.

53. C experienced difficulties in the period to 27 May 2022 in some of C's personal interactions and relationships with members of the team C managed.

C's employment: 27 May – 15 August 2022

54. On 27 May 2022, C went off sick with stress. R extended C's leave by a week so that GW would be available to support C on returning and C then had some annual leave booked for a house move. As a result, C returned to work on 15 August 2022. C was signed off as unfit to work due to 'stress' on 27 May for the period to 17 June 2022 and from 13 June for the period thru 26 June 2022. C was latterly signed off on 24 June 2022 for the period from 24 June 2022 to 1 August 2022. C was paid full pay throughout the absence.

55. In C's absence, GW took over many of C's duties and responsibilities with respect to the WASH project.

56. On 13 June, GW sent C a WhatsApp expressing that she was sorry to hear C's health was poor and that C was stressed. GW asked if it would suit to ring C the following day at 2pm. She said 'Please do not feel you are disappointing me or anyone at CIS, we are concerned for your health and well-being. With concern and warmly, Gillian'. C replied and agreed to the call.

57. On 14 June 2022, in a call, C told GW that C had been signed off for a further period, but C had not yet provided C's sick line.

58. On 18 June 2022, C had still not provided GW with a further sick line following the expiry of the first one on 17 June 2022. GW sent a message to C: '*Hi Natasha, how are you? Would be good to catch up on Monday, unless you want to speak earlier about where things are at. Your sick line ran out yesterday, so good to know if your GP has given you another one or what*.'

59. On Monday 20 June 2022, C emailed GW and provided the sick line. C advised that the sick line may require to be extended again, and that C was not fit for a catch up. C said they needed space to rest and recover. C said, '*Could we agree about check ins and their frequency as I am still finding the pressures difficult? Perhaps I could contact you in the last three days before the expiry of any fit notes?*'

60. C kept in touch with ED during the sickleave. In one call, C told ED that receiving emails from GW during the absence made C feel like 'jumping off a cliff'. ED was concerned about this. She encouraged C to speak to her doctor about this. C told ED it was a figure of speech. ED was sufficiently concerned that she told GW and SA about C's comment.

61. GW took advice from NG about C's absence and the question of contacts. NG was an external HR Consultant who worked for Glasgow Council for Voluntary Services (GCVS) which provided HR consultancy services to around 200 third sector organisations, including R.

62. NG told GW that she should keep in touch weekly with C. On 20 June, GW emailed C and said she was happy to agree frequency of contacts. She told C she had been advised there should be weekly contact and suggested this to happen on a day of the week of C's choosing. She acknowledged C might not be able to predict when C would feel up to it but said it would be good to have a plan and to try to stick to it where possible.

63. On 23 June, GW messaged C to ask if C's partner's surgery was going ahead that day. C confirmed he was in surgery that day.

64. On or about 24 June, C submitted a further (and final) sick line for just over five weeks covering the period 24 June to 1 August. The sick line recorded in the comments box: '*Note for employer.. Natasha appreciates you checking in with her but is finding that regular contact with work is exacerbating her mental health issues. If able could you reduce contact with her for the next few weeks to allow her to improve? Thank you*.'

65. On 27 June, GW sought advice by email from NG on the matter. She explained the developments with the Doctor's comments on the fit note and asked, '*What should an employer do in this situation that is both supportive and helps maintain some minimal level of contact with her? Or do you think a good employer would just keep to this request and stop contacting her at all?*' NG responded by email and said (among other things) '*Whilst the GP has requested you not contact them whilst they hold a valid fit note, you not only should be in contact as you are the employer, you also need to be in contact to support their health, safety and wellbeing. You have a right to contact staff on sick leave to ensure support is offered…*' NG also suggested sending a Stress Questionnaire to C and attached a template questionnaire.

66. On 4 July 2022, C sent GW a lengthy message, updating her on C's partner's operation and progress. C said that C was weepy and had started medication but that hopefully C would pick up soon. GW responded with thanks for the update and conveyed her hopes that Rob would continue to improve. She mentioned that, following advice from HR, she would send C a stress questionnaire. C replied, '*Okay, thank you for letting me know, I hope you have a great rest of your week*.'

67. On 5 July, GW sent C an email attaching the stress questionnaire. She also reminded C that R offered a free counselling service of 6 sessions through their contract with an organisation called Mandala.

68. On 11 July, C sent GW a message apologising for not having replied to the email yet. C said, '*I have been trying to figure out how I can word it in a way that is productive as right now every time I reply it's very emotional'*. C explained Rob's stitches hadn't healed and had become infected. GW replied to say she was sorry to hear about Rob's recovery being hampered. She said, '*I look forward too to hearing from you in relation to CIS supporting you through your own stress and health. Our intention always is to be a supportive concerned employer, aiming to support your own well-being and eventual supportive return to work*.'

69. Around this time, GW had suggested a referral to Occupational Health in connection with C's stress and had approached the OH company. GW believed she had confirmed an appointment for C with an OH doctor for 23 August 2022 (the first available appointment the company had).

70. On 20 July 2022, C sent a lengthy email to GW and ED. C attached the stress questionnaire which had been populated at length. The email, in print, ran to over 19 pages. The questionnaire with the table populated ran to a further 7 printed pages. C did not raise in either of these documents any allegations that GW had made comments about transgender issues. The stress questionnaire included a number of questions specifically about how C felt

about aspects of the relationship/interactions with C's manager. C did not raise any allegations in response to these questions that GW was harassing C or discriminating against C in relation to a protected characteristic. C did make broader assertions that *'…we live in a society that actively assimilates us into agents of systems of oppression. In highlighting these issues, it is my hope that I can highlight where we need to do work within our organisation so we are not contributing to and resisting harm*'.

71. Substantial parts of the email were dedicated to complaint about the frequency and nature of the contact from GW during C's absence. Among other things, C said '*I am subject to state violence, primarily through legislation, as a migrant femme of color, with constant reminders that much is out of my control, as well as navigating a very scary time in my life that is also out of my control. Despite advocating for my needs, CIS asserted it's* [sic] *right to check and to contact staff on sick leave due to stress to ensure support is offered – regardless that it wasn't the type of support I needed, and despite being transparent that I was seeing my GP, seeking therapy as well as trying to receive pharmaceutical help. Not only did this hinder my ability to recover, but it was yet another reminder that an institution believes it knows best about how to support me and what my needs are…*'

72. On 25 July 2022, GW responded to C. She proposed that C not return to work until the week commencing 15 August as GW was due to be on annual leave in the week when C's sick line expired and C had requested annual leave the following week (commencing 8 August) for a house move. GW agreed a phased return, broadly in line with suggestions C had made in C's email. She asked for C's feedback on the proposals for the phasing of the return.

73. Around this period, in June or July 2022, C had a call with UNITE. C was tearful on the phone with the adviser. The discussion focused on C's discontent at the level of contact C was receiving from GW during C's sick leave. C did not ask advice about an allegation of gender reassignment harassment. C was dissatisfied with the advice of the UNITE representative who told C that the employer had a right to reach out to C during C's sick leave.

74. C did not consult with DM of IWW about any concerns with regard to C's work during this period.

C's employment: 15 August to 14 November 2022

75. C returned to work on 15 August 2022. On or about 20 August 2022, GW discussed with C the proposal that C (and other members of staff) should attend the office one day a week, following the lifting of government COVID restrictions. C was reluctant. C was concerned about the risk of catching

COVID and the implications for her partner. C felt that Tuesdays in the office were particularly busy with people doing drop ins which C feared would be distracting. On Wednesdays, most of C's team would not be present in the office so C felt that it would be pointless for C to have to attend on that day.

76. On 30 August 2022, a meeting took place between C, ED and GW at a café to discuss how best to phase C's return to work and to build positive working relationships. At this meeting, C confirmed that C was working with a private psychiatrist who had agreed a diagnosis of ADHD. GW updated C that, following the lifting of Covid restrictions, the team had agreed they would all work on a hybrid basis and come into the office at least once per week (apart from one individual who was not client facing and did not have staff management responsibilities). She explained that this was so people could build relationships with each other and with volunteers and so that project managers could understand the work of their teams better. C expressed concerns about picking up Covid. C also raised about her ADHD and ways of working. It was agreed C would consider how C would come in one day per week and update GW on this soon. It was acknowledged this could be the same day each week or different days.

77. Following the meeting, GW prepared a note confirming the discussions including the agreed actions. GW circulated the note to C who did not read it (or any of the S&S notes which GW prepared following S&S meetings).

78. It is not established that C attended the office once a week in the period from 30 August 2022 until the garden leave began on 14 November. C did, however, attend the office from time to time in this period to attend face to face meetings. The frequency of this attendance is not established.

79. There was an expectation on GW's part, following C's return to work on 15 August, that, as before C's absence, C would attend a 'support and supervision' meeting once a month with GW. GW communicated this to C and her expectation that the meeting should take place in person. The first Support and Supervision (S&S) meeting after C's return was scheduled for 13 September 2022.

80. On 13 September, at the S&S meeting C told GW that C felt the unpredictability of the open plan office, the noise levels, the hot desking and the people coming and going made the office a much more distracting space than working from home. GW suggested C may have issued prioritising C's work. The next S&S meeting was planned for 11 or 12 October 2022.

81. On 23 September, C attended a telephone consultation with an Occupational Physician.

82. On 27 September 2022, GW and C met for lunch. C said words to the effect that there were patterns of discrimination within CIS and that in C's opinion it was an organisational cultural issue. It is not established that, on 27 September on the way back from lunch, C told GW that OH had suggested reasonable adjustments and had made R aware that C's ADHD is covered by the EA.

83. On 6 October 2022, C sent an email to ED. In it C said the following, among other things (bold and underlining as used by C):

> "***I want to be clear that I don't want to open a grievance or any disciplinary action*** *as I think some of this behaviour is trying to control/protect that from happening <u>… I have no desire of seeing her</u>* [GW] *<u>go through disciplinary or being reprimanded in any way shape or form</u>. I just want the behaviour to stop. I'm open to discussing ways of how that might happen but I really need support in being heard that the behaviour needs to stop without added pressure on me to fix it. I'm tired of bringing this to Gillian's attention in various ways and settings and having it minimised or turned back on me…"*

84. On or around 7 October 2022, the OH Physician sent GW a report following C's consultation almost two weeks earlier. The report included the following text:

> "*She* [C] *described feelings of perceived work related stress which she attributed to multiple factors including difficult interpersonal relationships with her seniors and colleagues, workloads, and an expectation to return to the office after a period of homeworking. She was also experiencing personal stressors at the time, some of which are ongoing.*
> *… She felt overwhelmed, a feeling of anxiety, her mood felt low, her sleep is poor and her motivation was an issue. She has since started talking therapy …*
> *I note that Natasha was recently diagnosed with attention deficit hyperactivity disorder (ADHD) ... People with ADHD can have problems with concentration and focus, controlling impulsive behaviours or regulating emotions. In Natasha's case she described a feeling of being overwhelmed at times and difficulty concentrating in certain environments, such as the office.*
> *She feels that undiagnosed ADHD was also adding to her stress and she could find certain things overwhelming...*
> *In terms of her mental well-being Natasha feels that her stress symptoms are much improved*

> *... In my opinion, Natasha is fit for work. Her ADHD is likely to be covered under the disability provisions of the Equality Act, in my view.*
> *…*
> *In terms of adjustments/recommendations:*
> *Today Natasha reported that she has feelings of anxiety around working in the office due to the risk of contracting COVID and then passing this to her husband who has been unwell with respiratory illness. She also finds that due to her ADHD she's easily distracted in the office whereas at home she is able to focus better on a task at hand. She perceived this to be one of her main stressors. Therefore, if operationally feasible and you are able to accommodate it, continued flexibility to allow her to work from home is likely to be of benefit to her well being.*
> *During her initial period of a return to work, she's likely to benefit from regular 1:1s with a suitable senior to touch base on how she's settling in and to allow the opportunity for any concerns to be raised and addressed at an early stage.*
> *Natasha reported that the regularity of monthly supervision and support (which is sometimes more than once a month) can sometimes feel overwhelming and add to her feelings of stress and anxiety. I would suggest a conversation takes place between Natasha and her manager so an agreement can be made as to how often feedback/supervision is required... and the way in which she would like to receive this.*
> *Natasha described difficult interpersonal relationships with her current senior and she reported that there are certain members of the senior team that she feels more able to talk to because of this, including board members. I would recommend that this is discussed with Natasha directly so that this issue can be addressed and a practical solution found if possible.*"

85. On 11 October, C emailed GW and requested the postponement of the S&S meeting scheduled for 12 October 2022. C said this was because C had a task that needed to be wrapped up before the end of the next day. C said "*I would like to note that I am aware and understand that this is all part of my job. I am not criticising that but emphasising that these are tasks I need to complete…*" In this email, C also told GW that C had been crying every day during C's working hours since 3 October and said C felt communications between C and GW were deteriorated. C suggested that Mandala facilitated meetings between them as part of a mediated process.

