



EMPLOYMENT TRIBUNAL

Claimant: Joshua Fache
Respondent: L'Oreal (UK) Limited
Heard at LONDON SOUTH
Hybrid
On: 21-25 July 2025

Before

Chairman: EMPLOYMENT JUDGE N COX
Tribunal Member: C Chaudhuri
Tribunal Member: R Singh

Appearances:

For the Claimant: In person
For the Respondent: Ms Winstone (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is :-

1. The complaint of direct sex discrimination is not well-founded and is dismissed;
2. The complaints of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments and harassment related to disability are not-well-founded and are dismissed.

Approved by Employment Judge N Cox

Date: 2 January 2026

Judgment sent to the parties and entered in the Register on: 23 January 2026

For the Tribunal Office

P Wing

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

RESERVED REASONS

Claims and Issues

1. The claimant brings the following complaints:
 - 1.1. Direct sex discrimination (s 13);
 - 1.2. Direct disability discrimination (s13);
 - 1.3. Discrimination arising from disability (s 15);
 - 1.4. Failure to make reasonable adjustments (s20-21);
 - 1.5. Harassment related to disability (s26);
2. References to EQA and sections refer to the Equality Act 2010.
3. The hearing in this matter took place in July 2025. Our Reserved Judgment and these Reserved Reasons have taken longer to deliver than the parties are entitled to expect. We apologise to the parties for that delay. This was a somewhat complex case in many respects. The Chairman's efforts to produce these detailed Written Reasons recording our deliberations were hampered by unfortunate timings of professional and other commitments and bouts of mild ill-health, and the tribunal wished to take the opportunity to review and confirm our reasoning and conclusions in detail before handing down our judgment.
4. The issues were discussed at a case management hearing before EJ Robinson on 23 May 2025, and were further clarified at the start of the hearing. The agreed list of issues was as follows (adopting the original numbering):

List of Issues:

DISABILITY STATUS

1. Did the Claimant have a disability within the meaning of section 6 of the Equality Act 2010 during the relevant period (24 August 2022 – 23 January 2023)? The Tribunal will decide:

- a. Did he have a physical or mental impairment:*
 - i. PTSD (mental)*
 - ii. Anxiety (mental)*
 - iii. Depression (mental)*
 - iv. IBS (physical)*

b. The Tribunal will decide:

i. Did they have a physical or mental impairment? The respondent accepts the claimant had impairments of PTSD, anxiety and depression. It does not accept that the claimant had the impairment of IBS.

ii. Did it have a substantial adverse effect on their ability to carry out day-to-day activities? The respondent puts the claimant to proof of the effect on his ability to carry out day-to-day activities.

iii. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment? The respondent puts the claimant to proof of this issue.

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

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

- 1. did they last at least 12 months, or were they likely to last at least 12 months?*
- 2. if not, were they likely to recur?*

vi. Did the Respondent have knowledge, or could they reasonably have been expected to know, of the disability/disabilities.

The respondent denies knowledge of any of the claimant's disabilities.

DIRECT DISABILITY AND/OR SEX DISCRIMINATION

The claimant identifies his sex as male.

2. Did the Respondent, through Angela Kehoe, subject the Claimant to the following:

a. On 16 November 2022:

i. withdraw previously agreed reasonable adjustments e.g. related to store opening times. The respondent accepts that store opening times, previously 9.30 am were changed to 9 am. It denies there were previously agreed reasonable adjustments;

ii. Implemented rigid start times: The claimant says he was required to call in all late appearances however minor. The respondent's welfare policy says adjustments should be made for changes in medication, and that he was trying new medication for one of his symptoms, namely insomnia.

iii. Impose telephone-only communication requirements: The respondent says that the respondent's policies required the claimant to notify absences by telephone, and that text messages were not sufficient, and this was explained to the claimant. The claimant says that he was unreasonably expected to call before 9am but because of insomnia and panic attacks he couldn't do so. He says his contract requires him to 'notify' not to call in person.

b. During December 2022:

i. Hostile mediation handling: The claimant said he relied on this conduct as amounting to direct sex discrimination. He said that the respondent acting by Ms Kehoe favoured his female assistant, Iman, and told the claimant to behave differently because he was male and therefore intimidating to Iman. The respondent disputes his account of the meeting. He also said that Ms Kehoe was more sympathetic to Iman's out of work difficulties than she was with his.

ii. Failure to address discriminatory treatment: He says that on 1 December before a meeting Ms Kehoe failed to sanction Iman's humiliating comments about his need to use the toilet.

iii. Undermining of managerial authority: The claimant says that AK 'micro-managed him, pursued him for every minor issue and required to provide proofs, while Iman's misconduct was not investigated and was ignored. Ms Kehoe asked other staff to monitor and report on his arrival times. Ms Kehoe ignored or gave Iman credit for his positive contributions and ideas. He only got information second hand.

c. During January 2023: -

i. Disregard sick notes: at the disciplinary /probation hearing.

ii. Inappropriate return to work processes: The claimant said Ms Kehoe would record that he had refused properly to complete and Return to Work forms ("RTW") when he had, for example been interrupted by a phone call on the shop floor to do so. The claimant says Ms Kehoe said if he couldn't handle the stress he should get different job or handle it like others do.

iii. Unfair probation review: The claimant complained that he was not allowed to speak about good things and contributions he had made during the review hearing. He was only allowed to speak about sickness absences. He says the grounds relied upon to dismiss him were not relevant.

iv. Discriminatory dismissal;

The claimant relies on the same matters as in (iii) above.

3. *Was that less favourable treatment?*

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

4. *The claimant says he was treated worse than Iman.*

5. *If so, was it because of the Claimant's disability or sex?*

DISCRIMINATION ARISING FROM DISABILITY

6. *Did the Respondent treat the Claimant unfavourably by dismissing him?*

7. *Did the following things arise in consequence of his disability:*

a. The claimant's sickness absence;

b. The claimant's lateness;

c. The claimant's failure to comply with absence management procedure? The claimant says that his Insomnia and panic attacks meant he could not wake up or call.

8. *Was the unfavourable treatment because of any of those things?*

9. *Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were to ensure that company policy is consistently followed and standards observed and upheld.*

10. *The Tribunal will decide in particular:*

a. was the treatment an appropriate and reasonably necessary way to achieve those aims.

b. could something less discriminatory have been done instead.

c. how should the needs of the claimant and the respondent be balanced?

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

REASONABLE ADJUSTMENTS

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

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

a. Requirement to start work at 9:00am.

The respondent accepted it had this practice.

b. Requirement to telephone for absence reporting:

The respondent accepted that it had this practice

c. Requirement the claimant to work alone for much of the time:

The respondent says that the claimant's rota anticipated that he would work alone for two hours per week;

d. Rigid break scheduling:

The respondent denies this PCP and says that the claimant could arrange his own breaks.

14. Did these PCPs put the Claimant at a substantial disadvantage compared to non-disabled persons?

15. Did the Respondent fail to make reasonable adjustments, specifically:

a. Flexible start times

b. Alternative communication methods

c. Support staff presence

d. Flexible break arrangements

16. Was it reasonable for the respondent to have taken those steps?

17. Did the respondent fail to take those steps?

HARASSMENT

18. Did the Respondent engage in unwanted conduct related to disability through Ms Kehoe's alleged conduct as follows:

a. Comments about toilet usage:

b. Dismissive attitude toward health conditions:

c. Public undermining of professional capability:

d. Inappropriate medical speculation.

19. Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

20. *Did it relate to disability?*

REMEDY

21. *What financial losses has the discrimination caused the claimant?*

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

23. *If not, for what period of loss should the claimant be compensated?*

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

25. *Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?*

26. *Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?*

27. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

28. *Did the respondent or the claimant unreasonably fail to comply with it?*

29. *If so, is it just and equitable to increase or decrease any award payable to the claimant?*

30. *By what proportion, up to 25%?*

31. *Should interest be awarded? How much?*

The Hearing

5. The hearing took place over three and a half days. The tribunal deliberated on the fourth and fifth days. We considered that we needed more time for our deliberations and notified the parties on the fifth day that we intended to reserve our decision.
6. The issues were discussed and clarified at the outset. We took some time to explain to the claimant how the issues could be used as a structure for his questioning and submissions to assist the tribunal to understand his case better. We also discussed and agreed that remedy would be considered at a later hearing but issues of Polkey (unfair procedure) and contributory conduct should be the subject of questioning during evidence.

7. We had a hearing bundle of 946 pages, a supplementary bundle of 201 pages, a chronology and cast list prepared by the respondent. We were also provided with a bundle that was used for an earlier open preliminary hearing. This contained material relevant to complaints by the claimant about disclosure of medical records and the conduct of the case by the respondent. The Chairman dealt with these issues at a case management hearing which was heard at the end of day one. The Chairman declined the claimant's application to prohibit the respondent from referring to and relying on disclosed medical records dated before the start of the claimant's employment (in particular from 22 May 2022 and thereafter).
8. We had witness statements and heard oral evidence from:
 - 8.1. The claimant on his own behalf;
 - 8.2. For the respondent from:-
 - 8.2.1. Ms Bianca Blum who was the claimant's first line manager. Ms Blum had worked for the respondent for 11 years, and for 9 years in charge of Beauty Advisers in 10 stores;
 - 8.2.2. Ms Amanda Kehoe who was the claimant's second line manager and the dismissing officer. Ms Kehoe was an experienced area manager with 14 years industry experience, of which 11 years were at the respondent. Ms Kehoe gave evidence despite her no longer being an employee of the respondent;
 - 8.2.3. Ms Debbie Balsom who was the appeal officer. Ms Balsom had 20 years' experience as an area manager for the respondent's Be Luxe division. She had training in the conduct of appeals. Ms Balsom is also no longer an employee of the respondent.
9. We found the claimant's recall of events somewhat unreliable. Whilst we do not doubt that he was honest and sought to assist the tribunal, under cross-examination he frequently claimed that his memory was poor. Whilst we took into account the fact that the disabilities he relied upon involved adverse memory effects, his reported difficulties in recall appeared to us to coincide with times when he faced particularly challenging cross-questioning. The reliability of his recollections and perceptions appeared to us also to be affected by his evident upset and anger at what he perceived to have been unfair or insufficiently supportive treatment by, in particular, Ms Kehoe. A third factor was his disposition or readiness to assume the worst, in particular in relation to health conditions, but also in regard to his interactions with Ms Kehoe. Examples are given in our reasoning below. Accordingly, when considering his detailed recollections we looked for support for them through internal and documentary consistency, corroboration from other witnesses and documents and inherent plausibility.

10. We also had some reservations about some aspects of the respondent's witness evidence. Ms Kehoe's witness statement, for example, appeared to contain a surprisingly detailed recall of the conversation during a contentious mediation meeting in December 2022. Ms Balsom struck as a very polished and well-prepared witness. However, in general both were impressive witnesses and sought to assist the tribunal, and it was noteworthy that both gave evidence while neither remained in the respondent's employment. In that sense they had no imperative to embellish to protect their employment or employer.
11. The claimant also provided witness statements from Robyn Bramzell-Villas [1/9/2024] (who provided some background on the claimant's personal history and health), Ms Queenie Rushton of the Southwark renters support programme at Kineara Ltd (who provided in effect a character reference for the claimant and gave information about a telephone contact she had with Ms Kehoe [25/9/2024]) and an unsigned witness statement from Dr Monika Kalensinkaite, the claimant's GP since July 2022. Although we agreed to arrangements at the last minute to allow Ms Rushton to give evidence remotely on day 3, in the event her timetable meant she was not able to do so. Neither of the other two witnesses attended and none was available to be cross-examined. We did not therefore place any weight on these statements.
12. As referenced below, during the course of the hearing, in connection with evidence relating to the claimant's misuse of drugs, we allowed the claimant to produce an email from Change Grow Live ("CGL") a drug rehabilitation support charity, and on the other side permitted the respondent to adduce a copy of a publicly available government infographic provided by drugwise.org on the effects of stimulant drug misuse.
13. At the conclusion of the hearing we had the benefit of written and oral submissions from both parties. We have taken all of those submissions into account in reaching our conclusions, whether they are specifically referenced below or not.

Findings of Fact

14. We make the following findings of fact on the balance of probabilities and in light of the totality of the witness evidence we have read and heard and the documents to which we have been referred. We reference only those matters which we have considered necessary for our conclusions.
15. The respondent is a substantial organisation with a dedicated HR support function.
16. The respondent's 'Kiehl's' store at Northcote Road, Clapham was a large area, less busy store with a loyal local customer base: known within the

respondent as a 'community door' to distinguish it from larger stores and stores within department stores. It was operated by a staff of three: a store manager, an assistant store manager (Iman) and part time staff members (often a colleague called Luna). At times it operated with only one or two staff.

17. There was a need to provide maternity cover for the previous store manager from 18 August 2022. The job was advertised on the respondent's careers platform. Ms Blum was responsible for interviewing applicants for that role.

18. The advertisement required that successful applicants would need, amongst other skills, the ability and experience of leading, developing and managing a team and:

- *Excellent business acumen including sales analysis, inventory management and organising staffing.*
- *Initiative to create events to drive your business in the community and store.*
- *Develop positive relationships with the community and head office.*
- *Be a brand ambassador with your attitude, eventing and on-brand grooming.*
- *Convey passion and master storytelling to our clients.*
- *Familiar with the operational aspects of a freestanding store.*
- *Ability to work flexibility during retail hours, which is likely to include evenings, weekends and holidays (except Christmas day).*

19. The claimant applied for the role on 2 August 2022. He had previous retail management experience. Ms Blum contacted him and invited him for an interview at midday on 4 August 2022. The claimant did not turn up but emailed at 1pm to explain that he had soiled himself on the train and dropped his phone. Ms Blum sympathised and rescheduled the interview for the following day. The claimant thanked her and said that "my stomach itself feels OK".

20. The claimant impressed Ms Blum with his experience, business plans and passion for the role. The claimant was offered and accepted the position.

21. At the end of the interview the claimant told her that he had health issues which he described as 'auto-immune problems' which made him susceptible to viruses and bugs and described a once-healthy and physically active lifestyle which had deteriorated after he caught COVID in

March 2022. The claimant made mention of the fact that these changes had affected him mentally, but he did not provide any further detail of the mental impacts on him.

22. The claimant signed terms of employment as follows, so far as relevant:

2: Term: from 14 August 2022 until 1 April 2023 when employment will automatically terminate unless previously terminated in accordance with clause 17.

4 (a): Salary £32,011.20

5: Probationary Period : The first six months of your employment will be a probationary period. During the probationary period your performance and conduct will be reviewed and, on or shortly after the expiry of the probationary period, the Company will write to you to confirm whether or not your probationary period has been successfully completed..... Should your performance or conduct be below the acceptable standard, or should the Company have any reservations about your continued employment, the Company reserves the right to terminate your employment by giving you notice as set out in clause 17 at any time during your probationary period, or to extend the probationary period by a further period.

7: Hours of work: a) 40 Hours per week b) The company reserves the right to change your start and finish times and the days upon which you work at any time as the Company or the Store considers may be necessary. In particular, if there is a change to store opening hours or if the Store or the Company requires you may be required to adjust your working hours on either a permanent or temporary basis. This may include working additional hours and/or days. For the avoidance of doubt you will be required to adjust your working hours if store opening hours are extended during busy periods (for example in the weeks prior to Christmas).

11: Sickness absence and sick pay: In all cases of absence from work due to sickness or other medical incapacity you must notify your Area Manager or direct line manager (If not Area manager) and department/store manager on each morning of your absence giving the reason for the absence and its anticipated duration. Absences must be reported by 9am or at least 2 hours before the shift is due to commence (whichever comes first).Failure to comply with these notifications and certification requirements or any other element of the Company's Sickness Absence Policy as may be amended from time to time will result in non-payment for the relevant periods and may be considered as a disciplinary offence.

23. We find that the claimant was also aware from his induction training of the

respondent's policies and staff handbook as follows:

Sickness Absence Policy and Procedure:

The policy is expressed to apply to all UK employees and specific provisions and terms relating to sickness are outlined in individual contracts of employment.

Notification of Sickness Absence: Employees should report their sickness by telephone on the first day of absence. Only in exceptional circumstances, i.e. hospitalisation may a family member or next of kin report the absence. Individuals should inform their Line Manager by the start of their normal working day on the first day of absence....Employees will be asked to provide the following details: (i) The nature of illness; (ii) An indication of likely duration and expected return date; (iii) Whether medical consultation will be undertaken.....Individuals must keep their Line Manager informed about their illness on a daily basis, unless agreed otherwise.