86. On 12 October, not having seen C's email of 11 October, GW emailed C to identify items for the agenda for their S&S meeting scheduled that day. Later the same day, GW emailed C back, having seen C's email. She agreed to postpone the S&S meeting and suggested this be re-scheduled for 25 October. She said "*Let me know a good time that day. You will be in the office for the Section Heads meeting that day so we could maybe have a break after*

that and then meet at about noon…" She recorded this was the second time that C had postponed a S&S meeting. She noted C had asked for the discussion to focus on C's wellbeing. GW acknowledged this was important. She said that she was happy to discuss how they could work better to enable a more conducive working relationship to improve C's wellbeing. However, she said '*It cannot just be about that always though – meetings are both support and supervision, I need to know that things are going well in the delivery of the project you manage.*'

87. C replied with a lengthy email on 12 October (9 pages in printed format). Among other things, C alleged in the email that C had experienced months of being gaslit, nitpicked and micromanaged by GW. C concluded the email by saying "*Please let me know if our next meeting will be facilitated by Mandala or if I can report to someone else*."

88. R was a small organisation in which it was not practicable for C to report to someone else. There was no one more senior to GW in the organisation (i.e. on R's board) with the capacity to line manage C. ED, who had provided C with considerable pastoral support, did not have the capacity to take on formal line management duties in respect of C. (ED was an unpaid board member and volunteer). Nor did any of the other project managers employed by R have the capacity to perform a role in line managing C. GW decided she would not step back from her role line managing C.

89. Around this time, GW made enquiries of Mandala. Mandala said they didn't provide services to support the facilitation of internal manager/employee relationships. GW did not explore whether any other external agencies may provide this service. GW decided to carry on line managing C without an external mediation or facilitation service for the time being.

90. On 25 October, C attended the in-person Section Heads meeting. It is not established that an S&S meeting took place on that date between GW and C as GW had proposed.

91. GW and/or ED/SA discussed with NG the deterioration in the relationship between C and GW. NG suggested she (NG) meet with C to see whether she could assist in finding some resolution to the difficulties.

92. On 1 November 2022, NG and C had a Zoom meeting which NG proposed and arranged at relatively short notice. The purpose as outlined by NG during her introduction was to have a chat to see what C's concerns were and what the organisation could do to help. C and NG did not know one another before this meeting.

93. NG's conduct during the meeting on 1 November was not unsupportive, hostile, interrogative or combative.

94. C recorded the meeting without advising NG. During the meeting, C alleged to NG that during a lunch on 1 March, GW and Stuart Radose had been discussing transgender identity and that GW said that she did not understand this as it was generational. C alleged to NG that GW had made transphobic comments to the effect that she didn't understand gender identity as when she grew up it was two genders and that it was ridiculous to say that there were more than two. C alleged to NG that C told GW and Stuart that C was non-binary at that point and that GW and Stuart didn't say anything or react in any way. C alleged to NG that C had suggested that more training was required. C alleged to NG that, the following day, on 2 March, C had offered to provide training at a meeting with the entire team.

95. C knew what C was telling NG on 1 November about the alleged discussions with GW and Stuart Radose on transgender issues on 1 March was untrue. C no longer wanted to be managed by GW and the relationship, from C's perspective, had broken down. However, this was not because GW had made gender critical comments in March or at all.

96. C did not tell NG on 1 November during the Zoom call about the allegation that on 10 October 2022, GW said to C, 'let's not be conflictual' during a weekly team meeting in the context of a discussion about capacity in the team and the ability of staff to take holidays.

97. NG was not aware until 1 November 2022 that C was making any allegation of discrimination or harassment or other prohibited conduct with respect to a protected characteristic. NG did not know the content of conversations C had had on 16 March 2022 regarding the Russian ESOL teacher or of the conversation between GW and C on 27 Sep 2022 about an organisational culture of discrimination.

98. Following the meeting with NG on 1 November, NG contacted R's board to discuss the matter. Within a day or two, GW was asked to step back from her management of C. GW was in no way involved in C's line management thereafter for the remainder of C's employment. GW was not involved in any future decisions about how to manage C and the complaints C raised on 1 November. These decisions were taken by R's board of trustees with input and advice from NG.

99. On 7 November 2022, C did not state to R at a meeting when SA and or ED were present, that C felt R needed to go back to first principles on racism and

anti-oppression 101 more broadly. During the meeting, C said that the organisation needed to be aware of how anti-oppression work shows up in practice to see if we (the organisation) were fully measuring up to that. During that meeting, JB, C's colleague and direct report, said that the C Suite needed to go back to basics and have a robust understanding about power and power dynamics. ED and SA pushed back and said they didn't feel the board didn't understand this. C later phoned JB after the meeting and they agreed with each other that CIS needed 'racism 101' classes. This was during a private call and it is not established that this was shared with ED or SA or any member of R's board (or anyone else).

100. Within a few days of 1 November 2022, NG approached R's board. She recommended to the board that she have what she termed a 'protected conversation' with C. She explained to the board that this was a conversation in which R would propose C's exit subject to the terms of a settlement agreement. She indicated her view was that this was the best option. She said the next best option was to place C on garden leave until C's contract ended in January 2023. She noted that in the intervening period there was, in any event, a two-week closure during the Christmas period. NG made these suggestions because she felt, having spoken to C on 1 November, that the relationship between GW and C was so poor it was unsustainable. She also made the suggestions because she understood C's contract of employment was due to expire in mid-January in any event with no funding having been confirmed which would sustain its renewal (and no funding decision expected until March 2023). As an alternative to a negotiated departure under a settlement agreement, NG identified to the board the alternative option of what she described as a 'some other reason dismissal' on the expiry of C's fixed term contract due to a lack of funding. The Board accepted NG's advice and gave her the authority to lead a 'protected conversation' with C. Before the meeting, the board discussed with NG the contingency that, if C was not agreeable to the protected conversation or the principle of a negotiated exit, C would be placed on garden leave.

C's employment: 14 November to 19 December 2022

101. On 14 November 2022, a meeting took place at NG's instigation between C and NG. DS, Vice Chair, and ED were also present. DM of IWW was also in attendance, not in his TU capacity, but as a friend to support C. NG informed C that they were having a 'protected conversation'. She referred to the funding time lines for C's contract and to the stress C was experiencing because of work and personal circumstances. She asked if C would be willing to agree to a settlement agreement to leave the organisation along with a financial compensation package. C expressed concern that this did not sound like an

informal conversation and that C believed they should have representation. NG explained the details would be discussed then C would be given 10 working days to take legal advice from a solicitor on the proposals.

102. NG suggested that the aim (or one of them) was to support C because C had been under considerable stress. C said that C wished to end the conversation and seek a formal grievance process. NG said words to the effect that this was up to C. She told C that the Board had asked her to offer C paid leave which she called 'garden leave'. She said this would allow C some time on full pay with no implications or impact on any other process and that, if C wished to raise a grievance formally, that was up to C. C repeated that C was going the formal grievance route, that C was ending the conversation and getting a trade union representative, and that C was not agreeing to anything. It is not established that either during or after the meeting on 14 November NG or R presented C with a settlement agreement. When C advised they did not agree to participate in the 'protected conversation', neither NG nor R continued to pursue this. C said that C was not agreeing to paid garden leave and NG told C that, in that case, it was a direct instruction. C was instructed that C was not required to access emails or have calls, or attend meetings or events. Shortly after the meeting, NG or member(s) of R's board made practical arrangements for C to be signed out of C's WASH account.

103. During this meeting, NG acted with the authority of R's board. Following the meeting, DS sent an email to C (albeit it may have been wrongly addressed) which said, "*As mentioned during the meeting, Natasha Gordon was speaking on behalf of, and with the full authority of the board*". In the same email, DS also stated, '*The board decided to place you on fully paid garden leave to support your personal and professional wellbeing. We are aware that you are under stress at work and in your personal life, and we are keen to ensure that your work does not contribute to your stress any further*.'

104. He carried on, '*I understand that you will be taking advice from a trade union, which you are, of course, welcome to do. I would be grateful if you would please contact Natasha Gordon and myself, once you have had a chance to speak to your union representative*.'

105. On 18 November 2022, DS emailed C. He referred to the meeting on 14 November and noted that C had suggested C was contemplating submitting a formal grievance. He asked if C could confirm if they intended to do so. He explained that, if a formal grievance had not been received by 25 November, R would assume C no longer intended to do so.

106. In the absence of a response, DS emailed C again on 22 November 2022 to ask if C could acknowledge his emails and to let him know if they could expect submission of a grievance by Friday 25th November.

107. C did not reply and did not submit a formal grievance.

108. On 29 November 2022, NG conducted investigation meetings respectively with Caroline Chinongo and Stuart Radose. NG asked S Radose, among other things, if he remembered a meeting on 1 March 2022 with C and GW. S Radose replied that he didn't remember it off the top of his head. NG asked him if, during this meeting, GW said, 'I do not understand transgender identity as when I grew up it was two genders it [is] ridiculous to say [there are] more than two genders now'. S Radose said no and that this was not something GW would say. He commented that GW was very inclusive as a manager.

109. On 7 December 2022, NG carried out an investigation meeting with GW to investigate the allegations C had made about GW during C's meeting with NG on 1 November 2022. NG, among other matters, asked GW about allegations by C that GW had said she didn't understand transgender identity and that it was ridiculous to say there were more than two genders. GW denied this. NG asked whether GW was aware of anyone identifying as gender neutral and GW said she was not.

110. On 9 December 2022, NG finalised a report which she labelled a 'Grievance Investigation Report' . The report followed NG's investigation into alleged bullying behaviour by GW of NG, alleged race harassment of C by NG and alleged inappropriate comments by GW to C in relation to what NG referred to as C being 'gender neutral' and 'non binary'. As part of her investigation, NG had met with and interviewed HD, Caroline Chinongo, Stuart Radose as well as GW. NG did not have a further meeting with C. NG concluded there was no evidence to substantiate any of what she termed the 'grievance points'.

111. On 13 December, SA sent a letter to C headed 'Grievance Outcome'. None of C's complaints were upheld.

112. On 19 December, C submitted a grievance appeal to Ako Zada (AZ), Chair of R's board. It ran to 43 pages (though the Tribunal was taken only to one paragraph of the document). C made this submission at the same time as sending a resignation letter, intimating resignation with immediate effect.

Post employment – From and after 19 December 2022

113. On 5 January 2023, AZ emailed C to advise that a panel had been formed to consider the appeal.

114. On 8 February 2023, C initiated Early Conciliation with ACAS. At this time, C had heard nothing further about the grievance appeal.

115. On 6 March 2023, an ACAS Early Conciliation Certificate was issued to parties.

116. On 6 April 2023, the ET1 claim form was presented.

Observations on the evidence

117. There were some evidential difficulties in the case. As discussed below, there were instances where evidence to substantiate the pleaded case was limited or missing. On the other hand, there was significant evidence led by C in the written witness statement of matters which were not properly foreshadowed by either the originating claim of C's further and better particulars. C's written witness statement was not available to Mr Briggs (or Ms Bennie) until the first day of the hearing diet which was used as a reading day, so that there had been no notice to R of the matters which went beyond the pleaded case. In the circumstances, I made it clear during the preliminary discussion that the Tribunal would only decide those matters which had been properly particularised in the pleadings and that any other matters would be treated as background only. Both representatives acknowledged this, and no application was made at the hearing to amend the pleadings to introduce other matters, not particularised in the pleadings and FBPs.

118. There was also an unwieldy weight of documentation provided to the Tribunal in multiple volumes. It was made clear that we would not have regard to any documents which were not introduced through witness evidence and, would only have regard to such documents or parts of documents which we were given an opportunity to read during the hearing. Only a small minority of the documents (or, often, parts thereof) were admitted into evidence.

119. There were many disputed facts in this case.

120. A contested allegation was C's contention that GW made comments about transgender identity on 1 March 2022 and that C then told GW that R would benefit from Equality and Diversity training. C's case is that in doing so C did a protected act because C impliedly alleged that C had breached the EA. In her ET1 paper apart, C alleged having told GW about C having a non-binary identity and that GW commented (in the same conversation) that she didn't understand transgender identity and that when she was growing up there were only two genders and that to suggest otherwise was ridiculous. However, in C's written witness statement (para 27.1), C's evidence was that GW made the comments at a lunch meeting first and that C then shared C's non binary identity after GW did so.

121. GW refuted the conversation entirely. She said that the comments C imputed to her did not align with her beliefs. She said she had been aware of transgender persons from a young age when growing up in India and it would not, therefore, have accorded with her personal experience or knowledge to

say there were only two genders when growing up. She pointed out she was a member of the Scottish Green party which had well published views on gender identity issues which GW shared, and which were at odds with the comments C alleges she made. GW equally denied the allegations in December 2022, when NG put them to her at an investigation interview, as well as denying that anyone (including C) had ever identified as gender neutral to her. NG also gave evidence that Stuart Radose, also alleged to have been present, denied that GW said it was ridiculous to say there were more than two genders and also commented it was not something GW would say.

122. Mr Merck did not cross examine GW on the contested allegations. Mr Briggs cross examined the claimant on these allegations. He put to C that it simply never happened, that C invented it when she felt backed up to the wall, and C disagreed.