Absences that are not notified in accordance with the above procedure will be considered as unauthorised and may not be eligible for payment of discretionary Company Sick Pay, unless the Line Manager and Human Resources / Consultant Personnel and Administration Manager considers the reasons for the delay to be reasonable. Unauthorised absence or failure to comply with the correct sickness notification procedures may, in appropriate circumstances, lead to disciplinary action under the Company's Disciplinary Procedure.

For absences of 1 to 7 days: All employees affected by ill health must complete the Company's self-certification form explaining the reasons for their absence. This form must be completed even if the absence was for only ½ day.

Company Support and Management of Sickness Absence:

Short-term sickness absence normally relates to a series of unconnected illnesses. The Company is sympathetic to employees who are unable to work for medical reasons and all cases are reviewed on an individual basis. However, absence levels are regularly monitored and Line Managers will formally review an employee's sickness absence record if unconnected illnesses result in an unreasonable number of frequent short-term absences.

Return-to-work interviews: When an employee returns to work following any period of absence, their Line Manager will touch base with them on their first day back at work or as soon as reasonably possible. This is to ensure that the employee is well enough to be back at work, the reason for their absence and to establish whether they require any

additional support. The outcome of this conversation will be recorded on the Company's Self-Certification Form.

Informal procedure: Nothing in this procedure prevents an employee's Line Manager dealing with sickness absence in an informal manner where appropriate. (The policy provides for a formal procedure in the event of frequent short term absences giving rise to concerns).

Formal procedure:

Frequent short-term absences may be indicative of underlying health problems and the Company is concerned that these problems should be addressed as soon as possible to help employees deal with the problem.

Where an employee's absence levels raise cause for concern, their Line Manager will write to the employee asking them to attend a formal absence meeting in order to establish: Details of the various absences and any underlying health problems; The Company's expectations regarding attendance; Whether the Company feels it needs additional medical opinion in order to assess an employee's capability to continue in their employment in a particular job or to provide regular and efficient service; Whether there may be an underlying work-related problem with which the Company could help and agree any support required.

If the Company considers that either, due to the levels of the employee's sickness absence that it may need to consider issuing the employee with a Notification of Concern (see below) or, where no improvements to the employee's attendance record have been made, dismiss the employee (if appropriate), the employee will be informed that the Company will need to consider this possibility with the employee at the meeting and the employee will normally be provided with any relevant evidence at least three days before the meeting. As with all formal meetings, employees are entitled to be accompanied. At the meeting, the employee will be given the opportunity to make representations and explain their situation.

The following factors will be considered (this is a non-exhaustive list): The nature of the absence (is it a recurring complaint; are there underlying contributory factors); The individual's service and previous attendance record; The effect of the absence on colleagues / department; Whether or not a reasonable improvement has been made; Whether there is a pattern (e.g. an individual's attendance record deteriorating as soon as they are out of the formal review process, specific days of the week etc).

Action taken by the Company in these circumstances may include:

investigating the medical condition, whether there is any underlying medical condition, the impact of the employee's absences on the business and whether there are likely to be any further absences preventing the employee from providing regular and efficient service; referring the employee to the Company Doctor if appropriate in the circumstances; and consulting the employee and with the employee's consent their doctor and/or such specialist as may be required to determine the true medical position, in order to obtain their views on whether there is an underlying medical condition, whether there are likely to be any further absences preventing the employee from providing regular and efficient service and to make clear to the employee that continued absences may lead to Notifications of Concern or in appropriate circumstances could lead to the employee's dismissal.

All such options are at the discretion of the Company.

Only after a full consideration of the matter, including the employee's medical condition, any further medical evidence (if appropriate) and the employee's representations, will the Company make a decision as to what action (if any) to take.

Following the meeting (or reconvened meeting), the Company may take any of the following steps: Take no further action; Issue the employee with a verbal Notification of Concern (recorded on the employee's personnel file); Issue the employee with a first written Notification of Concern; Issue the employee with a second and final written Notification of Concern; Impose an appropriate monitoring period; Terminate the employee's employment in appropriate circumstances; or consider whether any other alternatives are appropriate. This may include supporting the employee, providing additional training, obtaining further medical advice, etc.

Notification of Concern: The purpose of a Notification of Concern is to convey to the employee the Company's concern at the level of absence that the employee has taken, the impact that this is having on the business and to warn the employee of the consequences of continued short-term absences....There is no obligation on the Company to go through all the steps outlined above before an employee may be dismissed or given a final Notification of Concern.

An employee has the right to appeal against any decision made under this policy.

Medical reports are treated as strictly confidential and medical details will only be forwarded to an employee's manager with the employee's

prior written consent. However, the Human Resources / Consultant Personnel and Administration Department may need to discuss an employee's general condition with management to make necessary adjustments or to consider other recommendations of the medical report. The employee will be informed about any actions, in advance, at all times.

Appeals: An employee has the right to appeal against any decision made as part of this policy. Appeals must be made in writing to Human Resources within five days of receipt of the written confirmation of the decision. The letter should state the grounds for appeal and details of why you believe such grounds exist.

Employees are entitled to be accompanied by a work colleague (in-store consultants, an instore colleague) or trade union representative during the appeal meeting. The Company may adjourn any appeal meeting pending further investigation. You will be informed of the outcome of any further investigations before the appeal meeting is reconvened. Following the appeal hearing, the manager concerned will consider the case fully and communicate their decision in writing as soon as possible. The decision at this stage is final.

24. The Staff Handbook included the following:

6.2 Attendance: Attendance is mandatory based on the schedule. If you are unable to come to work, inform your store manager or area manager as far in advance of the start of your shift as possible....The store manager ensures that during a team member's absence, all of his/her regular duties will be carried out. All absences and sick-leave should be notified and justified according to legislation and local procedures.

Subsection A

Attendance: Points of attention: Whenever possible, days off must be requested formally in advance. Time management tools (i.e. Tamigo) allow shifts exchange between beauty advisors. The store manager is responsible for all schedule modification and has to accept the request online....If a member of staff arrives late on a regular basis, refer to your local procedure and alert your area manager and human resources manager as it might have legal consequences.

Subsection B.

Sick leave:...

1. If you are unable to come to work due to health reasons, notify immediately: a. Your store manager (for beauty advisors) b. Your area manager (for the store manager). If both managers cannot be reached,

contact the assistant manager and human resources (refer to your country human resources guidelines) and send an e-mail to the store e-mail address. Inform your store manager or area manager of your return date back to work.

25. The Staff Handbook also contained a code of conduct. The code of conduct contained a list of examples of unacceptable conduct including the following:

Section B: List of Unacceptable conduct.

Tardiness and absenteeism

Failure to comply with safety rules, policies or guidelines

Any other violations of any company policy procedure or guideline

26. We record in passing that the Handbook also provided that merchandising had to be consistent with brand visual standards.

27. The respondent also operated a Welfare Policy applicable to all employees. The Welfare Policy included an alcohol and substance abuse policy. This offered support for employees with alcohol or substance abuse related problems, in a helpful and sympathetic manner. However, it provided that affected employees may not disregard existing policies and procedures at their respective workplaces or the normal responsibilities of their employment. It set out a procedure for employees to obtain confidential help. For those who voluntarily disclose their dependency to the respondent and accept outside agency help, the policy provided that the respondent would treat the dependency as a medical condition, and absences for treatment as authorised absences, give consideration to assisting with treatment /counselling costs but that an employee who refuses the offer of assistance from the Company to overcome their problem will be informed that in the case of future alcohol or drugs abuse which impacts work performance in any way, or behaves outside the workplace in a way which affects an individual's ability to do their job or the Company's reputation, that could result in disciplinary action.

28. In relation to Prescribed Drugs the Welfare Policy provided:

Prescribed drugs or medications taken as treatment for a health condition may have possible side effects or cause impaired performance. It is the employee's responsibility to advise the Occupational Health Nurse (where one exists), Human Resources Retail or their Retail Business Manager if they are taking prescribed drugs, so that further professional advice can be sought as appropriate.

29. Ms Blum explained, and we find, that Iman, who had had some 16 years

experience as an assistant store manager had expected to be given the job as store manager, although she had not applied for it. She had a history of being difficult to work with under other store managers. Her relationship with the claimant deteriorated as time went on. We find that Iman was, and became increasingly deliberately difficult to manage because of, we infer, the resentment she felt towards the claimant. She sought opportunities to challenge and undermine him.

30. The claimant's start date was 14th August 2022 but he requested a postponement early that morning. The reason he gave was that he was having problems with his landlord and accommodation. The same reason prevented the claimant from attending for handover on 16 August 2022. The issues continued and Ms Blum allowed the claimant to defer his start date until 22 August 2022. As a result he was not able to do an in-person handover from the previous store manager who went on maternity leave on 18 August 2022.
31. The claimant started work on 22 August 2022.
32. Since March 2022 the claimant had been abusing non-prescription and stimulant drugs in very significant quantities and on a regular and, we understood, increasing basis. He described this practice as 'self-medicating' because, he told us, he needed to work to earn income and without abusing non-prescription drugs in the way he was he would have been unable to work. We find that he continued his use of non-prescription drugs, albeit that he sought external help and succeeded in reducing the frequency and amounts. He did not disclose his dependency or drug taking at any time during his employment in accordance with the Welfare Policy.
33. The respondent used a software package called Tamigo to record rotas, absences, holidays and lieu times, as well as comments – for example recording whether time was being made up for a late start. Both the claimant and Iman as Assistant Store Manager had access to Tamigo for this purpose. The respondent's practice was for Store Managers to approve store staff rota changes, and for the Area Manager to approve rota changes or requests for Store Managers themselves. Approval could be done through Tamigo, but there might also be approval through emails/discussion which was then recorded in Tamigo.
34. The claimant, as Store Manager was responsible for preparing staff rotas. On 31 August 2022 he sought some initial guidance and support from Ms Blum on procedures and authority for making and recording changes on Tamigo [240]. The claimant was responsible for arranging rotas for October onwards.
35. We would characterise Ms Blum's management of the claimant and the Clapham store as light touch and supportive. Ms Blum trusted that Store

Managers would be arriving on time and would be staying for their full shift, although she referred to an instance on 23 August 2022 when the claimant left early for a medical appointment which was not recorded. There is no evidence that she raised this with him.

36. Ms Blum told us and we accept that she tended to emphasise to new starters the requirements for absence/sickness reporting because these are most commonly engaged and overlooked. Her practice was to accept a messaged notification provided that the employee also called in. She would also give a new employee leeway for a first breach, and would use the occasion to remind them and emphasise the absence reporting policy. The respondent's practice was to give warnings where new employees made errors in their early weeks.
37. WhatsApp messages between the claimant and Iman indicate that their relationship was initially constructive and cordial. Contrary to Ms Blum's assumptions, both of them were late on occasion and they covered for each other informally rather than either of them recording lates on Tamigo. The claimant as Store Manager should have recorded these on Tamigo both for himself and Iman.
38. The messages also show that the claimant was struggling with health concerns during August and September 2022 alongside the stress of finding himself homeless. They record an incidence of diarrhoea and also an incidence of muscle weakness (12 September 2022) which led to him taking an unscheduled morning off leaving junior staff member Luna in charge alone. He reported these issues and his need to attend appointments and scans both to Iman and to Ms Blum. Both were supportive of his health and absences. He told Ms Blum on 21 September 2022: *"not such a great result at the hospital. Its not looking good"*. Ms Blum offered her support and referred him to the EAP helpline "for emotional and mental health support when going through a tough time". He told Iman that he was tired, and (on 22 September 2022) that his *"liver and spleen were all fucked"*. He did not tell Ms Blum about his liver/spleen conditions.
39. Ms Blum, at some point during his discussions about his medical appointments and absences reassured the claimant that if he needed to close the store to use the toilet when he was lone trading – that is to say being the only staff member in the store for a period of time - that he could lock the door to do so. This instruction was given informally. The claimant did not suggest to Ms Blum that his bowel condition was presenting in such a way (e.g. that it led to very urgent needs to visit the toilet) that locking the store was not a practical response, or that he needed a co-worker at all times so that he did not have to lone trade for this reason.
40. On 27 September 2022 Ms Blum messaged the claimant to emphasise

that his taking time off in lieu needed to be approved by her before it was taken. She had, we find, noticed a pattern of the claimant taking unapproved time off in lieu. He took further time off in lieu on 1,5 and 6 October 2022.

41. The store was due to conduct a stock take on 3rd October 2022. Third party contractors attended to conduct it. It was supervised by Ms Kehoe while Ms Blum was on holiday. In the event there were problems with it because the preparation had been poor. It had to be rearranged for the New Year. The claimant was frustrated that he had not received the work and support from staff - Iman in particular - which he had expected in order to prepare for the stocktake.
42. Ms Kehoe arranged for some support from a Retail Excellence Manager – Adam Inglis – to be given to the claimant, and arranged a training visit for the claimant to the Brighton store to take place on 20 October 2022.
43. The claimant reported to Ms Blum about the stocktake on 4 October 2022 and expressed concerns about missing samples. Contemporaneous WhatsApp messages evidence a deteriorating working relationship with Iman over the stocktake. On 5 October he said to Ms Blum *“honestly I tried to talk like a normal person with her but she had been really awful to deal with today. First being an hour late yet again. But instantly has gone into defence mode and suddenly for the first time has been talking about doing counts and adjustment using the gun... - but to be honest I can't deal this attitude today. This is very long winded sorry, Didn't really have time to go through it as clients came in but she was very unreceptive. She has an idea in her head that she is the victim and it's the company and my fault and because the other stores have loss then it's acceptable and that's not the right approach as managers we are supposed to come up with ways to combat and deal with an issue not just accept it. I think a clear job description laid out and what is and isn't expected of her and what my role is and define them will help. At the end of the day it's work and we have a job to do and not just when it's convenient. I feel very disappointed more than anything with her and I thought we had made some good progress and it's a shoot yourself in the foot to spite your face attitude.”*
44. Ms Blum offered to facilitate a mediation meeting.
45. The claimant went on holiday from 8-16 October 2022. This holiday was approved by Ms Blum in part to enable the claimant to sort out his accommodation problems and recover somewhat from the stress that was causing him.
46. Just before he left he recorded with Ms Blum that he was having difficulty accessing Tamigo after a password change. WhatsApp messages show that he was continuing to have problems accessing at least some parts of Tamigo, and that there were entries being made to the rotas which he was

not aware of (which appear to have been because the Northcote Road store's rotas had been combined with the Store).

47. While he was away Ms Blum spoke with Iman. Iman expressed resentment about the claimant being chosen ahead of her as store manager. She also accused the claimant of taking £20 of petty cash and regularly working late in the store – she later amplified this allegation to Ms Kehoe as being that the claimant was sleeping there overnight.
48. We interpose to record here that the allegations of misappropriating samples and of stealing petty cash were both investigated and found to involve absolutely no wrongdoing by either individual and there was no finding that the claimant was sleeping in the store overnight.
49. On his return on 17 October 2022 the claimant sent some conciliatory messages to Iman to try to restore working relationships, trying to encourage her to help Luna to arrange client bookings for a Halloween promotional event. In this email he records that he needed her help to make amendments on Tamigo for Luna as he could not access it. But Iman continued to fail to communicate with him. It was at this time that he told Ms Blum and Iman that he had been diagnosed with Coeliac disease and was still struggling with trying to find somewhere to live.
50. In fact, the claimant had not been diagnosed with Coeliac disease. He had only been sent for a scan to rule it out as a possible cause of his bowel-related symptoms.
51. Ms Blum spoke with Iman on 19 October 2022 to try to arrange the planned mediated discussion. By this stage Iman and the claimant were not speaking to each other. Iman only agreed to a mediation meeting if Luna was also present. In the event this meeting did not take place until after Ms Kehoe had taken over as the Store's Area manager.
52. The WhatsApp traffic confirms that the claimant was still experiencing some issues about rota entries on Tamigo in late October 2022. We find that the claimant's access to the rota functions on Tamigo had been resolved by 26 November 2022 at the latest. We infer that this was the case from the fact that there is a document on 26 November 2022 which records that both the claimant and Iman were having problems inputting personal sales figures. We infer that if there remained problems with the claimant's access to rotas this would have been referred to as an ongoing issue.
53. On 1st November 2022 the Store became the responsibility of Angela Kehoe as Area Manager, although Ms Blum continued to have overlapping contact with the claimant because Ms Kehoe was on holiday for the first two weeks of November. In a WhatsApp exchange with Ms Blum on 3 November 2022 she counselled the claimant, who was on holiday, not to

come in to work because the holiday was put in for his health, he responds with a passing comment that "*I have insomnia anyway so it helps fill my time*".