123. In all of the circumstances, we conclude on the balance of probabilities, not only that the exchange did not take place as C described but that her allegation that it did was made in the knowledge that it was untrue. We took into account the inconsistency between C's pleaded case and C's evidence with respect to the order of the exchange. We did not consider this to be a trifling matter of a muddled chronology. It is one thing to allege someone espoused a view that there are just two genders (as injudicious as the expression of views on such matters might be considered by some be in a casual workplace exchange). It would be contextually quite different to do so directly in response to a disclosure by an employee that they identified as non-binary. C's agents had opportunities to correct any inaccuracies in the pleadings, including when providing further particulars. It is an inconsistency we found troubling.

124. We also noted that the documentation in the period after the alleged conversation gave no hint of such an occurrence. It was striking that C did not raise the allegation in writing at all and did not bring it up verbally until 8 months later on 1 November 2022. This was despite the fact that, at least latterly in the intervening period (from 20 July and thereafter), C was prone to very wordy correspondence identifying multiple criticisms and complaints, particularly of GW. C's lengthy emails narrated many matters which appeared to us to be objectively less significant and which did not find their way into C's pleaded tribunal claim.

125. It was curious that, having written a 9-page email on 12 October 2022, complaining about many much more recent matters which were causing C upset, C chose at the meeting on 1st Nov, to focus in on this previously

undisclosed and allegedly historical allegation. C, though accompanied by her own notetaker (DM), covertly recorded this meeting. It is within judicial knowledge that the debate at the time was very prominent in Scotland as the Gender Recognition (Reform) Scotland Bill was progressing through the legislative process. It is also within the judicial notice that the debate was highly sensitive and polarised.

126. We found GW's emphatic refutation of the allegation and of the views that she was alleged to have espoused compelling. Our findings did not hinge upon this point, but we also saw force in Mr Briggs' submission that in the prevailing climate at the time, 'it was obvious to anyone that gender identity issues were contentious' and that making casual comments in the workplace would be reckless. We were persuaded that it would be improbable that a manager of GW's experience and clear intelligence would casually express views of the sort alleged at the time, even if she had held them (which we accepted she did not).

127. On the other hand, we regret to say that we found unconvincing C's explanation for not raising the allegation in a timely fashion. When asked about his, C said it was because of 'how prominent the racial stereotyping was and what [C was] dealing with racially'. However, in the material period from and after 1 March 2022, C was not raising that C was dealing with racial stereotyping. Even if C had been, it is difficult to see how this would have diminished C's ability or inclination to raise other concerns.

128. It was also disputed that on 16 March 2022, GW said of an interview candidate that she didn't like them because they wouldn't look her in the eye and that C replied that the candidate may be autistic. C gave evidence that this occurred during interviews for the ASH post with C, GW, ED and DS. GW denied this outright when Mr Merck asked her about it. Mr Merck did not cross examine ED on the matter and we have no evidence from this alleged witness. We preferred the evidence, on the balance of probabilities, of GW over that of C. No written records were produced either of interview notes or any other documentation in which C raised or recorded the issue. Having regard to our assessment of the overall credibility of the witnesses, we found GW's evidence more plausible and more convincing.

129. A second allegation was made about events on 16 March which was also contentious. C's pleaded case is that, on that date, C learned during interviews that R Henderson had hired a Russian ESOL teacher who held unsavoury stereotypes about refugees. The averment was that during a post interview discussion with GW, ED and DS, C stated they were really concerned this was allowed to happen and that it seemed that R thought this

was ok. C's pleaded case is that ED and DS were present during this discussion because C goes on to plead that they did not say anything in response to C raising this.

130. C gave evidence in the written witness statement that during post interview discussions with ED, DS and GW, C said that C was alarmed that nothing was done about the ESOL teacher and that this was allowed to happen in the first place. Mr Briggs cross examined C on the matter and put that it was not true and that it was also not raised anywhere by C before the summer. C maintained it was true and that it was raised at the time and in emails (which were either not in the bundles or in any event not introduced into evidence). Mr Briggs asked GW about this during chief and GW recalled a discussion but said she couldn't remember it well. However, she recalled RH recounting a stereotype being raised by the ESOL teacher about Arab men. She recalled speaking to him privately about the matter afterwards. Mr Briggs did not ask GW about what C did or did not say about it during the discussion. GW gave no evidence to the effect that C did not express concern and alarm. Mr Merck did not cross examine GW about the incident.

131. No evidence was taken from ED about this incident either in chief or in cross, though ED was alleged to have been present. On the somewhat unsatisfactory evidence before us, we accept C's account that R Henderson did recount a previous interview with a Russian ESOL candidate who expressed stereotyping views about Arab men during interview, and that C responded with concern as C narrated. Neither of R's witnesses who were present gave evidence that C did not and it seemed to us probable that C would express concern about the event RH was recounting (as many people might).

132. There was an averment by C (para 33(f)) that C did a protected act on 29 April 2022 when C said at a social that there was a lot of implicit bias around the way R worked and that certain members of staff were not willing to see it or address it. However, no evidence was led in support of this averment which is not established.

133. C averred a further protected act took place on 4 May (ET1, para 33(f)). C averred that on that date, C told GW that C was frustrated that when C made suggestions, they were declined but when white members of staff made suggestions, they would be accepted. We found C's evidence on the matter confusing and inconclusive.

134. C described in the written witness statement (para 21.3 and 21.4) a Sections Heads meeting on 25 October where GW said she was going to make

enquiries of Mandala about them possibly providing clinical supervision. C said that C complained in that meeting that C was frustrated because C had suggested group supervision to GW previously, but that now that someone else needed it, GW was suggesting it be led by a white woman from another organisation and it was forgotten that C had suggested it. C continues in their written witness statement (at paragraph 21.4) that C brought this to the attention of GW informally on several occasions including "on 4 May (in the above meeting and in a private conversation with GW the same day)". We found the narrative difficult to follow. C could not bring up in May that GW agreed to group supervision the following October. In another part of the witness statement (para 23) C again gave evidence about some conversations on 4 May but these included no evidence that C said that where C's suggestions were declined, those of white colleagues were accepted.

135. Mr Merck asked GW about the averment in cross examination and GW replied that she didn't think C said what was averred in paragraph 33(f). We find it is not established on the balance of probabilities that C made the comments on 4 May 2022 described in paragraph 33(f) of the ET1. There was inadequate evidence from any witness to establish the averments in that paragraph.

136. C averred (para 33 (g), ET1) that on 27 September 2022, GW and C met for lunch and C said there was an organisational problem that allowed people to be discriminatory. C's evidence in the written witness statement said words to the effect that there were patterns of discrimination within CIS and that in C's opinion it was an organisational cultural issue (para 22.8). During cross examination, Mr Briggs put to C that the conversation on 27 September was to discuss developing robust policies and that there was no allegation of racism or sexism. C did not accept this. C said C gave examples involving certain other members of staff. In cross examination, Mr Merck put to GW the pleaded protected act and GW accepted that C had brought up race discrimination and ableism. She said she didn't remember exactly whether C had said that it was an organisational problem but that C probably had. It seemed to us that C's account was broadly agreed, or at least not meaningfully disputed and we accept C's evidence on the balance of probabilities.

137. C pleads that a further protected act took place on 27 September 2022. C's pleaded case is that on the way back from lunch with GW that day, C told GW OH had suggested reasonable adjustments and made C aware that ADHD was covered by the EA. However, no evidence was led of this conversation by C in either the written or oral evidence**.** No evidence was taken from GW on this in chief and Mr Merck did not put to GW in cross examination that C said this on the way back from the lunch on 27 September. On the evidence

before us, it is not established that C made these remarks to GW on the way back from lunch on 27 September (or at all).

138. Another protected act averred by C relates (we understand, though there is a cross-referencing error in the pleadings) to the conversation between C and NG on 1 November 2022. Broadly, it was not disputed that C made an allegation about GW making comments about transgender identity to NG on 1 November. However, we mention a curious anomaly in the evidence on this. Two sets of notes of the 1 November meeting were produced to us. One was prepared by NG just after the meeting which was not and did not purport to be verbatim but captured what NG regarded as the key points. It included a narration that C had said GW said 'when she grew up it was two genders, and it was ridiculous to say there were more than two'. The other was a transcription prepared by an AI transcription aid produced by C. Oddly, the transcription included no record of C making an allegation that GW made the comment about 'only two genders'. The transcription records C saying that 'transphobic comments' were made on 1 March (p.503) but the document does not include any specifics. Since both parties seemed to accept that C made the specific allegation about GW making comments about 'only two genders', little turns on this. From the time stamps on C's transcription, the pages appear to have been produced in the bundle in the wrong order. It may be that there is simply a page missing.

139. C's final pleaded protected act was an alleged comment on 7 November. C's averment is that during a meeting on 7 November with SA and ED present, C stated that CIS needed to go back to basics and re-learn racism 101 and anti-oppression generally. However, the evidence in C's written witness statement was different. The evidence (at para 41.6) was that during the meeting with SA and ED, C said C felt it was clear that the organisation needed to be aware of how anti-oppression work shows up in practice and 'see if we're fully measuring up to that'. No evidence was taken from ED about this allegation either in chief or in cross and we have, therefore, accepted C's unchallenged account of what C said at the meeting on 7 November 2022. C's evidence was that the reference to 'racism 101' was made, not during that meeting, but in a later call between C and C's colleague, JB.

140. One of the alleged detriments is that NG was unsupportive, hostile, interrogative and combative during a Zoom meeting with C on 1 November 2022. This is disputed. It was not, however, put to NG in cross examination that she behaved in this way. C gave evidence in the statement which indicated C's view that NG's questions were sceptical or belittling of C's experience and that C was subject to frequent interruptions by NG. DM, who was also present, gave evidence that the meeting was quite formal and that

there was not much expression of sympathy by NG. He said NG was focused on getting the facts. DM did not use words like combative or hostile to describe NG when asked about her approach. We had before us NG's notes of the meeting and C's transcription. Nothing in the transcription suggested that NG's conduct or tone during the meeting was combative, hostile, unsupportive or interrogative. The vast majority of the speaking during the meeting was done by C. The questions NG asked appeared to us to be proportionate and not hostile or combative. They appeared to be aimed at understanding from C what C's position was. We were not satisfied that this was an unsupportive approach. We found, on the balance of probabilities, based on the oral and written evidence available, that NG did not conduct herself in a combative, hostile, unsupportive or (inappropriately) interrogative manner during the meeting.

Relevant Law

Time Limit in relation to complaints of harassment, victimisation and failure to make reasonable adjustments

141. Section 123 of the EA deals with time limits for bringing discrimination, harassment and victimisation claims and provides:

(1) subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of three 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…

….

(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.

142. The burden of proof in showing that it is just and equitable to allow a complaint to be received under s.123(1)(b) is on the claimant (***Robertson v Bexley Community Centre*** [2003] IRLR 434). The EAT has held that 'if the claimant advances no case to support an extension of time, plainly, he is not entitled to one' (***Rathakrishnan v Pizza Express (Restaurants) Ltd*** [2016] IRLR 278).

143. Parliament has chosen to give the Tribunal wide discretion in determining whether it is just and equitable to extend time, having regard to the language of the provisions (***Adeji v University Hospitals Birmingham NHS Foundation*** [2021] EWCA Civ 23.)

144. S.140B of EA provides for an extension to the three-month time limit in certain circumstances. In effect, s.140B(3) of EA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'Day A' and 'Day B' as defined in the legislation. Where a limitation period has already expired before the conciliation commences, there is no extension (***Pearce v Bank of America Merrill Lynch*** UKEAT/0067/19).

145. In ***Miller and Ors v The Ministry of Justice*** [2016] UKEAT/003/15, the EAT cited five points relevant to the test for extending time in discrimination claims which were relevant to the appeal in that case, as follows:

    a. The discretion to extend time is a wide one: ***Robertson v Bexley Community Centre …***

    b. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule ...

    c. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence…

    d. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET …

    e. The ET may find the checklist of factors in s.33 of the Limitation Act 1980 ("the 1980 Act") helpful (***British Coal Corporation v Keeble*** [1997] IRLR 336 …) … This is not a requirement, however, and an ET will only err in law if it omits something significant.

146. The Court of Appeal ("CA") has made clear that the Tribunal is not required to go through a ***Keeble*** checklist. With that said, the CA has also observed that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and the reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or prohibiting it from investigating the claim while matters were fresh) (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] IRLR 1050).

147. Even if a complaint is found meritorious at a final hearing which has been convened subject to a reserved time bar point, it does not follow that time will always in such a case be extended. That factor may be outweighed by other considerations, including possible considerations of prejudice in favour of the respondent (***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** [2022] EAT 132 at para 58 and 59).

148. The question of whether ignorance on the part of the claimant is reasonable has been cited as relevant in the context of the time limit provisions in unfair dismissal cases (which are different to discrimination cases and involve a test of reasonable practicability). Thus, in ***Wall's Meat v Khan*** [1979] ICR 52, Brandon LJ said "…*Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly have been found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it*." The dicta on the matter of claimant ignorance has been found to be relevant also in the context of the test in discrimination cases, requiring the Tribunal to decide what is just and equitable (***Averns v Stagecoach in Warwickshire*** [2008] UKEAT/0065/08, ***Bowden v Ministry of Justice*** UKEAT/0018/17/LA).