54. On 7 November 2022 he told Ms Blum that he had moved into a new flat and "*slept all day today*".
55. At this point Ms Blum still regarded the claimant as a good and passionate performer. She described the claimant as good at events planning, having brilliant plans, hard-working and impressive for a new manager. He had overseen business growth of 25%, generated additional sales revenue for certain products and from events, and had developed a VIP client list. She spoke to the claimant towards the end of her stewardship of the store in encouraging and optimistic (but non-committal) terms about future roles after the end of his fixed term contract.
56. Ms Blum was not able to meet Ms Kehoe for a handover but we consider it likely that she passed on to Ms Kehoe a warning that the relationship between the claimant and Iman was not working well.
57. Ms Blum did not believe or consider that any reasonable adjustments had been put in place for the claimant and did not tell Ms Kehoe that there were any such adjustments. We find there were no formal reasonable adjustments in place (contrary to the claimant's case) because both were consistent in saying that reasonable adjustments were undertaken only after a formalised written procedure involving HR and possibly medical or occupational health, and health and safety input (although Ms Blum had had no previous experience of the process herself). None of this had happened in the claimant's case. The only informal adjustment that, we find, had been raised by the claimant related to his need to use the toilet, and he was assured that he could close the store if he needed to. The evidence showed that he was also afforded general flexibility to enable him to attend medical appointments relating to his physical ill-health symptoms.
58. By mid-November when Ms Kehoe personally assumed direct oversight of the management of the store the working relationship between Iman and the claimant had seriously deteriorated. The claimant said that Iman was altering rotas without his knowledge or consent so that they were not rota'd together. He was extremely critical of her attitude towards him. He had good grounds for doing so. She was, in our judgment, working actively to undermine his attempts to manage her and the Store. Both were complaining to management about the other. Their attitude towards each other was in reality, and on occasion manifestly, mutually hostile and antagonistic.
59. Shortly after taking over supervisory responsibility Ms Kehoe discussed with her superior, Ms Munby, start times for the Store. Ms Munby directed Ms Kehoe that the store opening time should change from 9.30 am to 9.00

am to bring it into line with other 'community doors' stores' opening times. Ms Kehoe implemented this instruction.

60. Ms Kehoe as Area Manager made five in person visits to the store: on 16 November, on 1, on about 8 and on 21 December 2022 and on 17 and 23 January 2023.
61. When she took over Ms Kehoe intended to prioritise the restoration of the working relationship between the claimant and Iman.
62. Her first visit on 16 November coincided with a planned health and safety inspection. She arrived at 9am. The claimant was not there. Ms Kehoe expected staff to arrive 10 to 15 minutes before opening time (compared to the contractual requirement of 30 minutes). He had posted a message on the Store Teams account at 10am saying his electricity had gone off and his phone was not charged and he would arrive soon. He also messaged Iman to inform her. Iman complained to Ms Kehoe about the claimant, including repeating allegations that he took petty cash and slept in the store, she alleged he was always late and taking time off for appointments, but said (untruthfully) she had not raised this with Ms Blum before. The claimant arrived at approximately 10.15 am. The Store had not been adequately prepared for the Health and Safety inspection and so this had to be rescheduled to 17 January 2023 with an action plan.
63. On 17 November 2022 the claimant was late again. He messaged Iman suggesting he had a medical appointment but there is no evidence in his medical records that he had a medical appointment booked or that he alerted Ms Kehoe in advance that he had a medical appointment. We do not accept that he had a pre-arranged appointment.
64. The claimant's attendance record shows that he allocated to himself lieu time for 10, 14, 15 to 17, 19 and 22 of November 2022.
65. On the 19th of November the claimant arrived late again. He informed Iman at 9:00 am that he was running late and felt unwell. At 10:50 he messaged *"just waiting for my meds to kick in so I don't feel nausea's [sic] then I'll be on my way. So sorry for that this week really had not been the one for me but I'll explain when I'm in. I've got so much time owing me I'll amend the rota today and see if I can get those timesheets done too"*. He said he would be in by 1pm and wanted to go over the 'November/December timeline' – we understand that to be a reference to rota planning. The claimant did not tell Ms Kehoe about this late arrival and his allocation of lieu time and so she had not approved it. The claimant ought to have recorded this late on Tamigo but did not do so.
66. The claimant advised Iman that he would be in late on 22 November 2022. He messaged her at 11.25 and said he'd posted on the Store Teams account. He said *"I messaged on Teams I don't think you got it I'm on my*

way I'm sorry the new pills they gave me for insomnia work too well I have to stop taking them I literally can't wake up. I'll message Angela and sort out making up the time I've done so much overtime hopefully I'll use that or come and do hours on Saturday to make up for it I feel like a zombie". There is an exchange of messages on 23 November 2022 which suggests that there was a discussion between the claimant and Ms Kehoe. The claimant sent his email address, pointed out that he had accrued 11.75 hours of lieu time and asked for approval to use those. Ms Kehoe responded explaining that she had used 4 hours of that accrued lieu time for the absences on 16 and 22 November 2022 and added "please request the lieu day via Tamigo and I will approve, thank you". She sent a direct email to the claimant confirming that she had not been called on 16 or 22 November about lateness. She reminded him of the expectations and that lateness or unauthorised absence may lead to a pay deduction or disciplinary action under the terms of his contract. She approved 4 hours lieu time on this occasion for these absences.

67. Also on 23 November 2022 Ms Kehoe posted on the Store Teams to all staff to 'set a few expectations'. Her message included the following:

***Lateness** if you're going to be late to work then you will need to **call** [her emphasis] me and the team members you are working with that day to notify them, Company expectation is that this is a phone call not a text/teams message, please update any lateness on Tamigo in the comments section of that day you need to put late (it's the way the company tracks it)*

***Absence** any absences need to be **called** [her emphasis] through two hours before your shift start so if a 9:00 am start you will need to **call** me for 7:00 am and also let your team member you are working with day know at the same time. This way we will have a chance to try and arrange cover for the day. A text/teams message is not acceptable...it has to be a call and leave a voice message with reason for absence.*

68. After hearing Iman complaining to her that the claimant was stealing petty cash, was staying in the store overnight and was always late, and the claimant complaining that Iman was not helping him, was misappropriating samples and was deliberately sabotaging his management by changing the rotas without notice while he could not access Tamigo, we find that at some time in November Ms Kehoe spoke with Ms Blum to ask about those allegations: We find that Ms Blum reassured Ms Kehoe the more serious allegations did not involve wrongdoing on either part. She said that she knew about the claimant's late working but it had not been suggested the claimant was sleeping there overnight, and that the relationship with Iman was difficult and the claimant had a difficult home situation and health concerns and was finding things stressful. Both Ms Blum and Ms Kehoe's evidence on what was discussed were consistent with the other.

69. We find that at some point in late November 2022, probably in the course of one of these discussions and after Ms Kehoe's discussion with Ms Blum the claimant told Ms Kehoe something about his health issues which had beset him since March 2022.

70. Recollections of the two differed about these discussions, what was said and when.

IBS/Bowel Problems:

71. The claimant said that he provided Ms Kehoe with a doctor's note confirming a diagnosis of IBS on 15 November 2022. We do not accept this. There was no such note in the evidence before us. The medical records we have seen only state on 28 September 2022 that IBS was speculated upon by his GP as being a possible cause of his bowel symptoms.

72. Ms Kehoe's evidence was that she knew from Ms Blum that the claimant had health issues but was not clear exactly what they were. She knew that the claimant had some bowel dysfunction problems and needed access to a toilet, and that might require locking the Store doors. Although the chronology is unclear, it is common ground that the claimant confided in Ms Kehoe that he needed access to a toilet, and might need that urgently, but he did not at any time before 9 January 2023 suggest that locking the doors for the purpose of accessing the toilet would be impractical or insufficient to respond to these symptoms.

73. Again, although the chronology is unclear, the claimant contended that Iman made, but was not admonished by Ms Kehoe for, comments about the smell from the toilets and Ms Kehoe humiliated him with remarks about the cost of toilet paper. He also said that he confided in Ms Kehoe about having to bring a change of clothes in case he soiled himself if he was unable to leave the shop floor when it was busy with clients. Consistent with Iman's hostile and uncooperative attitude towards the claimant we find that Iman probably did make the cruel and humiliating comment about his bowel dysfunction. Ms Kehoe recalled a comment to her by Iman about his eating wheat which aggravated his bowel dysfunction. We do not accept, however, that Ms Kehoe joined in with Iman, or made comments about the cost of toilet paper. It is inherently unlikely that a senior Area Manager would do so, and the claimant did not make any such allegation at the time. We prefer Ms Kehoe's account, as being credible and more likely, that she told Iman that the claimant's health was not an appropriate conversation to have with her and therefore that Ms Kehoe did caution Iman against making such comments.

74. The claimant raised with Ms Kehoe the issue of his bowel-related problems in the course of an informal discussion. We find that Ms Kehoe empathised by disclosing that members of her family experienced Crohn's disease.

The claimant asserted that Ms Kehoe was unsympathetic towards him and his condition saying that he 'just had to get on with it' as her family did. By contrast, Ms Kehoe's account was that the discussion was about the difficulties sufferers could experience arising from the delay between reporting a problem to the NHS and the completion of testing, during which time the patient is left to manage the condition themselves before a suitable treatment plan was made. We prefer Ms Kehoe's account of this discussion. The claimant's recollections, we find, were less reliable and coloured by an emotional overlay which increased after his dismissal, and in his evidence before us he made the very same point: that NHS delays in testing and treatment caused him anxiety. The documentary evidence is consistent with Ms Kehoe adopting an approach to staff generally which emphasised policies and compliance, but her communications show she also acknowledged and sympathised when the claimant needed time off for medical appointments. Such an abrupt comment as '*you need to get on with it*' is not consistent with the messaging traffic and less likely to have been made in the context of an empathetic disclosure by Ms Kehoe.

Anxiety/PTSD

75. Ms Kehoe said, and we accept, that she knew from Ms Blum that the claimant had personal issues with his accommodation and that that was causing him anxiety, but that the claimant had said, or at least that she understood that by the time of the discussion that, that issue had been resolved. We find this is likely because the claimant had notified Ms Blum on 7 November 2022 that he had found a new flat. He was also emphasising, before us and in contemporary exchanges, that he was really enjoying the work at that time. He did not allude to any ongoing effects arising from anxiety as a mental health condition, medical condition or disability. The inference which we found Ms Kehoe was likely to draw was that the anxiety was an understandable response to his reported out of work stresses.

76. Ms Kehoe said that the claimant did not mention PTSD until his probation interview in January 2023. The claimant accepted in cross-examination that he 'would not' have mentioned that he experienced PTSD, but that he did mention insomnia.

Insomnia:

77. A disturbed night's sleep or periodic episodes or periods of sleeplessness is not the same thing as a medical diagnosis of chronic insomnia. Ms Kehoe said that she was aware that the claimant had said his sleep had been disturbed, but she denied that the claimant had described himself to her as having insomnia, that he had told her at any time that he was taking or changing any medication, or that that was the reason for any of his reported absences. We find that her recollection is accurate in this regard.

It is consistent with the absence of any documented references in fit notes or messaging to Ms Kehoe to insomnia, or medication for it as a cause of his lateness/absences (although he did disclose the latter to Iman). It is consistent also with Ms Kehoe's evidence, which we accept as being inherently likely, that in her dealings with the claimant regarding his absences she was in constant touch with, and was following guidance from HR (although we record that no details of such conversations were disclosed) and that HR had told her to ask /check if the claimant had any medical issues, and that the claimant did not disclose any conditions to her other than as set out above. In relation to the claimant's references to changes to insomnia medication affecting his timeliness, there was no evidence that he was being prescribed medication, and we recall that he was under an obligation under the Welfare Policy to report changes in medication which might affect his abilities to work.

78. Our finding about what the claimant disclosed to Ms Kehoe informally is consistent also with a wish on the part of the claimant, which we find that he had, to hide from management or minimise the appearance or impact of any absences due to, in particular, mental health illness/impairments because he was passionate about this employment, very much wanted it to develop into a longer term future with the respondent and was concerned that mental health conditions would adversely affect his prospects. We find this was particularly the case with Ms Kehoe as he felt his relationship with Ms Kehoe was less supportive than with Ms Blum. In her evidence before us Ms Blum speculated that the claimant might have been taking leave days rather than sick days to mask his pattern of absences. Ms Kehoe said in evidence that she had discussed OH reports with the claimant on 9 December 2022 and explained that they might involve the practitioner asking to look at the claimant's medical records. We accept that that was a conversation that took place, and we infer that the claimant was reluctant to engage with OH or corporate support programmes in part because, again, he was concerned knowledge of the contents of his medical records would harm his prospects of future employment with the respondent.

79. Returning to the chronology of events, on one occasion in November 2022 Mr Adam Inglis reported to Ms Kehoe that he had overheard the claimant talking to a customer about his toilet habits in a way which he, Mr Inglis, thought went too far. Ms Kehoe told the claimant that this conduct was inappropriate. The claimant responded to her that he did not recall saying such things.

80. The claimant was absent from work on 28 November 2022. He reported via text that he had gastrointestinal problems, diarrhoea and vomiting. He did not call Ms Kehoe as the absence reporting policy required.

81. A return-to-work call took place with Ms Kehoe on 30 November 2022. The

RTW form recorded that the reason for the claimant's absence was diarrhoea. He stated that he was not recovered as he still had bowel problems but was fit to return to work and that he continued to need hospital appointments because of his bowel problems. There is no mention of any ongoing medication being taken. The form includes a question whether the employee wishes to be referred to occupational health and the answer recorded is 'no'. The form also records that he had correctly reported his absence in accordance with company policy. Ms Kehoe said this latter entry was an error and he had only reported by text. The claimant did not dispute that he had reported his absence only by text. The claimant claimed that in this call Ms Kehoe said words to the effect that if the claimant could not cope with the stress, perhaps the job is not a good fit, and claimant should consider resigning. We do not accept that account. It is implausible that a one-day absence because of diarrhoea would provoke such a comment.

82. On 1 December 2022 the claimant was at work, but asked Ms Kehoe if he could make an early escape as he was in discomfort with his bowels and was passing blood and needed to go to his GP for a blood test. She readily consented but the claimant nevertheless chose to stay to attend the pre-planned meeting to discuss the deteriorating working relationship with Iman.

83. The mediation meeting took place on the afternoon of 1 December 2022 between Ms Kehoe, Iman and the claimant. The claimant and Ms Kehoe gave differing accounts of the meeting and what was said during and around it. Neither witness' evidence was entirely satisfactory about what happened. In short, the claimant's evidence and his recollection of events was somewhat unreliable, inconsistent and, we consider, coloured to a degree by emotion. Ms Kehoe's recollection of this unminuted meeting was unusually precise in respects which suggested to us some after the event reconstruction of her recollections. We find the following to be true on the balance of probabilities:-

83.1. The claimant and Iman were both upset and spoke over each other without listening;

83.2. Iman said she felt as though the claimant did not want her to be there;

83.3. The claimant said he felt Iman was not supporting him as she should have been, and was actively trying to frustrate and undermine efforts he was making to create in-store events;

83.4. Iman accused the claimant of blaming her for things which she had not done, and doing so in an aggressive tone;

83.5. The claimant responded to Iman's statements by eye-rolling,

over-speaking and saying she did not know what she was talking about.

83.6. Both claimed that the other had been bad-mouthing about them to other people behind their backs. Ms Kehoe criticised both of them for this lack of professionalism and that their 'dramas' should not be visited on other staff or visiting staff;

83.7. The mediation descended into a serious shouting match between the claimant and Iman which Ms Kehoe struggled to stop. Ms Kehoe admonished both of them for unprofessional behaviour.

83.8. The claimant's demeanour, language and tone towards Iman became confrontational. In particular, he called her 'delusional' and said she had a mental health problem. Ms Kehoe regarded his language and conduct at this point as aggressive and inappropriate. We infer her assessment was a reasonable one because, we find, Iman left the meeting in tears to go to the toilet nearby.

83.9. The claimant said to Ms Kehoe that Iman behaved differently when Ms Kehoe was present. Ms Kehoe pointed out that Iman was herself experiencing relationship difficulties at the time and told the claimant that the way he spoke to Iman was unacceptable;

83.10. Ms Kehoe asked Iman if she wanted to take a break for some air, which she did. Then, in her absence Ms Kehoe spoke privately to the claimant and told him about his body language and eye-rolling and that his interrupting Iman was aggressive and that he should not speak to her in the way he had. She also said that Iman had previously complained to her about how the claimant spoke to her and that the claimant's behaviour in the mediation meeting seemed to validate those complaints. She reminded him of his position as her line manager.

83.11. The claimant felt that he was being unfairly dealt with by Ms Kehoe, and that she was taking Iman's side in the argument and not taking on board his criticisms of Iman's conduct.

84. We find that Ms Kehoe was in fact more critical of the claimant's than of Iman's behaviour, but that she considered (for which we find there were objectively reasonable grounds) that his language directed towards Iman was in fact aggressive, and that it was reasonable to be more critical of the claimant's behaviour because he was the store manager, and Iman's line manager and that as such the claimant should set a better example.

85. On 2 December 2022 he messaged Ms Kehoe at 8am saying that he needed to visit the hospital in the morning and possibly the afternoon. Ms Kehoe responded at 10am telling the claimant he must take the time he needs for medical appointments but to keep her informed. The claimant also said in his first message that he was not happy with the meeting on 1

December 2022 and felt his points about Iman's conduct when senior management were not present were being overlooked. Ms Kehoe reassured him both parties' points had been listened to and offered to talk any points through with him.

86. The claimant experienced flu-like symptoms and a rash on 4 December 2022. He did not attend work on 5 December 2022 and suspected he might have monkey pox. At 11.36 he sent a photograph to Ms Kehoe and said he had attended clinic in the morning. She agreed that he should stay away until he got his results. He was absent until 7 December 2022. He was in fact ill although he did not have monkey pox (but we are satisfied that he genuinely believed that he might have and was acting responsibly in accordance with government guidance).
87. On 9th December 2022 Ms Kehoe conducted a Return-to-Work conversation with the claimant. The RTW form recorded that he had reported his absence in accordance with policy and that an offer to refer him to Occupational Health was declined. She sent a copy to the claimant who did not comment on it. We accept Ms Kehoe's evidence that she had discussed OH reports with the claimant on 9 December 2022 because he had expressed a concern about that appearing on his record. She explained that they were confidential and voluntary but that they might involve the practitioner asking to look at the claimant's medical records.
88. On 27th December 2022 Claimant was four and a half hours late to start his shift. He did not call or inform Ms Kehoe at all. He sent a message to a junior co-worker - Luna - at about midday to say he was coming in late. He sent a message to Ms Blum at 14.30. His absence was not entered on Tamigo. He said in cross-examination that he could not access it. We find that that was not correct. He had prepared to come in to work but had fallen asleep again.
89. The drug rehabilitation charity whose programme the claimant was participating in reported that he had a 'clean' test during November and December. The claimant produced a post-dated email to that effect in the hearing. Although he described different tests including blood tests, the detail of the tests, how, when and how frequently they were conducted and what drugs were being tested for were not clear on the evidence before us.
90. On 4 January 2023 the claimant did not turn up for his shift. The claimant did not call Ms Kehoe at all. He sent an email at 10.57 saying that since Christmas his physical and mental health was being affected and that he was receiving treatment but that he did not feel great and requested the next three days off. His GP assessed him on 6 January and provided him with a letter and a fit-note until 2 February 2023 which he sent to Ms Kehoe on the same day. The letter recorded that the claimant had been 'struggling

with multiple medical issues lately including gastrointestinal as well as mental health that have affected his ability to work". The fit note referenced "sleep disturbance; stress-related problem: IBS flare up". He was absent for three days up to and including Friday 6 January 2023. In that time Ms Kehoe tried to call and sent a supportive email on 4 January 2023 congratulating the claimant on his work during December, and approving his absence and referring the claimant to the respondent's confidential EAP programme.

91. On 6 January 2024 Ms Kehoe sent a good wishes email and again highlighted the EAP programme. He responded to say he would be back at work on Monday (in his later probationary review meeting he described himself to Ms Kehoe as "being in the middle of a mental breakdown' at that time. he added that this absence was 'around my birthday [which was in fact on 7 January] and I didn't hear from anyone so that triggers me. None of these problems are to do with work").
92. On Monday 9th January 2023 the claimant did not turn up on time. He did not call Ms Kehoe at all. He emailed Ms Kehoe at about midday to say that he was running late and had had a panic attack.
93. At this time, as the claimant later explained in his probationary review meeting, was again experiencing very high levels of external stresses. This arose from a number of factors. He was struggling with the circumstances of the accommodation which he had found in September 2022. The other occupants of the flat were active throughout the night and this disrupted his rest and he was facing financial pressures and, again, an immediate prospect of homelessness. He was also experiencing some personal emotional fragility after Christmas and around his birthday on 7 January and lacked contact or support from family members.
94. On 11th January 2023 the claimant and Ms Kehoe spoke on the phone to discuss the claimant's failure to report his absences, lateness and failure to follow the correct reporting procedures. The conversation was recorded in an email on 17 January 2023. On the call Ms Kehoe asked the claimant if there was any medical condition which was preventing the claimant from calling in to report lateness/absence and he said that there was not. She asked what the respondent could do to support him, and the claimant said there was nothing, and that it was the result of stress in his private life. In response to a request by him not to lone trade (i.e. be in sole charge of the store with no other staff present) so he had support in store, Ms Kehoe agreed to amend the rota 'where possible to avoid lone trading'. We were not taken to any instance after this date when the claimant was rota'd for lone trading. In the discussion relating in particular to 27 December and 9 January the claimant had told Ms Kehoe that he thought he had phoned in, and couldn't remember sending emails as he was "not thinking clearly'. In response to Ms Kehoe observing that there was a pattern of not

reporting until midday, the claimant said “this was probably because knowing [he was] late then caused anxiety and before [he] knew it the time had run away to around midday”. Ms Kehoe again referred the claimant to the confidential EAP programme. This was the fourth occasion she had done so. The claimant was reminded about the need to comply with the requirement to telephone in under the Absence Reporting policy.

95. On 17 January 2023 the rescheduled health and safety inspection took place at the Store and Ms Kehoe and another colleague attended. The claimant was due to attend work but did not arrive.

95.1. He messaged Ms Kehoe at 8.09 to say that he was at an appointment. This was not true. Even if he had had an appointment – and there is no evidence that he had entered into Tamigo or informed the respondent of any planned appointment but he said it was before working hours – in fact he had taken sleeping pills and not woken up.

95.2. He messaged Iman at 08.47. His message to Iman contained a request: “*let them know I’ll be in at 10. Can pretend like he had arranged it prior.... I took sleeping pills and didn’t wake up.....*” She replied that she was opening the store and hopefully the managers would not turn up first thing. The claimant responded: “*If they do say my appointment ran late and I’m on my way*”. We interpret this as a request for Iman to mislead senior management to cover up his late arrival and the reasons for it. Iman did not do as the claimant had asked her. Instead when Ms Kehoe inquired about the claimant’s absence she showed Ms Kehoe the claimant’s message.

96. The claimant did not attend work on 18 January 2023. He did not call or inform Ms Kehoe at all. At his later probationary review meeting the claimant said that he had checked that Iman would be in that day, but had then ‘blanked out’.

97. On 18th January 2023 the claimant was invited to an in person meeting (HR attending remotely to take notes) to be held on 23 January 2023. He was informed that the purpose of the meeting was to discuss his employment with the respondent, and concerns about his capability and conduct. He was advised of his right to be accompanied and of the possibility that his probation might be extended or his contract terminated.

98. On 19 January 2023 Ms Kehoe tried to call the claimant to conduct a return-to-work call. He did not answer the call. He did not call Ms Kehoe back on that day.

99. On 21st January 2023 Ms Kehoe called the claimant to conduct a Return-to-Work call following his absences. He told her that he had panicked on 17 January because everyone was waiting for him, and that on 18 he had ‘given up’ – he declined to explain to Ms Kehoe what he meant by this. By

this stage he had had four occasions of absence in the previous two months where he had not followed absence reporting policies by calling Ms Kehoe. No Return-to-Work form was completed on this call and the claimant terminated the call. The claimant's evidence before us was that he did so because he had people in the shop. He did not give this reason at the time or shortly thereafter. We find that he acted as he did because he was concerned about his absences and conduct being challenged and felt stressed by Ms Kehoe's attentions to those issues and did not want to continue with the call.

100. On 23rd January 2023 the Ms Kehoe, accompanied by an HR note-taker conducted the claimant's Probationary Review Meeting. We are satisfied that the record of the meeting is accurate. The claimant did not take a companion. Ms Kehoe asked the claimant about each of his absences, and where applicable his failures to report those absences in accordance with the applicable policy, and the reasons for and circumstances surrounding those events.

101. He gave a variety of explanations:

101.1. In general terms he explained that he was enjoying the work but his private life was 'falling apart'. He said he felt supported but training was not what he expected and so he was reliant on staff who were not leading him in the right direction;

101.2. In relation to his failing to call to report absences he said "I'm coming out of PTSD and I'm an insomniac too...it's a lot of anxiety and I'm scared I'm going to be homeless again. I don't remember what I was thinking or what I remember because my anxiety goes through the roof." He said the PTSD did not affect his memory so much. He said he sometimes forgets if he had called someone or not.

101.3. Regarding the failure to call on 16 November 2022 he said at the start he didn't realise he needed to call if he was 5 minutes late. When it was pointed out he was an hour late he said he had 'assumed' he'd messaged.

101.4. He did not offer an explanation for not reporting his 3 hour late on 22 November 2022, but acknowledged that Ms Kehoe had explained the requirements to him on 23 November;

101.5. His failure to report his 4.5 hour late on 27 December 2022 he said 'Basically haven't slept for a year, I don't sleep and I don't feel tired from it. ...I eat sugar all the time. After 5/6 days my body needs to sleep. He explained that he woke up for work then 'nodded off' then when he wakes up 'I panic'. He described being unable even to talk in that moment, "then anxiety comes" and that the more I'm told I need to call the more it becomes a thing that is the source of anxiety having to do

it”.

101.6. On 4 January 2023 Ms Kehoe noted that he was signed off for a few days but asked why he had not called her at all. He said he was “in the middle of a mental breakdown” and calling her was the last thing on his mind. There then followed an exchange in which the claimant referred to his struggles with getting consistent counselling support and the fact that he was not supported in the UK by family. He observed that “prior to this it wasn’t my brain it was my body. Now everything is sorted...Now that my life is more stable its all coming out”. Ms Kehoe referred him again to the confidential EAP assistance line. The claimant said had not used it.

101.7. The claimant said he had told Iman to stop “this is my happy place that I come to. When I’m here I feel normal” and that he felt he had done an ‘okayish job’ but that he had ‘a lot of stuff going on’ in his life and everything seemed to be a fight.

101.8. In relation to not calling on 9 January 2023 he gave the same reason – anxiety.

101.9. Discussing the RTW call on 11 January 2023 he said the calls were where the anxiety comes from. After an offer to support him he said “Its such a ridiculous thing – never had mental health issues before. I’ve had a horrible life but not this”. When Ms Kehoe reminded him that he had said there were no medical reasons preventing him from calling in, he said he was thinking something physical. He said he didn’t have anxiety before but now everything was causing him anxiety and that it was probably to do with that that was causing him not to call in. He recalled the position before joining the respondent as involving a lot of stress, going from fit to losing 20 kgs, a pancreas that had stopped working, no money, no flat. He said that doctors thought at times he had cancer, lupus and that was hard to deal with. He accepted that on the call he had said there was nothing the respondent could offer to do to support him.

101.10. He went on to describe unsettled living conditions with comings and goings all night, which was not a good environment and that he was two weeks behind with rent and was probably homeless now.

101.11. When Ms Kehoe again suggested the EAP support line he said “You don’t want to associate mental health on your job record”. She reassured him it was confidential and did not appear on his employment record.

101.12. In relation to his no show on 17 January 2023 for the health and safety inspection he said he was supposed to be at an 8am appointment but took sleeping tablets and didn’t want to say he’d done that and not

woken up. Ms Kehoe said it would be appreciated if he was honest. She emphasised that she wanted to support him but she also had a duty of care to know his whereabouts for health and safety reasons, fire etc. The claimant said he 'gave up' on that day.

101.13. As regards his no show on 18 January he said that he checked with Iman to see if the store was covered then 'blanked out'. When Ms Kehoe said he had not tried to call her at all, he said he thought about doing so on 19 January but did not want to do so when Adam Inglis was visiting the store.

101.14. Ms Kehoe asked if he understood the effect it has on the business and the team. The claimant replied that he didn't think it affected clients that much and that he understood and was prepared to be fired.

101.15. Ms Kehoe said no decision had been taken but pointed out the effect on the team at the Store who were aware he was not following the policy and that he needed to lead by example, and it made disciplinary conversations with them more difficult for him. He responded by saying Iman used to be regularly late and they would message each other, but now it was him.

101.16. Ms Kehoe then showed the claimant a screenshot of his message to Iman of 17 January asking him to cover up the reasons for his absence. The claimant said it was illegal to look into someone's phone and Ms Kehoe explained that Iman had provided the message when she had asked her about his whereabouts. The claimant then became agitated, said there was a double standard in the company and accused Iman of being manipulative, that he thought they were friends and that he was being made to look an idiot. Ms Kehoe said that asking your team to lie for you is not professional.

101.17. The claimant asked to talk about the positives and Ms Kehoe said that there were concerns, all linked to one in the last two months. She summarised the concerns and the claimant accepted that 'it looks atrocious on paper' but was at pains to emphasise the good things that he had done during his time, the events and work he had done (despite issues at the beginning). Ms Kehoe said she was not overlooking what he had done but the meeting was to discuss the breaches of policy.

101.18. Ms Kehoe took a 24 minute adjournment to discuss the position with the HR adviser. After the adjournment she told the claimant that she had decided to terminate his contract with immediate effect (subject to payment of accrued holiday pay). Her stated reasons were:

Considering all your responses, I have made the decision to terminate your contract. We've covered all the non-reporting policies and feel like we have had discussions to support. Going back to the discussion you

saying you didn't feel it had an effect on the business only the team is a concern for me".

102. The termination letter was sent on 26 January 2023. It referenced the following factors as having been taken into account:

102.1. Failure to follow the absence reporting policy on 16, 22 and 28 November 2022, 4, 9 and 17 January 2023;

102.2. Level of absence - 4 occasions of absence within 2 months;

102.3. Unauthorised absence on 27 December 2023;

102.4. Poor timekeeping: late arrival on 16, 22 and 28 November 2022.

103. The termination letter did not reference the message the claimant sent to Iman. However, we find that that matter was in the mind of Ms Kehoe when she decided to terminate the claimant's contract. We so infer because she referenced it specifically in the Probationary Review Meeting. We think it likely that it was left out of the letter because the claimant had voiced concerns that his personal messages had been accessed and had raised issues about Iman's own conduct and the respondent avoided mention of the point in case the claimant relied upon it to raise a grievance.

104. On 25th January 2023, having taken advice, the claimant lodged an Appeal. His appeal, in summary, relied upon:

104.1. Undue pressure imposed and failure to make reasonable adjustments by Ms Kehoe;

104.2. Differential treatment: his being treated as an aggressor towards Iman whilst her own misconduct was ignored.

105. On 31 January 2023 the claimant added to his grounds of appeal that his early January absences were covered by GP fit notes and he produced copies of fit notes backdated to cover his periods of sickness from 16th January – 23rd February 2023 due to anxiety and stress.

106. The Appeal hearing took place on 10th February 2023. It was conducted by Debbie Balsom, the Area Manager Be Luxe, L'Oreal Luxe Division UK. The claimant was unaccompanied and a note taker from the respondent's HR function, Ms Barber, was present. It lasted 50 minutes. The minutes of the hearing are an accurate record. In summary the claimant complained that relevant matters had not been taken into account. In relation to the failure to call he argued that he was not able to do so because he was either asleep or having panic attacks. He emphasised the positive contributions he had made, the stresses arising from his physical deterioration which developed into anxiety problems, the differential treatment of him compared to Iman. He asked for his contract pay to be

honoured to the end of his contract and complained that the dismissal had affected his chances of future employment with the respondent or others.