149. The question of delays while an internal appeal process is ongoing or pending has been considered by the appellate courts. The fact of such an appeal is a factor to be weighed in the balance in considering exercising the discretion to extend (***Robinson v Post Office*** [2000] IRLR 804, EAT*).* However, the pursuit of domestic grievance or appeal procedures will normally not constitute a sufficient ground for delaying the presentation of an appeal and the Court of Appeal has rejected the suggestion that there is any general principle that an extension should be granted where a delay is caused by the invocation of an internal grievance or appeal procedure, unless the employers could show some particular prejudice (***Apelogun-Gabriels v London Borough of Lambeth*** [2002] IRLR 116).

150. Time generally begins to run from the act of discrimination, harassment or victimisation complained of. However, there is an exception to this where there is a 'conduct extending over a period' (s.123(3)(a). Here, the prohibited conduct shall be treated as done at the end of that period. The distinction

between 'conduct extending over a period' and a 'one-off' decision to do something or not to do something is an important one.

151. Where a series of acts or failures are alleged to amount to harassment or victimisation, a finding that the later 'timely' acts were not prohibited conduct will mean that it cannot be considered to be part of 'conduct extending over a period'. In ***South Western Ambulance NHS Foundation Trust v King*** [2020] IRLR 168, EAT, the claimant alleged her grievance was a protected act and that the investigation of it, its dismissal and the rejection of her appeal were acts extending over a period. The first was found to be prohibited conduct but the later acts were not. As only the final act (dismissal of the appeal) occurred within the limitation period, the complaint of victimisation was out of time.

152. A failure to do something is to be treated as occurring when the person in question decided on it (section 123(3)(b)). Where an employee complains about a failure to make reasonable adjustments under s.20 of EA, the failure is not 'conduct extending over a period'. Time begins to run from the date the person in question decided upon it. In the absence of evidence that a person has deliberately decided on a certain date not to make an adjustment, the provisions of section 123(4) will apply (whether the failure to adjust was a deliberate decided omission or an inadvertent one) (***Kingston Upon Hull City Council v Matuszowicz*** [2009] ICR 1170, decided under the Disability Discrimination Act 1995, but the reasoning remains applicable to the EA provisions).

153. Under s.123(4), if there is no evidence of the person doing an act inconsistent with the making of the adjustment, then the Tribunal must consider when the period expired when the person might reasonably have been expected to make the adjustment. The Court of Appeal has held that, for the purposes of section 123(4)(b), time would begin to run at the point in time when it had, or ought to have, become clear to the claimant that her employer was not complying with its duty to make reasonable adjustments (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] IRLR 1050).

Reasonable adjustments

154. There is a duty in certain circumstances on an employer to make reasonable adjustments in relation to a disabled employee. Relevant provisions are contained in section 20 of the EA as follows:

> "*(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 reasonably practicable to have to take to avoid the disadvantage.*
>
> *(4) …*
>
> *….*
>
> ***21 Failure to comply with duty***
>
> *(1) A failure to comply with the first … 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.*"

155. 'The protective nature of the legislation [means] that a liberal, rather than an overly technical approach should be adopted when it comes to the concept of a provision, criterion or practice (PCP)' ***Carreras v United First Partners Research*** UKEAT/0266/15. There, the claimant said the PCP was that they had been required to work late. The ET found that he had been expected to work late but not forced or coerced into doing so (and therefore that the employer did not have the PCP). The EAT overturned the Tribunal. A 'real world' approach was required. Whilst a "requirement" might be taken to imply some element of compulsion, an expectation or assumption placed upon an employee might well suffice. The EAT observed employees can feel obliged to work in a particular way even if disadvantageous to their health. The claimant was relying on the "requirement" as a form of "practice" by the respondent, and the PCP was made out.

156. In ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090, EAT, Simler P gave guidance on the approach in relation to the question of comparators and disadvantage for the purposes of section 20:

> *"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.*
>
> *The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial.."*

157. In ***Griffiths v Secretary of State for Work and Pensions*** [2016] IRLR 216, CA, the Court of Appeal considered the approach to the comparative exercise in a reasonable adjustments complaint concerning the application of an attendance management policy to a disabled employee. The Tribunal had held that the duty to make reasonable adjustments did not arise where the attendance management policy applied to disabled and non-disabled people alike. The substantial disadvantage relied upon was "worry and stress and the threat of losing the job" and the Tribunal concluded that the non-disabled would be affected similarly to the disabled as the policy applied to all. The Court of Appeal held that the Tribunal had erred in concluding that there was no substantial disadvantage (paras 41-63). It was clear that a disabled employee whose disability increased the likelihood of absence from work on ill health grounds, was disadvantaged in more than a minor or trivial way. It said the nature of the comparison exercise under s.20 is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person.

158. The EHRC Code of Practice on Employment lists factors which might be taken into account when deciding if a step is a reasonable one to take:

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

159. The financial cost of making an adjustment and the impact on the employer's particular financial situation can go to the reasonableness of an adjustment (e.g. ***Aleem v E-Act Academy Trust Ltd*** UKEAT/0099/20).

160. The 'reasonableness' of an adjustment is to be assessed by a Tribunal objectively (***Smith v Churchills Stairlifts plc*** [2006] IRLR 41). The adjustment contended for the need not to remove entirely the disadvantage (***Noor v Foreign and Commonwealth Office*** UKEAT/0470/10).

161. If an employer does not know and could not reasonably be expected to know that the person has a disability and is likely to be at the substantial disadvantage referred to in the first, second or third requirement, the duty to

make reasonable adjustments does not arise (EA, Schedule 8, Part 3, Para 20). However, nothing in the EA provides that the duty to make RAs only arises if an employer knows or ought to know that certain steps are available (***Camden London Borough v Price-Job*** UKEAT0507/06).

162. The claimant need not identify the particular adjustment at the time the adjustment falls to be made (See EHRC Code para 6.24). At that stage the onus to comply with the requirements of the EA is on the employer.

163. However, the EAT has confirmed that, by the time of the Tribunal hearing, there should be some indication of what adjustments the claimant alleges should have been made (***Project Management Institute v Latif*** [2007] IRLR 579). What is necessary is that the respondent understands the broad nature of the adjustment proposed and is given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not (para 55).

Harassment

164. Section 26 of EA deals with harassment and is in the following terms, so far as material:

"*(1) A person A harasses another (B) if –*

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

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

(i) violating B's dignity, or

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

…

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

(a) the perception of B;

(b) the other circumstances of the case;

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

… "

165. For a complaint of harassment, it is not necessary that the conduct be 'on the grounds of' the protected characteristic, but only that it is 'related to' that characteristic. It is not necessary to construct a comparison with a real or hypothetical comparator. The intention of the actors in question is relevant to

but not determinative of the question; the Tribunal must apply an objective test in deciding whether the acts related to the protected characteristic of race.

166. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336, in the context of harassment related to race, the EAT's made the following observations. *'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offense was unintended. Whilst it is very important that employers and Tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct… it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in every unfortunate phrase.'* While the EAT's comments about a culture of hypersensitivity were directed to a case of race harassment, the expressed concern regarding the potential fostering of such a culture would extend to other protected characteristics.

Victimisation

167. Section 27 EA is concerned with victimisation and provides, so far as material, as follows:

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

(4) This section applies only where the person subjected to a detriment is an individual."

168. The wording of section 27(2)(c) is broad (doing 'any other thing for the purposes of or in connection with the EA)'. The predecessor Race Relations Act 1976 referred to doing something 'by reference to' the Act. Interpreting that provision, the EAT has held, for example, that participating in an investigation meeting with an internal investigator in connection with a complaint brought by a colleague was covered (***National Probation Service for E&W (Cumbria) v Kirby*** [2006] IRLR 508, EAT).

169. Though the present and previous wording are both broad, there is a limit on what is to be construed as 'done for the purposes of or in connection with [the EA]'. Under the old wording, the EAT found in ***British Airways Engine Overhaul Ltd v Francis*** [1981] IRLR 9 that the act founded upon was not protected. There, a shop steward gave a press statement along the lines that they regretted that the union was not carrying out its avowed policy of seeking equal pay for women. She was reprimanded by her employer for failing to obtain clearance for the release. Her victimisation complaint under the provision equivalent to section 27(2)(d) failed because she was not alleging that the employer or the union were in breach of the Sex Discrimination Act 1975. The EAT observed it was 'not entirely easy' to see how wide the phrase 'by reference to this Act or the Equal Pay Act 1970' was supposed to be, but held ultimately that she hadn't done anything 'by reference to' the Sex Discrimination Act 1975 either so that no protected act was established.

170. For a disadvantage to qualify as a detriment, it must be found that a reasonable worker would or might take the view that he had thereby been disadvantaged. The test must be applied by considering the issue from the point of view of the victim. An unjustified sense of grievance about an allegedly discriminatory decision cannot constitute a detriment but a justified and reasonable sense of grievance may well do so (***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] UKHL11).

171. Section 39 of EA provides:

> "
> *(1) – (3) ….*
>
> *(4) An employer (A) must not victimise an employee of A's (B)—*
>
> *(a) …*
>
> *(b) …*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment.*"

172. The case of ***Western Excavating Ltd v Sharp*** [1978] IRLR 27 sets out four conditions which must be met to succeed in such a claim of constructive (unfair) dismissal for the purposes of the Employment Rights Act 1996 (ERA). However, the key elements of a constructive dismissal are the same for the purposes of section 39(4), though the breaches of contract in response to which the employee resigns must also amount to victimisation contrary to section 27 of EA (discussed above).

    1) There must be a breach of contract by the employer, actual or anticipatory;

    2) That breach must be significant, going to the root of the contract, such that it is repudiatory;

    3) The employee must leave in response to the breach and not for some other, unconnected reason; and

    4) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may have acquiesced in the breach.

173. In every contract of employment there is an implied term, articulated in the case of ***Malik v BCCI SA (in liquidation)*** [1998] AC 20 as follows:

    "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

174. In ***Baldwin v Brighton and Hove City Council*** [2007] IRLR 232, the EAT held that the use of the word "and" following "calculated" in the passage quoted from ***Malik*** was an erroneous transcription of previous authorities, and the formulation should be "calculated *or* likely" (emphasis added).

175. Not every breach of a statutory right amounts to a breach of the implied term of trust and confidence (***Doherty v British Midland Airways Ltd*** [2006] IRLR 90, EAT). The EAT observed there is no authority for the contention that there is an implied contractual term which covers precisely the same territory as the statute. Nevertheless, a breach of a statutory right may amount to a breach of the implied trust and confidence term. For example, in ***Greenhoff v Barnsley Metropolitan Borough Council*** [2006] IRLR 98, the EAT ruled that the employment tribunal erred in finding that the employer was not in breach of the trust and confidence term, notwithstanding the Tribunal's finding that they were in breach of their duty under the then DDA to make reasonable adjustments. Having found that there had been a serious breach of the

obligation on the part of the employers over a period of time to make reasonable adjustments, it followed that there was almost bound to be a breach of the implied term of trust and confidence which the employee would be entitled to treat as repudiatory.

176. The principle that an employee must not waive/acquiesce in a breach or affirm the contract does not apply until an employee has become aware of the employer's breach of contract.

177. The breach must be an effective cause of resignation but need not be the sole cause (***Nottinghamshire County Council v Meikle*** [2004] IRLR 703).

Burden of proof provisions

178. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

"*(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) …

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

…"

179. The effect of section 136 is that, if the claimant makes out a *prima facie* case of harassment or victimisation, it will be for R to show an explanation which is not prohibited conduct.

180. There are two stages: under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination, harassment or victimisation. This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was prohibited conduct (***Madarassy v Nomura International plc*** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the

burden of proof is on the claimant to prove those facts. R's explanation is to be left out of account in applying Stage 1.

181. However, merely showing a protected characteristic plus unwanted conduct or a protected act plus a detriment is not generally sufficient to shift the burden. Those bare facts only indicate a possibility of prohibited conduct. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, R had committed a prohibited detriment. 'Something more' is, therefore, required (***Madarassy***). This requirement for 'something more' applies equally in harassment and victimisation cases as in direct discrimination cases (***Bailey***).

182. If the claimant shows facts from which the Tribunal could decide a prohibited act has occurred, then, under Stage 2, R must prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of (or in the case of harassment, related to) the protected characteristic (***Igen v Wong*** [2005] IRLR 258).

183. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove prohibited conduct. However, they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (***Hewage v Grampian Health Board*** [2012] IRLR 870).

Liability of employees and agents under the EA

184. Sections 109 and 110 of EA contain the following provisions so far as relevant:

> "*Liability of employers and principals*
>
> *109 (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
>
> *(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
>
> *(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
>
> *….*
>
> *Liability of employees and agents*
>
> *110 (1) A person (A) contravenes this section if—*
>
> *(a) A is an employee or agent,*

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and

(b) it is reasonable for A to do so.

…."

185. In ***Peninsula Business Services Ltd v Baker*** [2017] ICR 714, the EAT considered whether liability can attach to the employer as principal under section 109(2) where the agent's actions were not prohibited conduct under the EA. The facts were that the claimant had been employed for some years by his employer as a lawyer, when he told his manager, for the first time, that he suffered from dyslexia. He claimed that his condition had worsened and requested his managers make what he said were reasonable adjustments. The Director of Legal Services was suspicious about the extent of the claimant's dyslexia and thought he might be doing private work. The Director instructed agents to carry out covert surveillance. When the employer told the claimant that he had been subjected to surveillance for disciplinary purposes, he went on sick leave. He made complaints against the employer of harassment and victimisation.

186. The Employment Tribunal upheld the complaints of harassment and victimisation. It held that the decision to authorise the surveillance and the carrying out of the surveillance were both detriments; and that the claimant had been placed under that surveillance because of the protected acts. It held that, for the purposes of section 109(2) of the Act, there was a sufficient causal connection between the protected act operating on the mind of the employer, as principal, and the detriment represented by the conduct of its agent, carrying out the surveillance on its express instructions.

187. The EAT overturned the lower Tribunal. It held that the policy of s.109(2) was to make a principal liable for an act of an agent acting within the scope of the agency only if what the agent did was itself discriminatory. It reasoned that, if the agent's act was not in itself tortious, the section did not make the principal liable for a tort even if when giving instructions the principal's state of mind was such that he would have been liable had he carried out the act himself. The tribunal had, therefore, erred in applying a test of whether there was a sufficient causal connection instead of a "because of" test and in adding to the

agent's act the employer's knowledge and motives. In that case, since the agent did not know about the protected act and were not motivated by it, they did not commit the tort of victimisation, and no liability attached to the employer under section 109(2) (para 77-80).

Submissions

188. Mr Briggs handed up written submissions which he supplemented with oral submissions. Mr Merck handed up some authorities and citations and gave oral submissions. The entire content of both submissions has been carefully considered and taken into account in making the decisions in this judgment. Failure to mention any part of these submissions in this judgment does not reflect their lack of consideration. The submissions are addressed in the 'Discussion and Decision' section below, which sets out where the submissions were accepted and where they were not with the reasons for this.

Discussion and Decision

Time limit

189. Any complaint relating to an alleged act before 9 November 2022 is potentially time barred. It is necessary to identify with precision which acts and omissions complained of occurred or are said to have occurred in that timeframe. We also identify in the case of each complaint when the 'normal' three-month time limit (under section 123(1)(a)) expired so that the degree of 'lateness' can be assessed.

190. **Harassment related to gender reassignment.** The offending conduct is alleged to have taken place on 1 March 2022. The 'normal' time limit under section 123(1)(a) expired on 31 May 2022. As no early conciliation process had been initiated before that time limit expired, there is no extension to the time limit pursuant to section 140B (***Pearce***). The claim was raised on 8 April 2023, over 10 months after the normal time limit expired.

191. Mr Merck suggested in his submissions that the issues were 'always about the relationship between C and GW'. We understood his argument to be that this provided a linkage with later allegations such that the gender reassignment harassment allegation formed part of a 'continuing act' or conduct extending over a period (which ended after 9 November 22).

192. However, this argument cannot succeed. Firstly, we have found that the particular conduct alleged to have happened on 1 March did not occur as a matter of fact so it cannot have formed part of a course of conduct over a period. Secondly, and of wider relevance to all potentially time barred allegations, we have found elsewhere in this judgment that none of the later

'in time' allegations (i.e. those said to occur on or after 9 November) have been established to be prohibited conduct, contravening the EA. It follows that the earlier acts and omissions cannot be 'knitted together' with those later ones to form a course of prohibited conduct extending over a period, given the later ones were not unlawful under the Act (**South Western Ambulance NHS Foundation Trust v King).** We adopt this reasoning without repetition in relation to each of the pre 9 November allegations, none of which are brought within the 'normal' time limit by operation of section 123(3)(a) of EA.

193. The reason C gave when asked why C didn't bring a claim at an earlier stage in relation to the gender-reassignment harassment allegation was that C wanted to deal with it informally and didn't want to escalate it to that. When the time limit expired on 31 May 2022, C had not raised the matter informally or formally with R.

194. **Harassment related to race**. The alleged conduct of GW said to have been harassment related to race is said to have occurred on 10 October 2022. The 'normal' time limit under section 123(1)(a) expired on 9 January 2023. As no Early Conciliation had been initiated before that time limit expired, there is no extension to the time limit. The claim was raised on 6 April 2023, over 10 weeks after the 'normal' time limit expired.

195. It is not established that the claimant complained about the matter informally or formally within the 'normal' time limit (i.e. by 9 January 2023). C did not refer to it during the meeting with NG on 1 November 2022. We heard little evidence about C's appeal submitted on 19 December 2022 and it is not established on the evidence placed before us that C raised this alleged incident in her appeal submission.

196. **Failure to make reasonable adjustments (RAs).** Mr Merck did not initially make any submissions on time bar including whether it would be just and equitable to extend time in relation to the alleged failures to make reasonable adjustments. I drew the parties' attention to section 123(3)(b) of the EA which says that a failure to do something is to be treated as occurring when the person in question decided on it. I asked Mr Merck when he said the adjustments were decided upon (and from when time should, therefore, run).

197. In response to this enquiry, Mr Merck said that, with respect to working from home, there was a conscious decision in late September. He also said that after the OH report was received, R to continue to expect C to attend the office at times notwithstanding the contents of the report. He said that the failure continued until the date of C's resignation and that, as there was a continuing failure. I sought his clarification and he confirmed he was not making any submission on whether the time limit ought to be extended under section 123(1)(b) on the basis it was just and equitable because, he said, there was

a continuing failure. Mr Merck did not address us on time bar in relation to the other two alleged failures to make reasonable adjustments.

198. We do not agree that the alleged failures amounted to 'conduct extending over a period' which ended on C's resignation on 19 December 2022. Time begins to run from the date the person in question decided upon it pursuant to section 123(3)(b) and this applies to failures to comply with the duty to make RAs as it does to other failures (***Matuszowicz***).

199. In relation to each of the three adjustments contended for, we find that time started to run, at the very latest, from 12 October 2022. The normal time limit expired on 11 January 2023 at the latest for each of the RA complaints and C did not benefit from any EC extension, not having initiated Early Conciliation before the 'normal' time limit expired.

200. R had known of C's formal diagnosis since 30 August and had known since mid-May that C believed C had symptoms consistent with the condition and was pursuing a medical diagnosis.

201. There had been discussions on 20 and 30 August 2022 where GW indicated a wish that C would come into the office one day per week. There was an expectation made clear early in C's employment which was reiterated on 13 September 2022 that GW would hold monthly S&S meetings with C. It was clear on that date that GW expected these to take place in person and a further S&S meeting was scheduled to take place in person on 12 October. Insistence on C's attendance one day per week did not materialise in the sense that GW did not impose any sanction on C for non compliance, but neither did GW alter or withdraw her expectation and, on 12 October, she made it clear she expected C to attend the office for a Section Heads meeting and a re-scheduled S&S meeting on 25 October 2022 (having read the OH report recommendations on 7 October 2022). It was also clear from GW's correspondence on 12 October that, notwithstanding the terms of the OH report, GW was not stepping back from her line management role in relation to C and had no intention of involving some external individual to facilitate the management relationship at the next S&S meeting or otherwise.

202. At the latest by 12 October (if not before) R had done acts inconsistent with the three adjustments for which C contends, namely (i) allowing C to work (exclusively or more substantially) from home, (ii) varying the frequency of the support and supervision meetings, and (iii) implementing a bespoke solution to manage C's relationship with GW involving mediation and counselling.

203. **Victimisation – individual acts:** The following alleged victimisation detriments have not been brought within the 'normal' three-month time limit under section 123(1)(a):

a. The allegations set out at paragraph 14(a) to (l) of C's Grounds of Complaint document (of GW 'undermining, micromanagement, etc etc') are wholly unspecified. C was legally represented throughout and had the opportunity to elucidate the facts relied upon in further particulars but did not. R did not have fair notice and would suffer considerable prejudice if the Tribunal were to decide a victimisation complaint based on the unparticularised matters. Separately and in any event, from a time bar perspective, the latest date the paragraph 14 allegations against GW could have occurred was early November 2022 when GW stepped back from managing C such that the three month time limit expired in early February 2023 at the latest, prior to the initiation of Early Conciliation.

b. As far as the asserted detriment of a failure to make reasonable adjustments is concerned, the relevant dates for time bar purposes are set out at paragraph **[198]** above.

c. We find the alleged failure to act on C's request for mediation was done by on or about 12 October 2022. C had requested mediation or a change of line manager on 12 October. GW, having made enquiries of Mandala, decided not to explore alternative agencies but to continue to line manage C without external facilitation around that date. The 'normal' time limit expired by around 11 January 2023 and was not extended by EC.

d. With regard to the alleged conduct of NG at the meeting on 1 November 2022, said to be unsupportive, hostile, interrogative and combative, time ran from that date and the three months expired on 31 January 2023, with no EC extension.

e. The alleged failure to provide support or otherwise protect C from GW can only have been alleged to have been done by early November 2022 when GW was asked to step back from managing C. The 'normal' time limit for this alleged detriment expired by early February 2023 at the latest and was not extended by EC.

f. The alleged refusal to remove GW as C's line manager 'despite it being a recommended adjustment by OH' was done by 12 October 2022. By that date, GW had received the OH report, reviewed it and, decided not to remove herself from line managing C. It was clear from the email exchanges with C about re-scheduling the S&S meeting that GW was not removing herself from her line management of C. GW's acts were inconsistent with any decision to do so. The 'normal' time limit for this alleged detriment expired by 11 January 2023 at the latest and was not extended by EC.

204. The remainder of the individual victimisation detriment allegations have been brought within the normal three-month time limit and do not give rise to any time limit jurisdictional issue. These are the alleged detriments listed at paragraphs 34 (e), (g), (i), (j), (k), (l) and (m) which, we understand, relate to acts or omissions said to have happened on or after 9 November 2022.

205. **Victimisation – constructive dismissal.** There is no time limitation issue in relation to the complaint that C's alleged constructive dismissal was an act of victimisation. Time runs from the date of the (alleged) dismissal on 19 December 2022. The fact that individual acts or omissions relied upon as constituting or contributing to the contractual breach have not been brought within the normal time limit for separate standalone complaints, does not prevent C relying on these matters for the purposes of the complaint under section 39 (4)(c) of EA. The harassment complaints do not form part of the conduct relied upon as causing the constructive dismissal. The asserted dismissal is said to be an act of victimisation only and not other prohibited conduct such as discrimination pursuant to section 39(2)(c). C's case is put in a rather unusual way in that the failures to make RAs are said to be victimisation detriments relied upon for the section 39(4)(c) claim.

206. Therefore, certain acts or omissions which are time-barred as standalone complaints fall to be considered and decided in the context of C's constructive dismissal victimisation complaint.

207. **Reasons for lateness.** As to the reasons for the delay, we found the evidence put forward less than clear at times. When asked why C didn't bring the complaints in time, C said C was trying to deal with it informally. However, in the case of many allegations, the time limit had come and gone with no efforts on C's part to deal with the allegations informally or, at least, not in any direct way by complaining to R about the allegations. This is so, for example, in relation to both the gender reassignment and race harassment allegations where the primary time limit passed without the allegations being raised at all.

208. In relation to C's other complaints about GW, C indicated on 14 November 2022 that C proposed to raise an internal grievance but, although invited by R to do so by 25 November, C declined. C did not do so while the employment subsisted.

209. It was suggested that C proposed to deal with concerns informally by providing training to the team. Yet the evidence and indeed C's case was that GW rejected C's offer of training as early as March 2022. There was no evidence before us that GW gave encouragement to any belief by C that GW was sanctioning C providing training on the types of allegations that form the subject matter of C's tribunal claim.

210. We were not persuaded that the explanation of preference for an internal resolution was genuinely the reason for the delay, or, if it was, it was objectively unreasonable that C should have viewed this as anything other than a mere aspiration.

211. C was asked by Ms Bennie what their response would be to the proposition that with C's experience and background, C would know that there was a window of time within which to bring a complaint or would easily be able to find out. C replied that C understood that ACAS said it should be raised informally and dealt with internally. When asked why C had taken until 6 April 2023 to raise a claim, C said they had spoken to their TU representative and to ACAS and that the clock is stopped during ACAS early conciliation. The stop the clock provisions didn't become relevant until February 2023 (and weren't relevant at all to those complaints for which time limits had already expired before EC began). C was a member of two trade unions. Though the evidence on this was less explicit than it might be, we conclude that C did not consult either of them about time limits until late in the day and probably until after the employment ended. There was evidence that C did speak to Unite over the summer in 2022 and began consulting with C's contact at IWW in late summer 2022. However, there was no evidence that C sought or obtained advice on time limits from either Unite or DM other than the advice referred to above about the stop the clock provisions. C did not give evidence about when this advice was received. We infer this advice must have been provided relatively late in the chronology, when C started or was imminently starting Early Conciliation, since it would offer no explanation for C's delay at earlier stages while no EC process was in play.

212. There was no evidence that C sought to acquaint themself with information about recourse to Tribunal proceedings at earlier stages. There was no evidence C conducted any internet-based research to try to familiarise themself with applicable time limits. There has been no suggestion in this case that C was given incorrect advice. Yet, this is not a case where C was ignorant of any possibility of legal recourse at the time of, or soon after, the alleged prohibited acts. C had a particular interest in equality issues and was aware of the Equality Act 2010. Although the specifics of Scottish Employment Tribunal practice and procedure were not known to C, C was aware of the potential for bringing a legal claim or at least of the possibility of exploring that potential with a trade union representative at the material times. C has a paralegal qualification, albeit from the United States. We recognise that time limits and procedures will differ substantially from those applicable in the Scottish jurisdiction. However, we anticipate that someone of C's education and experience would reasonably be aware that some sort of time limit must be in place for the bringing of claims. The claimant struck us as a highly

intelligent and resourceful individual, as well as being someone who had strong internet research skills.