107. In her evidence, which we accept, Ms Balsom explained that:

107.1. For the purposes of conducting the appeal she looked at the report of the Probationary Review Meeting.

107.2. As was her usual practice she did not speak beforehand to Ms Kehoe because she preferred to make up her own mind. She did not speak to Ms Blum because the relationship appeared to have been good and at that early stage latitude and informal advice on compliance would usually be given.

107.3. The claimant's explanations of his failures to comply with the reporting policies and procedures did not convince her. Although he referred to PTSD, anxiety and mental health, he did not adequately explain the mitigating circumstances. She could understand why insomnia might prevent the claimant calling 2 hours in advance, but she was not presented with evidence, and did not believe that insomnia or panic attacks prevented him from calling in. Instead, he spoke a lot about Iman and feeling like he was not being treated in the same way as everyone else.

107.4. A significant factor in her consideration was that Ms Kehoe had asked him in the Probationary Review Meeting why he was unable to call in for any reason, and he had not given a clear or medical reason for not doing so.

107.5. However, she was concerned that Ms Kehoe ought perhaps to have referred the claimant to Occupational Health. She was not aware during the appeal hearing that Ms Kehoe had offered Occupational Health referrals during RTW calls.

108. On 21 February 2023 Ms Balsom sent the Appeal Outcome letter. The decision to dismiss was upheld but the letter acknowledged that "I believe there is more we could have done to accommodate you during this time, especially as you explained your situation to your manager". Ms Balsom decided to pay the claimant's wages on an ex gratia basis to the termination date of his contract.

109. She gave evidence that she decided to pay the balance of the contract term not as an admission of fault but because, after reflecting overnight on what had been said during the Appeal Hearing: i) she believed that the claimant had not been offered Occupational Health support and that ought to have been done ii) she considered he had been a passionate worker who had done some good work and was upset at not being able to continue in the role iii) she had sympathy with the claimant having to struggle with

housing and problems outside work iv) she regarded the respondent as a good employer and wanted him to leave without a bad taste v) he had said that the outcome he wanted was to be paid out to the end of his contract. She said she was disappointed that he appeared to have simply and repeatedly failed to comply with reporting procedures which applied to everyone. She told us, and we accept, that she felt that the dismissal was mainly to do with failure to report absence by phone rather than the fact of the absences themselves. The claimant had told her that he did not want to work with Iman or Ms Kehoe and that she had formed the impression that the claimant's failure to comply with these procedures in her view smacked of 'defiance'. She told us that she considered both overturning or upholding the decision to dismiss. She did not consider sending the claimant to another store because the issue was a disciplinary non-compliance issue. She did not herself suggest making a referral to OH because she thought that absence was not the key issue: it was rather a conduct issue. She explained that it was shortly after sending her outcome letter that she was informed by HR that the claimant had been offered OH referrals by Ms Kehoe in RTW calls.

110. The Store was closed by the respondent on 31 March 2023.

111. The claimant lodged his ET1 claim form on 21st April 2023.

Overview

112. When the claimant's employment with the respondent began he was facing an extremely difficult and challenging period in his life. He had suffered a particular breakdown in his physical health in March 2022. He attributed that breakdown to an autoimmune response to a COVID infection, but it is clear from his medical records that he was experiencing a number of concurrent conditions. He was also experiencing acute financial pressure, and was exposed to the risk and then reality of homelessness. He was also attempting to cope in ways which resulted in his becoming dependent on non-prescription drugs. Having moved from one NHS district to another he was also experiencing frustrations in securing consistent mental health support and he did not have support from any family members.

113. He threw himself into his new 9-month appointment at the respondent with high hopes and considerable passion and enthusiasm, managing and perhaps disguising his external stress factors by taking holidays and breaks. To his considerable credit he appears to have taken steps to address drug dependency and alcohol usage at this time. He had the benefit of a relatively laissez-faire supervisory manager in Ms Blum for his early months. He also had to cope with a hostile Assistant Manager upon whom the claimant placed very extensive reliance for the practical parts of the store management task, but who appears to have worked to undermine

him with his superiors and colleagues because of bitterness that she had not herself been chosen for the store manager role.

114. Despite his successes in events, client relations and developing sales, we felt his dependence on Iman's cooperation at the same time as that relationship was souring, on top of all of his external stressors, compromised his ability to perform to his full potential as an effective Store Manager and to maintain compliance with the respondent's policies. It was in this context that Ms Kehoe assumed responsibility for supervising the Store's management and introduced tighter discipline and a greater expectation of compliance with practices and procedures.
115. It is probably fair to say that whilst Ms Kehoe did try to address the toxic relationship between the claimant and Iman, she nevertheless expected the claimant as the Store Manager himself to exert discipline and demonstrate high standards. She expected him to sink or swim. Although she was generally supportive and tolerant of the claimant's absences for health reasons, she took a more robust view about unheralded or inadequately explained or justified absences and non-compliance with reporting procedures. He chose not to explain to her initially that any of his absences were the result of his mental health impairments.
116. When the claimant again faced heightened external stresses in his personal, financial and accommodation circumstances in late December 2022 and early January 2023, to which were now added greater scrutiny and expectation of him at work, he became ill and reported experiencing very marked mental ill-health effects at that time. He remained reluctant to explain to Ms Kehoe the position regarding the deteriorating state of his mental health because he was concerned that it would remain on his employment record and adversely affect what he hoped would be an opportunity for further employment with the respondent.
117. When he began to tell her about his mental health collapse in late January, it was a change from his previous position and these last-minute explanations were, in our judgment, not believed by Ms Kehoe. Faced with what appeared to her to be a pattern of lates and absences which were improperly reported or documented, together with other aspects of the claimant's management which appeared to her to set a poor example to staff, and the claimant's refusal to engage with offers of referral to OH or to EAP support, Ms Kehoe decided not to extend the claimant's engagement beyond his probation period, and Ms Balsom upheld that decision.
118. Critically, to succeed in his claims for disability related discrimination the claimant needed to prove the effects that he was experiencing related to the impairments he relied upon, and amounted in each case to disabilities. In relation to the mental health impairments he did not succeed in this, we

considered broadly that, notwithstanding that he was more vulnerable to stresses because of mental health impairments, the effects he experienced were likely responses to his extreme external stresses.

119. The claimant's upset and frustration at losing the anchor of stable employment along with what he thought would be an opportunity for further work, affected the reliability of his recollection and led him to blame Ms Kehoe and attribute to her proscribed motives and conduct which were not made out on the evidence.

120. Our detailed analysis and conclusions are set out below.

Applicable Law

Discrimination Claims – General

121. An employer must not discriminate against an employee in the terms of their employment, by dismissing the employee or by subjecting the employee to any other detriment EQA s 39(1). This prohibition gives rise to the right to claim under Section 13 and section 15 of the Equality Act.

Burden of Proof

122. Section 136 applies to any proceedings relating to a contravention of the Act and provides:

“(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”.

123. There is therefore a two-stage analytical process. Stage 1 concerns the primary facts and Stage 2 the employers explanation. Guidelines on the application of the burden of proof provisions were provided in the Court of Appeal in Igen v Wong [2005] EWCA 142 and subsequently restated and explained in Hewage v Grampian Health Board [2012] ICR 1054 (SC) Efobi v Royal Mail Group Ltd [2021] UKSC 33 and Field v Pye & Co [2022] EAT.

124. The burden of proof is on the claimant at stage 1 to prove facts from which a tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of discrimination. The employer's explanation is disregarded. The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found, and the tribunal assumes that there is no adequate explanation for the facts. Inferences may be informed by evasive answers or failures to adduce evidence from relevant witnesses. The tribunal may

also draw inferences from a failure to comply with applicable codes of practice. It is not sufficient at this stage for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required: Madrassy v Nomura International [2007] ICR 867 (CA). At this stage ultimately the tribunal must stand back from the detail and look at the cumulative picture.

125. If the claimant proves such facts, the burden shifts to the employer to prove on the balance of probabilities that the dismissal or detrimental or less favourable treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the employer is normally in possession of the facts necessary to make out an explanation, a tribunal will normally require cogent evidence to discharge the burden of proof. But the employer only has to prove that the reason for the treatment was not the forbidden reason. The employer does not need to prove that they acted reasonably or fairly, but in such cases the tribunal will be astute to test explanations that the employer was only acting unfairly and not for the discriminatory reason: Komeng v Sandwell Metropolitan Borough Council UKEAT/0592/10/SM.

Employer's knowledge

126. The question whether the employer had, or ought to have had, knowledge of the disability is a question of fact for the tribunal.

127. When considering whether an employer is to be regarded as having constructive knowledge of a worker's disability so as to trigger the duty to make reasonable adjustments, it is irrelevant that a formal diagnosis has yet to be made so long as there are other circumstances from which a long term and substantial adverse effect of a mental or physical impairment can reasonably be deduced.

128. While knowledge of the disability places a burden on employers to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for doing so. Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT, and Peregrine (deceased) v Amazon.co.uk Ltd EAT 0075/13.

129. If an existing employee asks for an adjustment to be made because of a physical or mental impairment the effects of which are not obvious, the employer is entitled to ask for evidence that the impairment gives rise to a disability within the meaning of the Equality Act section 6.

130. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place

that employee at a substantial disadvantage — see para 20(1)(b), Sch 8 EQA: eg see Glasson v Insolvency Service 2024 EAT 5.

Disability Status

131. The EQA defines a disabled person as a person who has a ‘disability’ : Section 6(2). A person has a disability if that person has ‘a physical or mental impairment’ which has a ‘substantial and long-term adverse effect on [the person’s] ability to carry out normal day-to-day activities’: Section 6(1). The burden of proof is on the claimant to show that he or she satisfies this definition.

132. Paragraphs 2(1) and (2) of Schedule 1 to the EQA provide, in relation to long- term effects that

“2 Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”

133. Tribunals must take into account the ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (‘the Guidance’) issued under S.6(5) of the Act and any parts of the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2011) (‘the EHRC Employment Code’) where they consider it relevant (and must refer to those parts that they have taken into account when they do so) but the statutory definition takes precedence: Sch 1 para 12 of the EQA.

134. Paragraph C7 of the Guidance indicates that it is not necessary for the effects to be the same throughout in order for the effects to be long-term for the purposes of the EQA. Provided the adverse effects on the person’s normal day-to-day activities are substantial, they may still satisfy the requirement that they be long-term even if, for example, the adverse effects vary in intensity or one set of adverse effects is replaced by another set of adverse effects.

135. Section 6(1) requires tribunals to look at the evidence by reference to four different questions (or ‘conditions’) to determine if a claimant is a disabled person. Goodwin v Patent Office [1999] ICR 302:

- 135.1. did the claimant have a mental and/or physical impairment? (the 'impairment condition');
- 135.2. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');
- 135.3. was the adverse condition substantial? (the 'substantial condition'), and
- 135.4. was the adverse condition long term? (the 'long-term condition').

136. These four questions should be posed sequentially and not together, but tribunals should not feel compelled to proceed by rigid consecutive stages. In cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings: J v DLA Piper UK LLP 2010 ICR 1052, EAT.

137. The Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128) specifically exclude from the scope of the EQA a number of conditions that otherwise might constitute disabilities: i.e: addiction to alcohol, nicotine or any other substance, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment: Reg 3. 'Addiction' for this purpose includes a dependency: Reg 2. However, paragraph A7 of the Guidance states that it is not necessary to consider how an impairment was caused, even if the cause is a consequence of a condition which is excluded. Therefore, people with impairments resulting from addictions, such as liver damage following alcoholism, will still be protected.

The Impairment Condition

138. In this case the respondent has accepted that the claimant had the mental health impairments alleged, but disputes that he has satisfied the other conditions based on their effects. It disputes that the claimant had the impairment of IBS.

139. There is no onus on the claimant to adduce medical evidence to establish each of the four conditions, but in practical terms the claimant's own evidence may be insufficient to satisfy the tribunal of the existence of an impairment. Tribunals may sometimes be unable to make the findings necessary to determine whether a claimant is disabled — particularly in cases involving depression or similar mental impairment, where the tribunal has to assess the likelihood of the condition continuing long-term, the risk of recurrence and the severity of such recurrence in the absence of direct or expert medical evidence: Royal Bank of Scotland plc v Morris

EAT 0436/10. Royal Borough of Greenwich v Syed EAT 0244/14 and Guinness Partnership v Szymoniak EAT 0065/17. The claimant also referred us to Kapadia v London Borough of Lambeth [2000] IRLR 699, for the proposition that expert occupational health opinions carry significant evidential weight.

140. The claimant is expected to give evidence about the impairment and the effects of it, this is typically in the form of a disability impact statement. In evaluating such evidence, it is not wrong for a tribunal to draw attention to the fact that any claims made by the claimant in an impact statement about the adverse effects of the alleged impairment on the ability to carry out day-to-day activities have not been independently verified or tested and/or that no other supporting evidence has been adduced: Olukanni v John Lewis plc EAT 0327/16 : AB v CD Ltd 2025 EAT 73.
141. Where a claimant is seeking to rely on a number of potential conditions and it is unclear which conditions might have led to the various symptoms, it is important that the tribunal makes clear findings as to the nature of the disability and which symptoms were attributable to it: Morgan Stanley International v Posavec EAT 0209/13. In that case the claimant's evidence contained a 'potpourri' of conditions and symptoms, which might or might not have been part of, or attributable to, the two conditions she had pleaded in her claim. In these circumstances, the EAT held, it was incumbent on the employment judge to identify the nature of the disability and make findings as to which symptoms were attributable to the conditions that the claimant originally set out in her claim and those identified in her oral evidence. This was a critical issue because if her symptoms arose from conditions which she had not mentioned in her original claim, she could not rely on them.

The Adverse Effect Condition

142. In this context, 'normal' should be given its ordinary, everyday meaning (see Guidance paragraph D4). Day-to-day activities are things people do on a regular or daily basis eg: shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can also include general work-related activities such as interacting with colleagues, following instructions, using a computer, and keeping to a timetable or a shift pattern (see paragraph D3).
143. When considering whether the elements of the test of disability in section 6 of the EQA apply to the claimant at the material time, the appellate courts have stressed the importance of analysing the effect of the claimant's condition rather than focusing too heavily on a medical diagnosis.

144. Incontinence of bowel or bladder is likely to be regarded as having an adverse effect on the ability to carry out normal day-to-day activities and so the main issue for a tribunal will be whether, in the individual circumstances of the case, that effect is substantial and long term. The Appendix to the Guidance includes as an example of such an effect 'difficulty carrying out activities associated with toileting, or caused by frequent minor incontinence'. However, infrequent minor incontinence is excluded.
145. In relation to mental impairments, tribunals are not expected to be familiar with psychiatric classifications. Expert or GP evidence will usually be required to prove both the impairment, and when, over what periods of time and how the impairment can be expected to manifest itself.

The Substantial Condition

146. Substantial is defined in S.212(1) of the Act as meaning 'more than minor or trivial'.
147. The Guidance explains that the requirement for any adverse effects of an impairment on day-to-day activities to be 'substantial' reflects 'the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people'. But in assessing whether an impairment's effect on a claimant's ability to carry out normal day-to-day activities is substantial, a tribunal should not compare what the claimant can do with what the average person can do. The tribunal should consider, first and foremost, whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are supplementary. It is appropriate for a tribunal to take into account the effect on the claimant's ability to cope in his or her job. It is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she can do (see Guidance para B9) so even though the claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that the claimant could properly be regarded as meeting the statutory definition of disability. The tribunal must identify the day-to-day activities, including work activities, that the claimant could not do, or could only do with difficulty, to found a proper analysis: para B1 of the Guidance; Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522, especially at paragraphs 45 and 66 to 67.
148. A medical diagnosis is relevant not only to the question of whether there was an impairment but also to the determination of whether that impairment had a substantial adverse effect. A diagnosis reflects a clinical judgment that someone is significantly different from the norm as regards the area of functioning covered by the diagnosis, although a diagnosis does not necessarily mean the definition of disability is met. It is still

necessary to make findings about the claimant's ability to carry out day to day activities. If the claimant is not a reliable narrator, this may undermine any clinical opinion that is based on the claimant's account. Stedman v Haven Leisure Ltd 2025 EAT 82.

149. In cases where it is not clear whether the effect of an impairment is substantial the Guidance suggests a number of factors to be considered (see paras B1–B17). These include the time taken by the person to carry out an activity (para B2) and the way in which it is carried out (para B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.
150. An impairment might not have a substantial adverse effect on a person in any one respect but its effects in more than one respect taken together could result in a cumulative substantial adverse effect on the person's ability to carry out normal day-to-day activities. The Guidance at paragraph B5 illustrates how the various effects of depression may lead to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.
151. Where a person has more than one impairment but none of the impairments considered in isolation has a substantial adverse effect on normal day-to-day activities, account should be taken of whether the impairments together have such a substantial adverse effect (see paragraph B6 of the Guidance). The tribunal must 'add up the component parts and see whether the sum amounted to more than the individual parts taken separately'. In other words, it needs to form a view as to the deduced effect of two conditions, look at its conclusions about this holistically, and ask whether the combined effect meets the relevant definition of disability under S.6: see Meeful v Merton and Lambeth Citizens Advice Bureau EAT 0127/16
152. In considering how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities, the fact that a claimant has a condition that would not have developed to the same degree of seriousness had the claimant adopted a healthier lifestyle should be ignored when determining whether the claimant is disabled, but it is relevant if a reasonable coping strategy could alleviate the current effects of the impairment: see paragraphs B7 and B9 of the Guidance.
153. Paragraph 5(1) of Schedule 1 to the EQA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means 'could well happen': Boyle v SCA

Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL . This means that in assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. The tribunal should set out clear findings as regards the medical and other evidence and address the part any medication plays in reducing the adverse impact of an impairment when making its assessment of substantial adverse impact. But tribunals require reliable evidence to make findings of deduced effects. A claimant's assertion as to what might happen if medication were to be stopped is unlikely to be sufficient. In relation to ongoing treatment, if the outcome of the treatment cannot be ascertained, or if it is known that the removal of the treatment would result in a relapse or deterioration, it would be reasonable to disregard that treatment: see paragraph B13 of the Guidance. But where current treatment has produced a permanent improvement, that improvement must be taken into account in determining the effects of the individual's impairment: see Paragraph 5 of Schedule 1 to the EQA and Abadeh v British Telecommunications plc 2001 ICR 156, EAT.

The Long Term Condition

154. 'The question which the tribunal has to ask itself is not whether the (mental) health impairment was likely to last at least 12 months but whether the substantial adverse effect of the impairment was likely to last more than 12 months: Royal Borough of Greenwich v Syed EAT 0244/14. It should not simply assume that the adverse effects of an impairment are likely to be long term merely from the fact that a medical impairment has already existed for more than 12 months as at the date of the alleged discriminatory act: Guinness Partnership v Szymoniak EAT 0065/17.
155. The effect of an impairment does not have to remain the same during the 12-month period. Some activities may initially be very difficult but become easier. The main adverse effect may even disappear temporarily or disappear altogether, while another effect may develop into a substantial adverse effect: see paragraph C7 of the Guidance.
156. Para 2(2) of Schedule 1 to the EQA provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is 'likely to recur'. Likely to recur means that 'it could well happen' — see paragraph C3 of the Guidance and Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL. The question for the tribunal in these cases is, again, not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur, so the substantial effect must be identified with precision. Medical evidence (or a lack of it) may be critical

in establishing that a substantial adverse effect is likely to recur.

157. In assessing the likelihood of a claimant's impairment recurring — and thus qualifying as 'long-term' — an employment tribunal must disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing: McDougall v Richmond Adult Community College 2008 ICR 431, CA.

Disability Status : Analysis and conclusions

IBS [Physical disability]

158. The respondent disputes whether the claimant experienced the impairment of IBS at all.

159. We remind ourselves that our focus should be on the evidence of the substantive adverse effects experienced by the claimant on his day-to-day activities and ability to carry out tasks at work which he attributes to this impairment and that the adverse effects may fluctuate and change over time.

160. We find that the claimant has not satisfied us on the evidence that he was disabled by reason of IBS because the evidence does not establish that he had the impairment of IBS.

161. However, we find that he did have an impairment of bowel dysfunction. Our reasons are as follows:-

Adverse Effects:

162. The claimant's First Impact Statement is a confusing and unhelpful document, notwithstanding that it appears to have been produced for the claimant (it refers to him in the third person). It lists a range of alleged physical conditions: enlarged spleen, liver lesions, haemangioma, bile duct dilation, polyps, bowel complications, limb weakness, numbness, cramps, spasms, skin infections, rapid weight loss, hiatus hernia, reflux, and episodes of vomiting blood.

163. IBS is not specifically referenced as an impairment however an impairment of Bowel Issues is listed.

164. In relation to Bowel Issues the claimant's First Impact Statement states: *They began in 1990 and was a lifetime condition. Without treatment the impacts are stated to be "Tumor growth turn to cancer / Cancers / Death / Incontinency".* The treatments listed are: *"Diet and exercise /regular check ups, colonoscopy / tumors removed 2018 / Ongoing checks / Endoscopy / Camera swallowed"* and other remedies are *"Gluten-free diet"*. These statements provide little clarity about adverse impacts on the claimant's ability to carry out work or domestic day to day tasks, or about the nature,

intensity, or frequency of symptoms.

165. More confusing still are that other conditions which are differentiated from bowel conditions/issues are also listed and are said to result in bowel dysfunction. The conditions of “Enlarged Spleen / Liver lesions / Pancreatic disorder” said to have commenced in August 2022 and to be continuing, are said to be caused by automimmune disease and PTSD and, if unmedicated to lead to symptoms of “pancreatic disease/ Incontinence / Pass blood /Bowel motions don’t flush /Weight loss/ cancer death.” Medication is listed to include “Nitrofurantoin / Diet / CT scans / MRI scans, and additional remedies are Gluten-free diet”.
166. A third category of health condition listed as” Hyatis (sic) Hernia / reflux /Vomit Blood/ Weight gain loss / deficiencies” includes among other symptoms, if unmedicated, “blood in bowel motions”, and medication by various antacids.
167. As to the impact on work performance of the multiple conditions set out, the statement refers to the ‘litany of health issues manifested distinctly at the workplace”, but it does not identify which impacts arise from which conditions. In relation to physical symptoms relating to bowel function the statement records the following impact on work performance: “Bathroom needs and incontinence frequency were barriers, especially when working alone. Pain, dizziness, cramps, and panic attacks compelled breaks or deviations from the shop floor, not feasible while working solo”.
168. The claimant filed a revised and much shorter Impact Statement on 8 December 2023. This document asserts that the claimant’s prevailing condition is PTSD, which it describes as “a recognised disability that gives rise to various associated disabilities notably severe anxiety leading to distinctive manifestations such as insomnia, dissociative disorder, and depression. These resultant conditions substantially impede Joshua's daily functionality and overall well-being.” Under a sub-title “amalgamation of symptoms profoundly affects Joshua’s daily life” there is a list of conditions Insomnia, Dissociative Disorder, Anxiety, Depression. Included in that list is a reference to “Digestive Issues: Spanning irregular bowel movements, abdominal distress, queasiness, emesis, notable weight loss, incontinence issues, gastroesophageal reflux, abdominal distention, and gaseousness.”
169. The impact statements together in so far as they refer to bowel Issues more widely, while stating symptoms of the condition at length, do little to illuminate the frequency or severity of the effects referred to or what coping or adjustment mechanisms were in fact undertaken.
170. In addition to the impact statements there was information from the claimant’s medical record:
- 170.1. On 3 August 2022 the claimant reported a variety of symptoms to

his GP dating back to “x2 bouts of COVID earlier in the yr followed by losing his job.”. The note records “Then 2 w ago noticed PR discharge, bowel motions have been loose (longstanding) awaiting colonoscopy arranged by previous GP”.

170.2. On 23 August 2023 he self-reported his medical history to a new GP. This included: “Complains of passing yellow mucus and loose stools for months..FHx [family history] of IBS”.

170.3. On 28 September 2022 the GP noted “normal colonoscopy. ? sx [symptoms] may be IBS-related ?”

170.4. On 4 October 2022 following a CT scan and a normal coloscopy the GP noted “?IBD – check calprotectin and coeliac” , and these were discussed with the claimant on 14 October 2022 when the GP noted ‘longstanding bowel issues – as recapped before’ and proposal to do a coeliac screen and inflammatory check up”.

170.5. On 14 October 2022 he told his GP that he had not received his results message and these were discussed with him. She noted his history including longstanding bowel issues as recapped before, and she said she would arrange to carry out a coeliac screen and an amylase retest. The claimant in the event did not attend these appointments.

170.6. On 7 and 8 November 2022 he attended colorectal and psychiatry clinics. Thereafter he was referred routinely to gastro for management and he undertook some talking therapy.

170.7. On 4 January 2023 he self-reported to his GP “ongoing bowel symptoms: loose stools, passing mucus”.

170.8. On 6 January 2023 he self-reported “ongoing bowel issues” (although the GP noted that he had had extensive investigations – colonoscopy, abdo CT, liver MRI) which were all nil.

170.9. On 6 January 2023 the claimant provided a fit-note from his GP which included amongst the reasons for his absence: “IBS flareup”.

171. On the basis of this material we are satisfied that the claimant experienced adverse effects on his day to day activities arising from a condition of bowel dysfunction.

Substantial

172. The material thus far considered does not assist us to form a clear view about the frequency or severity of these episodes or their impact on day-to-day activities. However, there was further evidence relating to the effects on the claimant arising from bowel issues (putting aside the issue

of formal diagnosis of the condition as IBS) which impacted his day-to-day activities. These included the following:-

- 172.1. The fact that the claimant reported to Ms Blum that he had soiled himself on the way to his interview on 4 August 2022, and that he asked that he have access to a toilet as a matter of urgency.
 - 172.2. The claimant's evidence that he took spare underwear to work because he was concerned that he might not be able to make it to the toilet in time of the store (although there was no evidence of when, how often or for how long he did this).
 - 172.3. The uncontested evidence that he had also mentioned to Ms Kehoe that he had bowel problems and the need to have access to a toilet.
 - 172.4. Ms Kehoe's evidence that she had to admonish the claimant after Adam Ingliss, the excellence manager, had overheard and reported the claimant to her for talking about his bowel problems in front of a customer in, we find, early October.
 - 172.5. The absence and return to work report on 28-30 November 2022 which referenced diarrhoea and the need for ongoing hospital appointments for bowel problems.
 - 172.6. A message to Ms Kehoe on 1 December 2022 while at work asking to be allowed to leave because he had discomfort and pain in his bowel, was passing blood and needed to go the doctor to take a sample and give blood 'for the millionth time', although he remained to attend the mediation meeting and went to hospital the following day.
 - 172.7. On 6 January 2023 reported ongoing bowel issues to his GP and diahorrea is mentioned in fit notes as part of a suite of symptoms being experienced by the claimant during his absences from 4 January 2023.
 - 172.8. The claimant did discuss with Ms Kehoe in a phone call on 11 January 2023 that he not trade alone. We infer from the fact that he had previously asked to be able to close the store to use the toilet that this request related at least in part to this need.
173. The fact that the claimant soiled himself while travelling on one occasion, and needed urgent access to a toilet (with accompanying concern and the need (or at least the need as he perceived it) to have spare underwear with him while working) are facts from which it is clear that the impact on the claimant when the condition flared up was substantial and adverse.
174. As against this there was no evidence, nothing in the impact statement and nothing in the contemporaneous medical reports which makes clear

how unpredictable or frequent these episodes were. It was not clear for how long the claimant took spare clothing to work. The claimant did not give any detail about triggers or other steps taken to adapt to or mitigate the effects complained of. Nor is there evidence that this condition was being clinically medicated during his employment (although it was being clinically investigated). In his impact statement it is asserted that: "His digestive issues and related bathroom needs, coupled with frequent pain and discomfort, severely hindered his ability to stand for prolonged periods and necessitated quick access to facilities.....Bathroom needs and incontinence frequency were barriers, especially when working alone. Pain dizziness, cramps and panic attacks compelled breaks or deviations from the shop floor, not feasible while working solo". But the claimant's own accounts were, we found, to be treated with a degree of caution because of a tendency to exaggerate.

175. We also considered the mental health impairments and effects asserted by the claimant: there was no medical evidence which directly linked the claimant's mental health impairments to his bowel dysfunction (although the GP on 28 April 2023 speculated on such a link) but the claimant's fit notes in January 2023 refer both to stress/anxiety and also to diahorrea. Taking these together we infer there was some link between stress/anxiety and the bowel dysfunction.

176. We take into account also the fact that the claimant appears to have had other conditions for which he was being treated simultaneously. Whilst these are not relied upon as disabilities, we take into account that they might exacerbate the effects of the claimant's bowel dysfunction impairment.

177. Having regard to the totality of the evidence including the frequency of his complaints and concerns expressed to doctors, we conclude that on the evidence adduced the claimant has satisfied the burden of proving the substantial adverse effects conditions because the events and effects referenced, although recorded only as occurring on isolated occasions over a number of months, and whose effects appeared to be becoming less substantial or frequent as time went on, were nevertheless sufficient in our judgment to satisfy the substantial condition.

Long-term

178. In accordance with authority in reaching our decision we have considered only the evidence as it stood by February 2023 – the latest of the instances of alleged discrimination.

179. The claimant described in his First Impact Statement that his bowel condition 'started in 1990' and was a lifetime condition, but there was no specific medical evidence for this assertion, although his report was accepted by his GP. But even if the claimant's assertions were accepted,

it is not appropriate simply to infer from the fact that he had previously experienced bowel issues that the effects of the condition would be likely to recur.

180. The condition arose first in the medical evidence before us when he reported on 3 August 2022 that he was experiencing PR discharge and (which he described as 'longstanding') loose stools. He was experiencing a variety of other physical conditions at that time.

181. We have set out above the instances in which incidents or absences were attributed to bowel issues/diarrhoea in the course of his employment: these started on 4 August 2022 and continued intermittently through early January 2023. This evidence suggests that the effects on the claimant were intermittent and fluctuating, but they recurred throughout the period.

182. He was referred to specialist clinics for this impairment, but none of the medical investigations into his bowel habit formally diagnosed IBS, coeliac or any other pathology.

183. Although he himself referred to the condition of IBS as 'lifelong', his evidence was also to the effect that the main effects were experienced after Spring 2022. The evidence did not establish that the claimant had already experienced substantial adverse effects (even if he experienced the impairment) for 12 months. We considered therefore whether they could well recur within 12 months – i.e continuing - or could well recur after 12 months – long-term.

184. The claimant's own evidence both to his GP, specialists and before us was consistent that the adverse effects had lasted, or at least recurred for at least 6 months before his first absences and failures to report in November 2022. Further, although the effects in the main occurred at a time when the claimant was experiencing stressful periods in his private or working life, the pattern of incidents reported does not precisely coincide with them, suggesting some effects are experienced outside of such periods.

185. By the time of the Probationary Review Meeting the claimant was , however, stating that his physical conditions had stabilised, although at the same time he told his GP he was still experiencing diahorrea.

186. Taking the evidence as a whole, and notwithstanding that the claimant's specialist investigations were negative, we infer that on balance incidents of loose bowel function were likely to recur and to last for a period of at least 12 months, or to recur thereafter. They therefore satisfy the long-term condition.

Impairment:

187. As set out above the claimant's GP records show that from 3 August 2022 he had begun claiming about impairments relating to his bowel functions. Whilst he describes them as IBS, aside from one passing reference in the GP fitnote on 6 January 2023, extensive physical tests did not support an IBS diagnosis.

188. However, having regard to the pattern of effects on the claimant above, whilst we find that there is insufficient evidence that the claimant experienced an impairment of IBS, there is sufficient evidence that he experienced an impairment of bowel dysfunction.

189. We take the view that, focussing on the effects, it is appropriate to read the claimant's claim to a disability of IBS in the wider sense of a reference to a condition or impairment of bowel dysfunction. This appears to have been the sense in which the claimant's GP used the acronym IBS. The nature of the impairment relied upon was, we consider, sufficiently clear to the respondent and the respondent was able to respond to the claim in so far as it related to complaints relating to the claimant's bowel dysfunction.

190. The respondent made submissions about the effect of the claimant's misuse of non-prescription drugs on his conditions. Ms Winstone argued that the fact that there was evidence of the use of such drugs meant that, in effect, the claimant bore the burden of proving not only that he had the impairments claimed but also that the effects were caused by those impairments and not by the ingestion of drugs. She provided during the course of the hearing a government fact sheet/infographic from drugwise.org listing possible risks and harms from such drug use. We consider the issue of drug mis-use below in connection with the mental health impairments. We note that the infographic provided by the respondent does not identify bowel dysfunction as a potential risk of the relevant drug mis-use. Accordingly, we do not consider that there is a basis for concluding that the bowel dysfunction was caused by the claimant's drug misuse.