213. We conclude that C may have been ignorant of the time limits until early 2023 but, if that were so, such ignorance was unreasonable in all the circumstances.

214. When Mr Briggs put to C that C knew in March 2022 that there were claims in relation to gender reassignment, C said C knew about the Equality Act but said they also knew that there were issues about people trying to bring claims but not being able to. C didn't elaborate on what these perceived barriers were but repeated this assertion a few times. On one such occasion, C said 'I knew there was legislation. I was also aware people experience barriers to be able to access justice.' We were unclear as to whether C's perceptions (right or wrong) about barriers to accessing justice through the Tribunals were being put forward as a reason why C did not raise their complaints within three months of the acts complained of. There was no elaboration either as to what the perceived barriers were. We did not conclude that this was a reason for the delay, or at any rate, not a compelling one.

215. In relation to the earlier allegations, we note that C was signed off as unfit for work with stress between 27 May and the end of July 2022. When asked about C's reasons for not raising a claim earlier, C did not indicate that as the reason for the failure to do so. The matter of C's illness was raised by Ms Bennie and C simply agreed the chronology of the time C was signed off work. Nevertheless, C's poor health, even if not causative of the delays, remains a relevant factor which we take into account in weighing our decision on whether to grant a 'just and equitable' extension.

216. C also referred to the fact that C believed that R had formed a panel to look at C's appeal. C lodged an appeal on 19 December which had not been substantively progressed when C initiated early conciliation on 8 February 2023. A good number of the time limits had expired before C submitted the formal grievance appeal. We heard virtually no evidence about the subject matter of the appeal so are not in a position to assess whether it included any or all of the matters which are complained about in this forum.

217. With respect to the cogency of the evidence, no specific prejudice was identified to us by Mr Briggs, such as the loss or destruction of documents or the unavailability of a relevant witness due to a departure from employment or other incapacitation. Nevertheless, it is fair to acknowledge that the final hearing began almost three years after the earliest events complained of. That delay is not all down to the lateness in raising the complaint, but it is reasonable to assume that the delay in raising the claim has been unhelpful in relation to the issue of fading memories.

218. We considered all relevant factors to determine whether it would be just and equitable to extend time for presenting all complaints to 6 April 2023 to allow them to proceed.

219. Factors which weighed in favour of extending time to that date included:-

    a. that the disadvantage to C if the extension is refused is substantial in that C will be deprived of the opportunity to litigate the 'late' complaints and to have these judicially determined;

    b. that C wished to pursue an informal resolution through (in relation to some matters) by providing an explanation of C's concerns and seeking to educate GW and offering training to the organisation;

    c. that C latterly on 18 December 2022 raised an appeal which C hoped may deliver a resolution and that this had not progressed by 8 February when C initiated Early Conciliation;

    d. that C had no or little knowledge of the applicable time limits for bringing claims under the Equality Act until C took advice on this point in around January 2023;

    e. that, during the period from 27 May 2022 to around 1 August 2022, C was signed off as unfit to work due to stress, and that C continued to experience significant stressors after returning to work including as a result of work-related difficulties as well as C's partner's illness and C's own ADHD which had been recently diagnosed;

    f. that it appears that most if not all of the key documentary evidence relevant to C's claim has been preserved and was extensively produced at the final hearing;

    g. that all witnesses were able to attend;

    h. that certain complaints, even if time barred as standalone allegations of discrimination/victimisation will require, in any event, to be judicially decided as part of C's complaint of constructive dismissal under section 39(4)(c) of EA.

220. However, the following factors ultimately weighed more heavily in our deliberations:

    a. that the disadvantage to R of permitting the extension is also significant in that an extension means the complaints relating to acts or omissions before 9 November 2022 will be judicially determined;

b. that time limits are designed to ensure compliance with the principle of legal certainty and departures from these time limits should be the exception;

c. we noted that the period of delay was variable in relation to different complaints but in relation to the earliest complaints, it was quite substantial, exceeding ten months;

d. that C's ignorance of the time limits throughout 2022 was unreasonable for the reasons discussed above;

e. That we found C's professed reason for not acting in a timely manner uncompelling in all the circumstances. C said C's wish was to resolve matters informally but the circumstances gave no cause for C to have optimism that this was a realistic or viable alternative to litigating, such that C might reasonably disregard time limits to focus upon informal avenues. The time limits passed for some complaints with C having taken no steps towards raising internally the matters which belatedly founded complaints to the Tribunal.

f. Although we noted C had a period of sickness absence, C was able to and did correspond at length about matters she was unhappy about in this time. This was not a case where it was established on the evidence that C's illness rendered C was incapable of acquainting themself with time limits or raising Tribunal complaints or substantially impeded C from doing so.

221. We conclude that, on the facts and circumstances of this case, it would not be just and equitable to extend the time for receiving of the claimant's complaints relating to acts before 9 November 2022 to 6 April 2023.

Victimisation: (Timeous) standalone acts and omissions - Liability

222. We begin by considering whether or not the acts asserted by C to be protected acts were indeed protected for the purposes of section 27(2) of EA.

223. **Grounds of Complaint (GOC) 33(a) On 1 March 22, C suggesting to GW and SR that R would benefit from equality and diversity training**. In the pleaded case, C says that this impliedly alleged that GW and Stuart Radose had breached the EA. C refers to paragraph 20 of the GOC which appears to be irrelevant. The error is repeated in the Further Particulars. We understand para 33(a) is intended to cross-refer to paragraph 25 of the document. We have found that it is not established that C told GW and S Radose on 1 March that R would benefit from equality and diversity training. It follows that it was not a protected act.

224. **GOC 33(b) On 2 March 22, C suggesting R should implement training in equality issues around gender and race, and offering to facilitate it.** We have found that on that date, at a staff Zoom meeting, C pitched the idea of providing equalities training and specified C was thinking about anti-racism training. We don't accept this amounted to a protected act on the grounds of section 27(2)(d) (i.e. an implied allegation that someone had contravened the EA). There was no context which would give rise to any such implication. It has been found that events did not take place the previous day as C avers.

225. We considered whether, by suggesting giving training on equalities, C was doing 'some other thing for the purposes of or in connection with' the EA. We acknowledge that this is a widely framed category but we do not accept that C's suggestion of training falls within it. Again, we had regard to the overall context at the time. While C had extensive credentials that sat within the sphere of equalities in a broad sense, there was no evidence that C had a particular knowledge or expertise in the Equality Act 2010 as a specific piece of legislation or that C was offering that such training would be focused on the EA.

226. Mr Merck did not give submissions on how the offer of training was said to fall into the protected act category. Mr Briggs said that the suggestion C should carry out training has nothing to do with the EA except in the most tenuous manner. He said that the EA creates the sex equality clause, creates the public sector equality duties and houses and consolidates the predecessor legislation. He said it does no more than that. It is not, in Mr Briggs' submission, about addressing structural racism or requiring education events. It is right that the EA does not create a specific obligation on employers to provide equalities training (on the EA itself or indeed more broadly). Of course, in light of the potential risks of infringing the Act, many employers may consider it a wise measure to do/take.

227. We conclude that the offer of training on equalities and, specifically anti-racism, as made on 2 March 2022 to R's employees, was not C doing something for the purposes of or in connection with the EA. We do not accept that C has established the necessary connection. It is undeniable that there is a sense in which one could say that the EA is concerned with equalities (in its particular way by creating a legislative framework of individual rights) and that C's proposed training was also concerned with equalities (in a different way, informed by C's lived and professional experience and expertise on structural oppression). However, we are not convinced that this is sufficient for the training offer to be interpreted as 'for the purposes of' or 'in connection with' the specific UK statute.

228. **GOC 33(c) On 16 March 2022, C said that an interview candidate could be autistic when GW had commented that she didn't like the candidate because they 'wouldn't look her in the eye'.** We have not found it established that this occurred and, therefore, it is not a protected act.

229. **GOC 33(d) On 16 March 2022, C told GW that C was concerned a Russian ESOL teacher had been appointed who held stereotypes about refugees.** We have found that during interviews, R Henderson, an ESOL Teacher on the panel, shared that at an interview he'd done in the past, a candidate for an ESOL teaching post said she was uncomfortable working with Arab men because she believed a stereotype was that they were uneducated, not well kept, and sleazy. We have found that C stated that this was a huge red flag and that C was alarmed that nothing was done about the ESOL teacher. In saying such words we find that C did a protected act. Though the implication was somewhat opaque, we accept that C was impliedly alleging the ESOL candidate, by using these words, had contravened the EA for the purposes of s.27(2)(d). Alternatively, by referring to a red flag and alarm that nothing was done, C was effectively expressing a fear about the risk, in the context of an organisation working with refugees, that the ESOL teacher's conduct in post may come into conflict with the EA. In the latter case, we are satisfied that this would fall within section 27(2)(c) (doing something in connection with the EA).

230. This conclusion was finely balanced. We recognise that C did not reference the EA or even equality laws in her utterance. We acknowledge that the implication we read into C's words may appear stretched if based on C's words in isolation. However, the implied allegation or concern over contravention of equality laws is drawn not just from the words C used, but also from the important context of what C had just been told by RH, the nature of the charity and the type of work an ESOL teacher working for it would do, working with asylum seekers from diverse cultural backgrounds. We consider the wording of section 27(2)(c) is drawn sufficiently widely to extend to C's expression of concern and that it was not necessary for C to have articulated or even known which particular provisions of the EA may be engaged.

231. **GOC 33(e) On 29 April 2022, at a WASH team social, C said there was a lot of implicit bias around the way R worked and that certain members of staff were not willing to see/address it.** This was not established as a fact and so is not a protected act.

232. **GOC 33(f) On 4 May 2022 in a debrief with GW after an informal meeting involving JB and JS, C told GW that C was frustrated that when C made suggestions, they were declined but when white members of staff made the same suggestions, they were accepted.** This was not established as a fact and so is not a protected act.

233. **GOC 33(g) On 27 September 2022, at a lunch with GW, C told her issues of racism, ableism and other types of discrimination were an organisational problem that allowed people to be discriminatory.** We have found that on that date, C said words to the effect to GW that there were patterns of discrimination within CIS and that in C's opinion it was an organisational cultural issue. We find that C specifically was responding to GW asking C about C's allegations of racism and ableism and 'and so on'. Mr Briggs submitted that such allegations of structural bias had nothing to do with the EA, other than tenuously, and that this was not a protected act.

234. We are not persuaded by this submission. Section 27(2)(d) does not require that a person doing a protected act give specification how a person has contravened the EA or the type of prohibited conduct. Albeit C was attributing discrimination to an organisational culture, we are satisfied C was, in the context of these remarks, nonetheless impliedly alleging discrimination by reference to race and disability, two of the protected characteristics prescribed by the EA. In order for this to be a protected act, it is not necessary that there is any finding that C was correct about this, along as the allegation was not made in bad faith. We do not find that this allegation was made in bad faith. We accept it was C's genuinely held perception that C had witnessed conduct which C considered was discriminatory with reference to race.

235. **GOC 33(h) On 27 September 22, C told GW that OH had suggested reasonable adjustments and had made C aware that ADHD was covered by the EA.** This was not established as a fact and so is not a protected act.

236. **GOC 33(i) On 1 November 2022, C recounted 'the incident with GW' to NG.** C's pleaded case cross-refers to paragraph 9.1 of the Grounds of Complaint. There is no such paragraph. This error was repeated in C's further particulars and, although R identified the cross-referencing mistake in their further particulars, no additional clarification was given. We conclude from the context that C's representative intended to refer to paragraph 10 (gender reassignment alleged harassment) which in turn refers to other paragraphs 23-27. We have found it to be established as a fact that C told NG on 1 March, GW said she didn't understand gender identity as when she grew up it was two genders and that it was ridiculous to say that there were more than two. We have found that C to NG on 1 November that this comment was transphobic. We accept that in saying these things, C was making an allegation, implicitly, that GW had contravened the EA.

237. However, we have also found that C knew C was giving false information when C made this allegation. It was made in bad faith, and, on that basis, it is excluded from the definition of a protected act.

238. C also pleads at 22(i) that C also told NG that C's offer to deliver equality and diversity training to deal with it had been rejected. C did not make such an offer on 1 March. She offered training on 2 March to the team (which offer was not focused on gender identity issues). We are not satisfied that an allegation that an offer of training on equalities was made (and rejected) amounts to a protected act for the purposes of section 27. We refer to the reasoning in paragraphs **[223-226]** above.

239. **GOC 33(j) On 7 November 2022, C stated that CIS needed to go back to basics and relearn racism 101 and anti-oppression more broadly.** We have found that C said in a weekly WASH meeting at which SA, ED, C, JB were present, that C felt it was clear that the organisation needed to be aware of 'how anti-oppression work shows up in practice, and see if we're measuring up to that.' We do not find that this amounts to an implied allegation that R or any other person had contravened the EA for the purposes of s.27(2)(d). It is not an allegation that R does not 'measure up' to anti-oppression assessments. Construing C's words in a natural way, they are no more than an assertion that R should have a keen awareness of this and be self-reflective in monitoring and assessing this.

240. We recognise, of course, that the term 'anti-oppression' may frequently have a relevance to groups with the protected characteristics prescribed by the EA but may not inevitably or exclusively do so. Anti-oppression work may relate to other or broader categories, such as those living in poverty or particular social classes. We accept the EA is not irrelevant to C's statement nor vice versa. Nevertheless, there was no evidence from which we could infer that the statement was made with the measure of intent required to be characterizable as being 'for the purposes of' the EA. We are not persuaded either that it can be properly said to have been 'in connection with' the EA. The relationship between C's words and the EA is simply too precarious.

241. C made later comments to JB in a subsequent phone call about R needing 'racism 101 classes'. The argument that this was a protected act, though finely balanced, has more strength. We hold that this indeed amounts to an (admittedly faintly) implied allegation that someone has contravened the EA by acts of race discrimination or harassment. However, contrary to C's pleaded case, this was not said to R's board members or any other asserted alleged perpetrator of the asserted detriments.

242. In summary, we find that C did three protected acts, as follows:

    a. **'the ESOL PA'**: On 16 March 2022, C told GW it was a huge red flag and that C was alarmed that nothing was done following R Henderson disclosing having interviewed an ESOL teacher who espoused stereotyped views of Arab men.

b. **'the Cultural Discrimination PA'**: On 27 September 2022, C told GW at a lunch words to the effect that there were patterns of discrimination within CIS and that in C's opinion it was an organisational cultural issue.

c. **'the Racism 101 PA'**: C told JB on 7 November that CIS needed racism 101 classes.

243. We turn to whether any of the standalone alleged detriment complaints (which are not time barred) were done because C did any of the established protected acts or because R believed C had done any of them.

244. The detriments which the Tribunal has jurisdiction to consider as free standing complaints are set out in paragraph 34 (e), (g), (i), (j), (k), (l) and (m) of the GOC. In each case, the treatment complained of was meted out by or at the behest of NG and/or the board of R.

245. We apply the burden of proof provisions under section 136 of EA. At Stage 1, we assess whether facts have been shown from which we could properly conclude on the balance of probabilities that has been victimisation. We leave R's (and NG's) explanation for any of the treatment complained about out of account in applying Stage 1.

246. There was no evidence to support a finding that the board or NG were aware of the Cultural Discrimination PA or the Racism 101 PA. Neither NG nor any board member were present during C's conversation with GW on 27 September or during C's phone call with JB on 7 November. It was not put to either NG or ED that they were aware of the C's comments on either date, much less that these influenced their later treatment of C. We find NG and the members of R's board whose decision-making led to the alleged detriments were aware of the Cultural Discrimination PA or the Racism 101 PA. It follows, and we find, that they did none of the acts specified at paragraphs 34 (e), (g), (i), (j), (k), (l) and (m) of the GOC because C did these protected acts or because they believed C had done so.

247. The other established protected act is the ESOL PA on 16 March 2022. ED and DS, both board members, were present when C did this protected act. NG was not. It is not established that NG was aware of this protected act. It was not put to NG in cross that she was so aware (or that she was influenced by this PA). We have heard no evidence from which we could properly infer that NG was aware. It follows, and we find, that NG did none of the acts specified at paragraphs 34 (e), (g), (i), (j), (k), (l) and (m) of the GOC because C did the ESOL PA or because NG believed C had done so.

248. As to ED's motivations for her decision-making as part of R's board, it was not put to ED in cross examination that the reason ED or the other members of the board did any of the alleged detriments at para 34 (e), (g),(i), (j), (k), (l) and (m) was because of the ESOL PA.

249. Against that background, we consider in turn the alleged detriments and assess whether the Stage 1 hurdle has been met of establishing facts from which we could decide, in the absence of any other explanation, that R subjected C to the detriments because of the ESOL PA.

250. **GOC 34(e) Failure to investigate complaint about harassment related to gender reassignment as reported to NG on 1 November.** The scope of the investigation into C's allegation of gender-reassignment harassment was framed by NG based on her understanding of C's concerns from the meeting on 1 November. The investigation was also conducted by NG. NG did not know that C had done the ESOL PA (or any other established protected act). In any event, NG did investigate C's allegations about alleged transphobia on GW's part by interviewing S Radose on 29 November 2022 and GW on 7 December 2022. C has not surmounted the Stage 1 hurdle. The complaint that this alleged detriment was victimisation contrary to section 27 is dismissed.

251. **GOC 34(g) R purported to hold a protected conversation on 14 November 2022 and to seek protection to which it was not entitled in relation to C's claims of discrimination.** On NG's advice, the board approved the proposal that NG have what she termed as a 'protected conversation' with C, which she did, or at least unsuccessfully attempted to do, on 14 November.

252. Mr Briggs submitted that C had not pled any vicarious liability for the acts of NG under section 110 of EA and for this reason, no evidence had been led as to the scope of NG's authority. Similarly, he said there was no evidence that R had caused instructed or induced NG to breach the EA pursuant to section 111. Neither section 110 nor 111 seem to us to be engaged in this case. NG is not a respondent to these proceedings and is not claimed to be liable whether pursuant to s.110 or 111.

253. R is the only respondent. The provision of the EA with which we are concerned (when it comes to R's liability for NG) is section 109. It is true that in C's GOC and further particulars, there is no reference to section 109 of EA. C does not explicitly spell out the basis on which C asserts R has liability for acts or omissions of NG by reference to this section or otherwise. Nevertheless, NG is described in the Grounds of Complaint as "the Respondent's HR

Consultant" (e.g. para 27, 33(i)). At the same time, it is also clear from the GOC that C brings a claim against R for alleged victimisation visited upon C by NG specifically (e.g. para 34(d)) as well as acts perpetrated by NG which C has attributed to R (e.g. para 34(g)). While we have some sympathy with Mr Briggs' submission about the omission in the pleadings to explain the mechanism by which R is said to be liable for NG's acts, we do not agree that C should thereby be prevented from relying upon the provisions of section 109(2) of EA. Mr Merck clarified in his submissions that C says that NG was an agent for R acting with R's authority.

254. As to NG's authority, in this particular case, there was ample and unchallenged evidence that, in seeking to hold a protected conversation with C on 14 November, NG was acting with the board's full authority. Two board members were present during the conversation who did not intervene. DS, the Vice Chair, subsequently confirmed in writing that the conversation had been conducted by NG with R's authority. As such, we are satisfied that R is liable for any contravention by NG of section 27 of the EA, pursuant to section 109(2) of that Act.

255. However, it remains to be decided whether NG contravened section 27 of the EA by victimising C by seeking to hold the 'protected conversation' with C. Mr Briggs cited ***Peninsula Business Services Limited v Baker*** which is discussed in the 'Relevant Law' section of this judgment. He pointed out that, in effect, that there is only liability, if NG's conduct was in and of itself prohibited victimisation.

256. On the facts of this case, NG was not aware of the established protected acts and so was not influenced by them in any sense so she could not and did not commit the prohibited act of victimisation. Following the approach in ***Baker***, we note that even if it were established that the board's reason for instructing NG to have the protected conversation with C was because of the ESOL PA, this would not render NG's action a tortious contravention of section 27. As NG's act in initiating the protected conversation was not a contravention of section 27 of EA, C's complaint based on this detriment is dismissed.

257. **GOC 34(i) the respondent presenting the claimant with a settlement agreement pursuant to which their employment was to be terminated without just cause.** It is not established that R presented C with a settlement agreement as averred. The complaint of victimisation based on the presentation of a settlement agreement is dismissed.

258. **GOC 34(j) the respondent placing the claimant on garden leave as a punitive measure.** NG placed C on paid garden leave during the meeting on 14 November without C's agreement. NG did so with the board's authority. NG was not aware of any of the established protected acts and as such, these

acts could not and did not influence either NG's advice to R's board to put C on garden leave or NG's imposition of the garden leave on C on 14 November. For the reasons set out above, R is only liable for NG's conduct if that conduct, itself, amounts to prohibited victimisation (***Baker***). NG's conduct in relation to C's garden leave was not victimisation.

259. However, following the 14 November meeting, DS, the Vice Chair of R, was in email correspondence with C about C's leave. Later the same day, he wrote, 'The board decided to place you on fully paid garden leave' and gave C an instruction that C would not, during the leave, be expected to read or respond to emails or calls or to attend meetings or events. We consider whether the board's actings in maintaining C's garden leave after NG initiated it was done because of the ESOL PA (it not being established that any board member involved in the decision was aware of the other established PAs).

260. At Stage 1, we ignore R's explanation for maintaining C on garden leave. We consider whether we could properly conclude on the balance of probabilities that the board did so because of the ESOL PA. DS and ED was aware of the protected act, having been present. In order to surmount the Stage 1 hurdle, something more is usually needed than the existence of a protected act and a detriment (***Madarassy***). In this case, having considered all the facts and circumstances bar R's explanation, we could not identify 'something more' which would permit us to draw an inference that the board decided to maintain C on garden leave because of comments C had made over 7 months earlier. Mr Merck did not put forward suggested facts or evidence which might furnish that 'something more' from which an inference could be drawn. We concluded that C has not surmounted Stage 1. This complaint of victimisation is dismissed.

261. **GOC 34(k) the respondent's revocation of C's access to emails and internal systems immediately after the meeting on 14 November.** We adopt broadly the same reasoning as set out in relation to 34(i). NG did not know about any of the protected acts. ED and DS knew about the ESOL PA. There is no evidence they shared the incident with NG or other board members involved in the decision-making. Merely showing a protected act and a detriment is not generally sufficient to shift the burden. There is not evidence in this case from which we could properly infer a causal connection between the ESOL protected act in March and the removal of email access in mid-November. The Stage 1 hurdle has not been surmounted and this complaint of victimisation is dismissed.

262. **GOC 34(l) the respondent's failure to provide redress of grievances.** C did not raise a formal grievance. On 6 October, C was categoric in insisting to ED that C did not wish to do so (while in the same email complaining about GW's behaviour and saying C wanted it to stop). On 14 November, C

indicated an intention to raise a formal grievance at the meeting with NG, ED and DS. However, C declined to do so while the employment subsisted. C was asked to clarify their intentions in this regard by DS and was invited to raise a grievance by 25 November. DS told C that if C did not do so by that date, R would assume C no longer intended to do so. R was placed in the position that, while C continued to complain at length about GW (in large part about matters that do not form part of the particularised complaints in C's tribunal claim), C had persistently declined the option of raising a grievance and having the matter dealt with under R's formal grievance procedure. Notwithstanding this, NG investigated matters raised by C at the meeting on 1 November and produced what she labelled a 'Grievance Investigation Report' dated 9 December which she provided to R's board. R in turn (SA) wrote to C on 13 December to advise that the 'grievance' was not upheld.

263. R found itself in the invidious situation that, by omitting to investigate the complaints C was making to NG and others, it would be vulnerable to criticism by C that it did not provide redress of grievances (which C indeed pleads as an act of victimisation). At the same time, by progressing to investigate C's complaints as NG understood them, R and NG were vulnerable to the other criticisms. They faced potential criticism for ignoring C's preference not to pursue the matter and/or the criticism which Mr Merck levelled at them in this Tribunal, that they misunderstood C's complaints and therefore investigated them inadequately.

264. Having regard to all the facts, we are not satisfied R's treatment of C in 'failing to provide redress for grievances' was a detriment in circumstances where C did not raise a grievance at C's own election. We do not accept C's sense of grievance about this 'omission' by R is objectively legitimate in all the circumstances.

265. However, if this was a detriment, we are not satisfied that C has surmounted the Stage 1 hurdle to shift the burden of proof to R. NG didn't know about any of the protected acts. On R's board, DS and ED knew about the ESOL PA. Ignoring R's explanation, there were no facts or evidence from which we could properly infer that any omission to provide redress of C's complaints was done because of C's comments about the ESOL teacher story on 16 March. This complaint of victimisation is dismissed.

266. **GOC 34(m) The respondent's failure to investigate and respond to the claimant's grievance in a reasonable, measured and accurate manner and instead to produce an outcome of a grievance that had never properly been formulated.** Essentially this seems to us to be the same complaint as 34(l) and we refer to our reasoning in the preceding paragraphs. This complaint of victimisation is dismissed.

267. Therefore, all of the stand-alone victimisation complaints which have been brought in time are dismissed.

Constructive Dismissal as an act of victimisation

268. We turn now to the complaint that C was constructively dismissed and that this was an act of victimisation. C complains that C was constructively dismissed and that this was an act of victimisation pursuant to section 39(4)(c). Time runs from the date of the (constructive) dismissal and the Tribunal has jurisdiction to hear the complaint, including where C relies on alleged acts of victimisation which have been ruled out of time as stand-alone complaints. We, therefore, consider whether any of those are established to be acts of victimisation.

269. **GOC 34(a) GW's conduct as set out at paragraph 14 of the ET3.** We dismiss this allegation for the reasons set out at paragraphs **[117]** and **[203(a)]**.