191. Accordingly, we find that:-

191.1. The claimant has not established that he was disabled because of IBS in particular; but

191.2. Whilst the evidence is finely balanced, we consider that he experienced an impairment of bowel dysfunction by which he was by reason of that condition disabled within the meaning of section 6 of the Act.

Knowledge:

192. In light of our factual findings about the discussions between the claimant and Ms Blum, and Ms Kehoe relating to the claimant's bowel functions, we

are satisfied that at all times during his employment the respondent knew, through attribution to it of the knowledge of Ms Blum and Ms Kehoe that that the claimant experienced effects of bowel dysfunction, although they did not know, nor did they have constructive knowledge that the claimant had IBS in particular.

Mental Health Conditions/Disabilities – PTSD/Anxiety/Depression

Impairment

193. The respondent accepted that the claimant experienced the impairments of PTSD, Anxiety and Depression but put him to proof of the impacts of that condition on him. The impairment condition is therefore satisfied.

194. Although the authorities make clear that we are required to make findings about which symptoms are attributable to the claimed impairments made in the claim form, neither the claimant's impact statements, nor his evidence, nor the medical evidence disentangled impacts attributable individually to the claimant's separate mental health impairments of PTSD, anxiety and depression. The GP's referral form to Southwark IAPT refers to 'mixed depressive and anxiety disorder'. In this sense there was a 'pot-pourri' of conditions. However, given that there was no issue that the claimant experienced all three impairments, and given that in cases of multiple impairments we must also take a holistic view of the impacts of the various impairments as a whole in order, we have found it convenient to consider the impacts of all three together to determine whether the claimant has established that those impacts satisfy the conditions required to establish a disability within section 6 of the EQA.

195. The claimant referred us to a subsequent OH report prepared for him by an OH professional in connection with subsequent employment which he obtained at Harrods in late 2023, and to the fact that he was granted a PIP payment in 2024. However, these events post-date the events in question, and his symptoms and situation may have changed significantly in the interim so, even if they were legally admissible at all we found them of limited relevance to this exercise.

Substantial and Adverse Effects Conditions

196. The claimant's initial impact statement stated that: "*Joshua's PTSD, insomnia, anxiety, and depression affected his cognitive functions, mandating constant written reminders and detailed schedules to combat short-term memory lapses. Working without a competent assistant manager heightened stress, necessitating extra hours and added pressure. While Bianca's support and accommodations, sanctioned under the Equality Act 2010, provided relief, they were then nullified post Angela's arrival, leading to increased stress and difficulty managing workloads independently.*"

197. The claimant's revised impact statement describes the impairment of PTSD as his 'prevailing condition' which "gives rise to associated disabilities, notably severe anxiety leading to distinctive manifestations such as insomnia, dissociative disorder and depression". These symptoms are said to have 'plagued' the claimant "from 2022". Specific impacts are stated to be as follows:

- **Insomnia:** Provoking memory impairments, muscular and articular discomfort, and side effects from sleep aids contributing to cognitive foginess and delayed arousal.
- **Dissociative Disorder:** Triggering episodes of memory loss, cognitive disorientation, and a distorted self-perception, predominantly during evening hours, alongside ongoing short-term memory impediments.
- **Anxiety:** Inducing elevated stress levels, perspiration, panic attacks, and a compromised ability to concentrate owing to fear and prior adverse experiences.
- **Depression:** Originating from the situation and worsening post the outcome of probation meetings, exacerbating consequences via subsequent actions by L'Oréal, resulting in consequential adverse effects on Joshua's employment opportunities.

198. The impact statement describes the symptoms experienced but provide no, or insufficient detail of the actual impacts of the impairments or their sequelae on the claimant's ability to carry out his day-to-day activities. They do not explain how severe or long-lasting episodes of anxiety, insomnia, dissociative episodes/memory loss or depression were, how they impacted day to day tasks, when (during the day or night) they arose, how they were managed or adapted to by the claimant, nor do they provide any information about the frequency of any such effects. As far as dissociative episodes and memory impacts are concerned the statement indicates that they were predominantly experienced during evenings, rather than during working hours.

199. A complicating factor, as we have stated above, is that we found the claimant's evidence in relation to his health to be somewhat unreliable. He had a tendency in our judgment to assume the worst and to attribute medical labels to complex and multi-faceted health conditions which did not necessarily reflect underlying medical diagnoses. An example was his assumption that he had been diagnosed with coeliac disease when he had only been referred for tests to exclude it (which proved negative). Another example was his contention that he suffered from autoimmune disease following a COVID infection. Although we accept that he experienced a significant physical health shock in early 2022, there was no evidence of any diagnosis of an auto-immune condition. This meant that it was more difficult for us to rely on his own account of his conditions and also of their

attributable effects. This also meant that where medical records simply record his presentation of symptoms, we read them with a degree of caution as regards the extent to which they represent diagnostic conclusions.

200. We were left therefore to reach conclusions about whether the claimant has proven that the substantial adverse effects conditions (and the long term condition) are satisfied based principally on the contents of the claimant's medical records and the documentary evidence relating to his employment.

201. As regards the medical records:

201.1. Each impairment is mentioned somewhere in the medical records, we were not provided with a psychiatric report or a definitive diagnosis of PTSD, although we note this is referenced in the January 2023 Mental Health referral form as a presenting condition. His experience of anxiety was referred to in January 2023 as 'mixed anxiety and depressive disorder'. There are references to depression beginning in lockdown and in January 2023 a reference to chronic or recurrent depression but no reference to clinical depression – in April 2022 and February 2023 the GP refers to 'low mood' (although that April report explained that together with insomnia and muscular symptoms this was due to drug withdrawal).

201.2. In Summer 2022 the claimant was reporting worsening mental health, extreme drug dependency, multiple physical conditions, severe insomnia, forgetfulness. These effects coincided with acute financial, domestic and work stressors as well as a marked deterioration in his overall physical healthiness.

201.3. Largely unsuccessful attempts were made to secure counselling and mental health support. He was given some social prescribing and referred to CGL for assistance with drug dependency;

201.4. There are no references to mental health problems in the medical record in subsequent months.

201.5. The first reference to PTSD and associated memory impairments and panic attacks is on 4 and 6 January 2023. He reported to his GP struggling with mental health, being frustrated with the lack of support, stress, feeling detached and sleep disturbance which reflected on his fitness to work and function, being late for work, and ongoing issues with memory, having 'blackouts for days, cannot remember things after'. The GP queried "imp-blackouts related to recreational drug use? Unclear whether engaging with CGL".

201.6. The GP made a reference to the Southwark Primary Care Health

Care team to try to obtain psychological therapy/CBT. That referral document referred to PTSD, ongoing mixed depressive anxiety disorder, emotional dysregulation, struggling to cope which affects his sleep significantly, affecting his ability to work, afraid his contract will not be extended. Engaging with CGL for illicit substance misuse. This document recorded as a 'minor' past event that there had been an 'anxiety state' for one month in Oct/November 2020.

201.7. On 6 January the GP provided fit notes for the period to 2 February 2023, and retrospectively to cover his periods of sickness from 16th January – 23rd February 2023 which referenced anxiety and stress and insomnia.

201.8. On 10 February 2023 he reported to his GP with, amongst other things, "ongoing mental health problem. insomnia...in constant state of low mood...memory is not good, concentration is poor, appetite is gone, suffered with lots of anxiety as a child'. He had tried talking therapy but had been referred to a medical psychologist for input.

201.9. On 13 and 15 February he reported a good night's sleep but had money worries and was signposted to financial and mental health support and counselling charities. The report on 13 February 2023 notes that he 'was 'taking [stimulants]' and on 15 that he was engaging with CGL for substance misuse, was transferred to Loraine Hewitt House [another substance abuse rehabilitation provider].

201.10. On 24 March 2023 his GP records show that he was 'having trouble with sleep' and wanted medication for that.

201.11. On 2 May 2023 the claimant attended on his GP still complaining of disrupted sleep and mild memory loss issues. The GP agreed to refer him to a sleep clinic.

201.12. There was no evidence of any prescribed medication for his insomnia during his employment. He was prescribed titrate amytryptilene for anxiety and sleep disturbance, but this post-dates his termination in late April 2023.

201.13. He told us that he was seeing a number of other medical practitioners privately but there was no evidence of this. We that if he was consulting other medical practitioners that they would likely have written to his GP surgery to inform them about any medications they had prescribed. His GP notes for 24 March 2023 – after the end of his employment - recorded that he "want[ed] medication for sleep'.

202. As regards the evidence arising from his employment records and witness evidence:

- 202.1. He told Ms Blum on 3 November 2022 by WhatsApp that he had insomnia and on 7 November that he had had a good sleep after getting his accommodation situation resolved;
- 202.2. He told Iman in a WhatsApp on 22 November 2022 that he overslept because of new pills he was taking to address his insomnia;
- 202.3. There was an email exchange with Ms Kehoe on 7 December 2023 when the claimant said, when explaining why he had not reported an absence to Ms Kehoe relating to his Monkeypox concern, that he “got some sleep for once”.
- 202.4. He told Ms Kehoe in his probation interview that On 27 December 2022 he had woken up but fallen asleep again. He said ‘Basically I haven’t slept for a year. I don’t sleep and I don’t feel tired from it, I’m constantly in fight mode and that’s why I eat sugar all the time.. after 5/6 days my body wants to sleep...’;
- 202.5. In the period leading up to and during his Probationary Review Meeting he mentioned to Ms Kehoe that his absences were connected with mental health or his stress-related insomnia, and after 11 January 2023 anxiety. However, he had told Ms Kehoe that there was no medical reason why he could not comply with the procedural requirement to call.
- 202.6. On 17 January 2023 he told Iman that he was late because of sleeping pills he had taken.
- 202.7. In his Probationary Review Meeting on 23 January 2023 he mentioned insomnia, that he woke up with anxiety and panic attacks and mentioned that he was coming out of PTSD. These comments were made in the context of his stating that his personal life was ‘falling apart’ and that he had had a difficult Christmas period and was triggered by lack of support around his birthday. As we have recorded above the claimant blamed anxiety for an inability to remember whether he had called in (although he also said “It doesn’t affect my memory so much, maybe a little bit”) and a fear of doing so.
203. In our judgment the evidence shows that the claimant experienced a degree of disturbed sleep or insomnia continuously throughout the period of his employment. However, the evidence as regards the effect on his ability to carry out day to day tasks is inconclusive and unclear. He described himself in January 2023 as ‘not feeling tired’ but then needing to sleep after 5/6 days. At the meeting he described work as his ‘happy place’ and emphasised many of the positive things he was able to achieve. He mentions muscle aches and other matters as arising from sleeplessness, but he also attributes that effect to bowel issues, and there is insufficient evidence from any source for us to reach a conclusion on the

frequency, severity or impacts on work or day to day activity for us to be satisfied that the effects of insomnia or muscle aches were substantial.

204. One effect that is recorded contemporaneously was an inability to wake up or stay awake after administering sleeping pills. However, there was no evidence of medication being prescribed at the relevant time, so the effects appear to have been the result of self-administering medication. We accept that the adverse effects of taking medication, even non-prescription, are relevant adverse effects for the purpose of considering whether the claimant was disabled. Effects in this category appear to have resulted in late arrivals at work on only a limited number of isolated occasions. On their own these effects were not shown to our satisfaction to have been substantial.

205. The claimant also reported experiencing some adverse effects on memory, but these were reported at the time as being mild. There was insufficient evidence of the nature, frequency or severity of memory effects or of any adaptations. Memory loss was not proved to be a substantial adverse effect.

206. There was no persuasive evidence of any other substantial impacts on or adaptations required to carry out work or normal day to day functions of the kind suggested in the impact statements prepared later.

207. The position appears to have changed markedly after 27 December 2022 and into early January 2023. From this time the claimant began to complain to his GP of anxiety and more serious episodes of panic attacks, extended amnesia and blackouts. On 23 January 2023 he was reporting to Ms Kehoe confusion about his symptoms: he didn't have anxiety before but now everything was causing him anxiety and that it was probably to do with that that was causing him not to call in. His complaints about these adverse effects continue through February 2023 and he continued to be signed off as unfit because of them.

208. There was no evidence of ongoing medication during the period of his employment to control anxiety, although attempts were being made to secure counselling, and there was a more pressing attempt by the GP to refer him to Southwark Mental Health team for psychiatric support in January 2023.

209. The effects of the claimant's mental health impairments appear to fluctuate. Between the two periods (May-September 2022 and January 2023 onwards) when the claimant was experiencing circumstances of extreme external stress, the medical record does not contain reports by the claimant of impacts arising from anxiety, and his description of his work as his 'happy place' militates against a finding of substantial adverse effects during that period.

210. It is a very finely balanced question whether the adverse effects were substantial during the periods between times of exceptional external stress as well as during them. Taking a holistic view of the effects of the claimant's (admitted) mental health impairments, we find that on the evidence before us the claimant has not established that the effects were substantial in the sense of more than trivial. We find that the claimant's reported experience of panic attacks/blackouts/amnesia after early January 2023, a time which coincided with the second period of reportedly heightened personal stress and crises in the claimant's personal and financial life over Christmas/Early January 2023 and concern about the risk of losing his job, together had a substantial adverse impact on his ability to function. They were plainly more than trivial effects and led to the claimant being signed off work.
211. The respondent put in issue whether any substantial adverse effects experienced by the claimant were in fact caused by his taking (or being dependent upon) non-prescription drugs rather than by his impairments. The respondent relied on the infographic from drugwise.org. Without going into detail, the infographic identified as risks of misuse of the stimulant used by the claimant many of the symptoms relied upon by him, in particular during the period after January 2023. It warned that the drug was dangerous when mixed with alcohol and that excessive usage can make people feel tired, depressed and run down. At higher dose levels users may feel very anxious, panicky and paranoid. With chronic use dependence, restlessness, hyperactivity, insomnia and weight loss may develop.
212. We remind ourselves that adverse effects on carrying out normal day to day/work activities which are caused by an existing impairment which itself has resulted from previous drug misuse can nevertheless be a disability. The factual question is whether the current adverse effects complained of at the time were caused by existing mental health impairments (even if those impairments arose from previous drug dependency or mis-use) or were the direct result of the misuse of non-prescription drugs. The burden, we remind ourselves is on the claimant to prove on the balance of probabilities that the effects were caused by the impairments.
213. The claimant was highly critical of the respondent's line in this regard which he submitted amounted to an unjustified criticism of his lifestyle choices. When the issue of his drug misuse was raised during the hearing the claimant produced an email from CGL (Change Grow Live) which stated that he had been tested 'clean' in November and December 2022, although no evidence or further information was provided and he was unable to provide any detail of the nature or timing of the testing referred to.
214. The evidential picture was finely balanced and difficult to interpret with any confidence. Neither party had adequately addressed this issue in their

documentary evidence.

215. In terms of PTSD there is no suggestion that this could be caused by drug dependency. As regards anxiety and depression the claimant refers to a lot of anxiety as a child and there is a reference to an anxiety episode in 2020 which occurred after, by his own account, the drug abuse began. But there were no medical records of a diagnosis of an anxiety or clinical depression.

216. The claimant's medical reports record:

216.1. that he told his doctors that he started abusing stimulant drugs during lockdown – that is 2020 onwards.

216.2. His safe-guarding nurse specialist in May 2022 had “serious concerns about his mental health and drug use”. He reported using daily large quantities of non-prescription stimulant drugs since January 2022, being fearful of sleep and of bingeing and of using drugs to enable him to keep working for financial reasons. He was referred to Southwark CGL (Change Grow Live) to ‘manage his acute [stimulant] dependence’ and was given drug abuse prevention advice in July 2022 by his GP. He reported being fired from his job on 2 August 2022 and using drugs daily and on 11 August 2022 a referral for social prescribing was made “due to level of need in terms of high addiction.. and issues around non/low engagement”. This referral was rejected because of his complex needs.

216.3. On 4 January 2023 when the claimant again reported sleep disturbance and also more serious effects such as memory loss/blackouts, the GP noted: “*imp - blackouts related to recreational drug use ? unclear whether engaging with CGL*”. On 6 January the GP wrote to CGL to see if they could provide some mental health support stating: “my understanding is he is still struggling with drug misuse”. Her referral to Southwark IAPT on this date recorded that he was “under CGL for support with his illicit substances misuse, engaging”. The GP noted on 6 January 2023 that the claimant reported that he had ‘stopped drinking completely’.