270. **GOC 34(b) R's failure to make reasonable adjustments.** This alleged act of victimisation is considered in a separate section below.

271. **GOC 34(c) R's failure to act on C's request for workplace mediation.** We consider first whether this amounts to a detriment. Mediation is a purely voluntary process. We have reservations as to whether, as a matter of principle, a reasonable employee can have an objectively legitimate sense of grievance at a manager's refusal to engage with their request for mediation.

272. However, even assuming R's omission to take forward a mediation process between C and GW was a detriment, we are not satisfied that Stage 1 has been surmounted. GW is the alleged perpetrator of this detriment. It was to GW that C's requests were directed. It was GW who declined to explore other potential external mediators on learning that Mandala was not an option. GW was aware of two of the established protected acts (the ESOL PA and the Cultural Discrimination PA). Leaving out of account GW's explanation for why she did not act further on C's mediation requests, we are not satisfied that there is evidence before us from which we could properly infer that the reason was because of C's comments on 16 March and 27 September. The claim lacks the 'something more' needed (beyond protected act plus detriment) which would permit such an inference. C's complaint of victimisation based on this detriment is, therefore, dismissed.

273. **GOC 34(d) NG's conduct at the meeting on 1 November 2022 which was unsupportive, hostile, interrogative and combative.** We have found that NG's conduct was not unsupportive, hostile, interrogative and combative

during this meeting. In any event, NG was not aware of any of the established protected acts. This alleged act of victimisation is dismissed.

274. **GOC 34(f) R's failure to provide support or otherwise protect C from bullying, aggression and abuse from GW.** It has not been established on the evidence that GW subjected C to 'bullying, aggression and abuse'. The complaint that this was a detriment which was an act of victimisation is dismissed.

275. **GOC 34(h) the respondent's unreasonable refusal to remove GW as C's line manager, despite it being recommended by OH**. The OH advice, which is the apparent premise of this asserted detriment is misrepresented. It was not, in fact, recommended by OH that GW be removed as C's line manager. The report records that "[C] described difficult interpersonal relationships with her current senior, and she reported that there are certain members of the senior team that she feels more able to talk to because of this including board members. I would suggest that this is discussed with [C] directly, so that this issue can be addressed and a practical solution found if possible."

276. C was asked to provide specification of how the contract was said to have been breached by the alleged acts of victimisation relied upon. With respect to the failure to remove GW as manager. C responded: 'failure to provide support or to otherwise protect C from bullying, aggression or abuse' (p.51 of the bundle). It is unhelpful that a contractual term which is asserted to have been breached has not been identified. If the complaint about the failure to remove GW as line manager depends on an allegation that GW subjected C to bullying, aggression or abuse, this has not been established on the facts.

277. We accept that C had a sense of grievance about GW's omission to remove herself from her line management role, but on all the facts we are not satisfied that it was objectively reasonable for C to hold this sense of grievance. We are, therefore, not persuaded that C has shown that the refusal to remove GW as C's manager was a detriment.

278. Even if it were, C has not shown facts from which we could decide, in the absence of any other explanation, that GW or R refused to change C's line management because of the established protected acts. Beyond the mere existence of the protected acts and the refusal to step back from line managing C, there is a lack of evidence to support any such inference. The 'something more' is again missing. This alleged act of victimisation is dismissed.

Reasonable Adjustments (in the context of the Victimisation Constructive Dismissal complaint): Liability

279. We consider first whether R knew or whether it could reasonably have been expected to have known that C had the disability of ADHD and from when. The term 'ADHD' or its long form title was not mentioned in the initial health questionnaire completed before C began employment though this referenced a 'disability'. C told GW in mid May that C was seeking a diagnosis. On 30 August, C told GW that a psychiatrist had diagnosed ADHD. R certainly knew of C's ADHD diagnosis by that date and reasonably ought to have known that it was a disability for the purposes of EA. C gave them certain information and, if unsure, they could reasonably have made further enquiries of C at that time to satisfy themselves as to whether C was likely to satisfy the test in the EA. Whether or not they reasonably ought to have known at an earlier stage (between mid May and the end of August) is an academic question given C's absence in the intervening period and given the findings below.

280. We turn next to the question of whether R had the PCPs which C asserts.

PCP 1: Requirement to work in the office within a fixed pattern

281. GW did not oblige in the sense of forcing C to work in the office within a fixed pattern of one day per week. Nevertheless, from the meeting on 30 August 2025, GW made it clear that there was an expectation that the team, including C, would do so. C was resistant to the suggestion, but GW held firm and the meeting ended on the footing that C would go away and consider how C could come in one day per week and update GW soon. GW left flexibility to C as to whether it would be the same or different days each week. There was no evidence that C updated GW as requested, or that C in fact attended the office one day per week between 30 August and the date C went off on garden leave. There is evidence that C did, during that period, attend the office for certain in person meetings though the frequency is not known. That being said, whether C complied or not with GW's expectation, there was no evidence that GW withdrew or downgraded the expectation of office attendance once per week and we find she continued to maintain the expectation with respect to C and the team generally.

282. We consider whether this amounted to a PCP. We find it did so. We note we must take a 'real world' approach and avoid being overly-technical in interpreting the PCP (per ***Carreras***). Adopting a liberal approach, we accept that the imposition of an expectation, even if ignored, may be a provision or criterion for the purposes of section 20(3), whether or not it was a practice in which C themselves participated.

283. Did the PCP put C at a substantial disadvantage? C described feeling the unpredictability of the open plan office space with changing noise levels, hot desking and different people coming and going made the office a more distracting space. We also had before us comments from the OH adviser in

the report that '*People with ADHD can have problems with concentration and focus, controlling impulsive behaviours or regulating emotions. In Natasha's case she described a feeling of being overwhelmed at times and difficulty concentrating in certain environments'.*

284. Section 20(3) of EA requires that the PCP actually puts the individual at the disadvantage, not merely that it would do so if it were to be imposed. Though it is not established that C worked in the office once per week, C sometimes did so in the material period. When C did so, we accept C found the office environment more distracting. Most people, with or without ADHD, would find changing noise levels and different people coming and going in an open plan space more distracting than a home space where these factors were not present. The question is whether C was put to a particular disadvantage compared to a non-disabled person. We note that a 'substantial' disadvantage is a disadvantage that is not merely minor or trivial. We accept the evidence of the OH to the effect that people with ADHD can have problems with concentration and focus. It has to be implicit that these problems are generally more acute in people who warrant an ADHD diagnosis than in those who do not. We accept C's evidence that, in their particular case, C found these problems exacerbated by the office environment. We accept this PCP placed C at a substantial disadvantage.

285. We turn to what steps R could have taken to avoid the disadvantage. C suggests permitting C to work from home (at all times). We consider whether that is an objectively reasonable step for R to have to take. R was not insisting that C attend the office for all of C's working time or for a majority of that time. GW's reasons for resisting C's protestations at the suggestion C come in once a week were so that the team could build relationships with one another and with volunteers. GW's wish was also that project managers (like C) would see the work and understand the work of their teams better. She said it was important to understand the project and the experience and challenges of the front line team that C was managing. C disagreed that office attendance was necessary and pointed out the problem that if C came in on a quieter day, then C's team would not be in the office.

286. Taking all relevant factors into account, we concluded that it was not objectively reasonable that R should allow C to work exclusively from home or that R should expect C to attend the office with less frequency than once per week. C, having begun the employment during COVID, and having had a lengthy absence over the summer, had had limited face to face contact with C's team members and others. C had experienced difficulties in C's relationships with members of C's team as well as with GW. A significant proportion of C's time was taken up with meetings (as opposed to other tasks) and C was at liberty to manage C's time so that C attended on a day to

coincide with meetings. R's aims in asking C to attend one day a week were objectively reasonable and the frequency with which C was asked to attend was not excessive. We acknowledge that C would experience less distraction and problems with concentration on those days if C were allowed to work and conduct all meetings remotely. Nevertheless, it was not objectively reasonable that R should be required to permit this, having regard to its objectives of improving C's relationships and understanding of the day to day work of the project.

287. As discussed, the Tribunal lacks jurisdiction to decide the standalone complaints of failures to make reasonable adjustments. The context in which this asserted RA is determined is that C says a failure to make the reasonable adjustment was in turn an act of victimisation which contributed to C's asserted constructive dismissal. Even if we had found that there had been a failure in the duty to make a reasonable adjustment by declining to allow C to work exclusively from home, we would not have found that this was because of a protected act or acts. Leaving GW's explanation for her stance on the matter out of account, there is insufficient evidence from which we could have inferred that GW took the stance she did with respect to homeworking because of C's comments on 16 March about the ESOL teacher or C's comments on 27 September about patterns of discrimination.

PCP 2: practice of feedback and supervision at a frequency and manner at the discretion of management

288. We find it established as a matter of fact that the frequency and manner of providing supervision and feedback to her reports was at GW's discretion and further that she chose to do so, among other things, by holding monthly supervision and feedback meetings, with C. We accept that the practice of holding these monthly meetings was a PCP and that the PCP came about by GW exercising her discretion as a manager.

289. C says in the further and better particulars that C's wellbeing and productivity suffered substantially (more than others) from the PCP. It is stated in the further particulars that, '[C] struggles to regulate her attention flexibly because of ADHD, and as such, depends more on regular feedback and supervision presented in a helpful manner'. There was a lack of evidence as to why the arrangements for the provision of support and supervision should bite harder on C because of C's ADHD compared with someone without ADHD. The meetings were monthly and scheduled one month in advance. They were structured according to agenda topics and GW produced notes after the meeting.

290. We understood Mr Merck's contention was that the OH report lent support to the contention that the frequency and manner of support and supervision

meetings placed C at a disadvantage compared to someone without ADHD. We have read carefully the terms of the report, including, but not limited to the paragraph where Dr Solomon discusses the regularity of monthly supervision and support and records that C had reported to her that this could sometimes feel overwhelming and add to C's feelings of stress and anxiety. We are unpersuaded that this observation and the recommendation which flows from it provides any assistance on the question of comparative disadvantage between C and someone without ADHD.

291. We fully accept that C did not enjoy C's meetings with GW. We also accept that C felt stressed by C's workload. There was considerable evidence that C had a poor (and deteriorating) relationship with GW and that C disliked GW's management style. It is not established, however, on the evidence that the frequency and manner of supervision put C at a substantial disadvantage compared with someone else who did not have ADHD (but who had the same workload pressures and poor personal relationship with their manager).

292. Again, this alleged failure to make an RA is decided here because it is said to have been an act of victimisation contributing to C's dismissal. Even if the disadvantage had been made out, and even if the adjustment contended for were reasonable, we would have found that C did not surmount Stage 1 in establishing that the failure was an act of victimisation. The facts and circumstances simply do not sustain an inference (leaving out of account GW's explanation) that the stance GW took regarding the frequency and manner of support and supervision was because of any of the established protected acts. GW's preferred structure for S&S had developed before any of the protected acts took place.

PCP 3: practice of no particular mechanism to manage relationships with one's senior

293. The next PCP is framed by C as the practice of having no particular mechanism to manage relationships with one's senior. We understand this simply to mean that R's practice was not to have a third party, internal or external, involved in managing the relationship between an employee and their line manager. In relation to C, this description of the PCP does not accurately capture R's practice in that ED was frequently and latterly quite deliberately utilised as a conduit for pastoral support for C as problems emerged in the relationship between C and GW. NG was also latterly brought in, initially with the envisaged purpose of assisting in managing the relationship between C and GW.

294. We are not convinced and do not find that the PCP C asserts is one which reflects the reality of R's practice. However, assuming on a very liberal interpretation that R applied this PCP, we are not satisfied in any event that

this put C at a substantial disadvantage compared with someone who did not have ADHD. C's further particulars state that '[C] struggles to regulate her focus spontaneously because of ADHD and as such is less able to manage relationships with her senior..' However, beyond this bald assertion, there was scant evidence that the way in which ADHD impacted on C meant that C was less able to organically manage relationships in the absence of 'mechanisms'. There was evidence that C had some difficulties with the interpersonal relationships C had with GW and, at times, with others. Evidence that this was related to her ADHD was distinctly lacking. We did not find support for the proposition in Dr Solomon's words. Dr Solomon observed in the OH report that ADHD can present differently in different individuals and that there is no 'one size fits all approach'. Elsewhere in the report, she observed that C had reported difficult interpersonal relationships with her senior. We could not read into the report any asserted linkage with C's ADHD.

295. It is not within judicial notice that people with ADHD are less able to organically manage relationships (and, in fairness, Mr Merck has not suggested it to be so). It is for C to establish on the balance of probabilities that the PCP placed her at a substantial disadvantage compared to someone without ADHD. On the evidence before us, this is not established.

296. Again, we observe, that even if C established that section 20 of EA was contravened by a failure to make an RA in this regard, we would not, in any event, have found the failure to be an act of victimisation (in turn contributing to a constructive dismissal). The facts and circumstances of this case do not support an inference of a causal connection between R's approach to managing the relationship between GW and C and any of the established protected acts.

297. As C has established no acts of victimisation, it follows that C's asserted constructive dismissal was not an act of victimisation for the purposes of section 39(4)(c). This complaint is dismissed.

Date sent to parties **25 August 2025**