216.4. On 13 February his GP noted, amongst other things, the claimant: “was taking [the non-prescription stimulant drug]”. On 15 February 2023 in the context of an offer of social prescribing he reported that he was ‘engaging with CGL for substance misuse and had been transferred to Lorraine Hewitt House’. LHH is the centre of Lambeth’s drug and alcohol treatment service;

216.5. On 2 March 2023 his GP recorded: “history of recreational drug use and issue with mental illness: proactive and engaging with services – under CGL, stated he’s been weaning himself off”.

217. Drawing the threads together, there is evidence that the accepted impairment of anxiety may have pre-dated the inception of stimulant drug abuse, at least where that abuse was marked and amounted to dependence. The heavy drug use/dependency in 2022 coincided with a time of extremely challenging factors and personal and health stressors outside of work. He experienced an exacerbation of his mental health symptoms at the same time. The other period of extremely high stress for the claimant in late 2022/early 2023 also coincided with a more serious exacerbation in his reported mental health symptoms. The email from CGL stated the claimant was 'clean' in November and December 2022, but his report to his GP in March 2023 was that he was still engaging with CGL, had given up alcohol and was 'weaning himself off' drugs. We infer from this report that he was not entirely drug-free by or in January 2023 although it was likely becoming less potent factor in causing any symptoms by March. There appears to have been doubt on the part of his GP during the critical period when the claimant's adverse effects were at their height in January 2023 whether those effects were caused directly by drug mis-use or by his mental health impairments exacerbated by stress factors to which the claimant's impairments made him more susceptible and more likely to experience debilitating and substantial effects.

218. There may in fact have been concurrent causes of the exacerbation of the adverse effects which led them to become substantial.

219. In all the circumstances, we find that the claimant has established that the adverse effects such as they were from January 2023 were attributable to and caused at least in substantial part by the mental health impairments relied upon becoming more severe in response to external stresses. In other words whilst there is some doubt on the part of the GP at the time, and on our part, whether the effects may have been exacerbated by current drug abuse, that doubt is insufficient to displace the conclusion on the balance of probabilities that the effects were attributable to and caused by the impairments.

Long Term Condition

220. The evidence in relation to long term effects was also confused.

221. In the period before March 2022 there are references in the medical records to anxiety having been experienced as a child and on an occasion in 2020, PTSD is asserted by the claimant to have been of long standing, but there is no reference to depression. None of these conditions were medicated on the evidence before us, although the claimant was being offered counselling. Prior to about March 2022 there was no evidence of the effects experienced by the claimant.

222. The claimant's own account was that the substantial adverse effects of the mental health impairments post-dated his physical health crisis which

he says commenced in March 2022 and coincided with his life falling apart in a number of other ways. In his witness statement he describes his mental health impacts as being effects of the virus. The evidence therefore is that at the time of the discriminatory events the adverse effects had not lasted more than 12 months by the date of the discriminatory conduct alleged.

223. In light of our finding above that the effects were intermittent and only substantial before September 2022 and after January 2023 we must therefore determine whether they could well recur after 12 months. We remind ourselves that for this purpose we take no account of evidence of events after the events alleged to be the discriminatory events.

224. We were not provided with an expert or psychological report to assist us. In favour of a conclusion that the effects were likely to recur is the fact that the GP continued throughout the relevant period to seek to obtain counselling, psychiatric and mental health support for the claimant's 'complex' needs and the claimant continued to complain of sleeplessness.

225. Against this is our clear conclusion that the substantial effects occurred only during periods of extreme stress.

226. Whilst we accept that the claimant's impairments make him more susceptible to stress factors than other people would be who do not experience the same mental impairments, and that he would therefore be likely to experience substantial adverse effects from stressful situations in the future, the balance of the evidence was that outside of those conditions the adverse effects were intermittent and minor, or at least not substantial. On the claimant's own account work was his 'happy place' and so in a conducive and fulfilling environment the claimant was able to flourish. The question of recurrence after 12 months cannot be answered in the affirmative by assuming that events of sufficiently extreme stress could well occur so as to support a finding that the effects themselves would be likely, in the sense of could well, recur.

227. Taking the evidence as a whole, and recognising that this is a finely-balanced judgment, we consider that the claimant has not discharged the burden of proving the long-term condition.

Disability Status - Conclusion

228. Accordingly, for the above reasons and recognising this was a difficult and finely balanced exercise of judgment, we find that the claimant was not disabled within the meaning of s 6 of the act by reason of the mental health impairments relied upon.

229. Our further conclusions and findings below are set out in case our conclusion is wrong on the issue of disability status but without prejudice

to that conclusion.

Knowledge – the Mental Health Impairments

230. We have made relevant findings of fact above. In summary:

230.1. The claimant mentioned to Ms Blum that he had problems with sleeping and changes to his physical wellbeing had affected him mentally, but he did not, as he accepted in cross-examination, tell her that he had any mental health conditions or problems. He did not mention PTSD, anxiety or depression. His account of his sleeping difficulties was made in the context of him experiencing particular stress outside of work because of his period of homelessness and physical health changes. Ms Blum passed on her knowledge as above to Ms Kehoe.

230.2. At the mediation meeting on 1 December the claimant told Ms Kehoe that he had had ‘a lot of issues’ before he started work, and that his period of homelessness had taken a toll on his mental health. He mentioned ‘anxiety’ and his bowel dysfunction to Ms Kehoe, but he did not give details of those issues or any specific effects. We accept Ms Kehoe’s evidence as to this. She said she was liaising with HR throughout her dealings with the claimant and they were telling her what to say in relation to his absences and lateness and, plausibly in our judgment, said that if the claimant had said that he had a mental health or insomnia impairment that was the cause of his conduct, a welfare call protocol would have been initiated. Her account is consistent also with the claimant’s concern to suppress discussing mental health problems with the respondent in case it might harm his future prospects. Although the Welfare Policy required employee to report medications if they were likely to have any effect on an employee’s ability to work, he made no such report. In particular he did not report to the respondent that he was taking, or self-medicating with, sleeping pills. He declined Occupational Health referrals when these were offered during return to work calls.

230.3. On 6 January the claimant mentioned that a stressful Christmas had taken a toll on his physical and mental health but gave no further details. His GP’s letter, which Ms Kehoe saw, mentioned that the claimant had ‘multiple medical issues including gastrointestinal as well as mental health issues’. The fit note referred to sleep disturbance, stress-related problem and IBS flare up”.

230.4. On 9 January he told Ms Kehoe he had had a panic attack and was running late.

230.5. On 11 January he told Ms Kehoe that he had not remembered not calling in on 27 December 2022 and mentioned anxiety arising because he knew he was late. But he said there was no medical reason why he

had not called.

230.6. On 21 January he told her he had panicked on 17 January and on 18 January had given up.

230.7. In his probationary interview on 23 January 2023, he gave more information about the reasons for, and for his previous failures to report, absences. He mentioned insomnia, that he woke up with anxiety and panic attacks and mentioned that he was coming out of PTSD. These comments were made in the context of his stating that his personal life was 'falling apart' and that he had had a difficult Christmas period. He did not specifically disclose depression to Ms Kehoe.

231. We find that the respondent through Ms Kehoe had no actual knowledge that the claimant had depression or a current impairment of PTSD. The claimant's statement that he was 'coming out of PTSD' but that it had limited memory effects was not sufficient to amount to actual knowledge of that impairment as a disability.

232. In assessing whether respondent had constructive knowledge (because it ought to have made reasonable inquiries and had it done so it would have discovered the facts from which it can be taken to have known of the claimant's disability) we find that Ms Kehoe was making reasonable inquiries and asking questions about the reasons for the claimant's absences and failures to report them during November and December. She was offering OH and EAP support. However, the claimant was choosing not to provide an explanation which identified any medical reason. Instead he emphasised that the causes of his absences/non reporting were primarily connected with and caused by external stresses. The respondent we find did not have constructive knowledge of any mental health disabilities before 23, or at the earliest 21 January 2023.

233. However, Ms Kehoe (and accordingly the respondent) did have actual knowledge on or by 23 January 2023 that the claimant experienced anxiety (and insomnia) and that the claimant had claimed that that impairment had caused him to fail to report absences in January 2023.

234. Without prejudice to our conclusions above that the claimant's mental health impairments were not disabilities, we find that:-

234.1. the respondent only had knowledge of the anxiety impairment

234.2. that that knowledge post-dated 21 or 23 January 2023, but

234.3. in all the circumstances, having made reasonable inquiries of the claimant, the respondent did not have knowledge of facts from which to conclude that the anxiety impairment was a disability.

235. The respondent is not therefore fixed with constructive knowledge of anxiety as a disability.

Direct Sex and Disability Discrimination - Applicable Law

236. Section 13 of the EQA 2010 provides :

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

237. Disability and Sex are both protected characteristics: Sections 6 and 11 of the EQA.

238. Direct discrimination occurs where the employer treats or would treat the employee less favourably than another employee 'because of' a protected characteristic.

239. Section 13 requires the claimant to identify a comparator who was or would have been treated differently. The circumstances of the comparator, which may be actual or hypothetical, must be not materially different to those of the claimant (s 23: Hewage v Grampian Health Board [2012] UKSC 37). The claimant relies Iman as a comparator.

240. The crucial question in every direct discrimination case is what is the reason why the claimant was treated as they were. Was it because of their protected characteristic or was it wholly for other reasons. The protected characteristic need not be the only reason for the less favourable treatment it may not even be the main reason provided the decision in question was significantly that is more than trivially but influenced by the protected characteristic the treatment will be because of that characteristic.

241. In most cases the tribunal will have to look to the mental processes of the alleged discriminator to determine their motivation: Nagarajan v London Regional Transport [1999] IRLR 572. Motivation is not the same as motive and a well-meaning employer may still directly discriminate. Discrimination may also be subconscious. An employer may genuinely believe that the reason why he acted as he did had nothing to do with the applicant disability but a tribunal may decide that the proper inference to be drawn from the evidence is that whether the employer realised at the time or not, that disability was the reason why it acted as it did.

242. The individual decision-maker must be proven to have actual or constructive knowledge of the protected characteristic.

243. The claimant also referred us to Bahl v Law Society [2004] IRLR 799 for the proposition that explicit gender-based assumptions may be or constitute evidence of sex discrimination and to James v Eastleigh Borough Council [1990] ICR 554 in support of a submission that applying

different standards of expected behaviour based on sex constitutes direct discrimination.

244. In regard to disability discrimination, the claimant referred us to Richmond Pharmacology v Dhaliwal [2009] IRLR 336 for the proposition that characterising necessary disability-related communications as problematic may create a hostile environment and may constitute direct discrimination.

Direct Sex or Disability Discrimination - Conclusions

245. The claimant identifies his sex as male. He compares his treatment with the treatment of Iman, the Assistant Manager. Iman was female. She was not a disabled person.

246. Iman was female, but is not a suitable comparator. Her circumstances differ in material respects from those of the claimant. In particular the claimant was appointed as the store manager. Having regard to the responsibilities of that appointment it was reasonable for the claimant occupying that role to be held to a higher standard of behaviour, to lead by example and to take effective management action in instances of breaches by more junior staff, and to manage rotas.

247. Considering the position by reference to a hypothetical comparator, it is for the claimant at stage 1 to prove facts from which a tribunal could infer that the reason for Ms Kehoe's conduct was a prohibited reason, beyond a mere difference in treatment.

248. In reaching our conclusions we have taken into account the totality of the evidence but for clarity we record the reasons for our conclusions by reference to the complaints about conduct relied upon by the claimant.

November 2022

248.1. Failure to address discriminatory treatment: We have found that Iman did make an insulting and humiliating comment to Ms Kehoe about the claimant's bowel dysfunction, but Ms Kehoe challenged Iman's conduct in this respect and Ms Kehoe did not herself participate in it. This claim fails on the facts.

248.2. Changed and Rigid start times: On 16 November 2022 store opening times, previously 9.30 am were changed to 9 am by Ms Kehoe. The claimant was advised at the start of his employment of his start times. His terms of employment required flexibility in relation to working hours. He was contractually required to be at the store to open it 30 minutes before the opening time. In fact, the Ms Kehoe expected employees to attend 15 minutes before opening. We find that the same changes to store opening times applied equally to all employees at the

store, whatever their sex. There was no differential treatment because of sex. There was no pre-existing reasonable adjustment in place addressing any disability. The change in hours therefore did not involve a differential treatment of the claimant because of any disability. The claimant has failed to discharge the Stage 1 burden of proof. Even if we are wrong about that, we are satisfied by Ms Kehoe's evidence that she acted in response to a direction from her Area Manager to align store opening times and that her actions were consistent with (in fact less demanding than) the respondent's published policies. The respondent's actions were not in any way because of the claimant's sex or disability;

248.3. Telephone-only communication requirements: The contractual requirement was to notify the respondent by the earlier of two hours before the start of a shift or by 9 am whichever is the earlier. The staff handbook required absence to be reported "as far in advance of the start of your shift as possible". The policies applied to all employees. The claimant was reminded by Ms Kehoe, formally and informally on the occasions referred to above in our statement of facts, that the respondent's practice was to require sickness absences to be called in by telephone in all cases, and in advance of his shifts where possible. Ms Kehoe's treatment of the claimant was consistent with the respondent's policies and established practices of which he was made aware and with his place in the management hierarchy in the store. The claimant failed to establish on the evidence a pattern of lateness by Iman or that she was treated differently from the claimant in this respect. But in any event the claimant was responsible as her immediate report for implementing and enforcing lateness and absence policies. The claimant has failed to discharge the Stage 1 burden of proof. In any event we are satisfied that Ms Kehoe acted as she did because she tended to and did apply policies strictly and was concerned as the person accountable to her superiors for this store that she would be exposed if there were a problem at the store and she had not applied the policies correctly. Ms Kehoe's actions were not in any way because of the claimant's sex or disability.

December 2022

248.4. Hostile mediation meeting: At the mediation on 1 December 2022. Ms Kehoe was critical in the meeting of the conduct of both Iman and the claimant towards each other as unprofessional. She criticised the claimant in private for conducting himself in the meeting and addressing Iman in an unprofessional and inappropriate manner towards a member of his team. Even if the claimant was criticised more than Iman, any such difference in treatment was objectively justifiable because of his superior position. The claimant has not satisfied the Stage 1 burden of proof. In any event, Ms Kehoe genuinely believed, on reasonable

grounds that the claimant's conduct fell below the standards she expected of a store manager. We are satisfied on the evidence of Ms Kehoe, which on balance we prefer, that her actions were not in any way because of the claimant's sex or disability.

248.5. Undermining of managerial authority: The claimant gave a number of examples of what he considered were instances of undermining or lack of support by Ms Kehoe or favouritism towards Iman. He was particularly upset that he felt that his shortcomings and absences were criticised and highlighted while he did not receive praise for what he had achieved and felt he was doing well. Examples included:

248.5.1. After his late arrival on 16 November 2022 and missing the health and safety meeting, Ms Kehoe insisted that rota changes should be recorded and approved by her. We find that Ms Kehoe did so.

248.5.2. Overlooking his contributions or crediting them to others. This claim is not made out on the facts. There were examples in the correspondence of Ms Kehoe praising the claimant's efforts. He referred to an incident when he had been told to take down signage which he had taken the initiative to create for an in-store promotional event. But the evidence in the bundle showed there was a policy in place that mandated brand approval for promotional signage and we find he had not obtained such approval in advance.

248.5.3. Undertaking stock taking, and store operating tasks without his knowledge and then being blamed for not being up to date or informed. We find that it is inevitable that some store management and operating tasks would have been carried out in the claimant's absence, and likely that Iman, upon whom the claimant accepted he was heavily reliant, undertook tasks and made it difficult for the claimant to find out the position or get up to speed, or undertook tasks poorly despite the claimant's instructions to try to make him look bad. However, we infer from the evidence that this involved what could be expected from the operational strains of a retail store involving two managers who could not get along.

248.5.4. The claimant alleged that Ms Kehoe 'micro-managed' him, pursued him for every minor issue, asked other staff to report on him and required him to provide proofs, while Iman's misconduct was not investigated and was ignored. The evidence discloses on balance that Ms Kehoe required proofs, for example to explain absences, from the claimant from time to time, but there is evidence also that allegations against both the claimant and Iman relating to

conduct were investigated by the respondent. We accept her evidence, as being consistent with her general procedures and compliance focussed approach, that the same procedures were applied to Iman as to the claimant and other staff. There was no evidence of a pattern by Ms Kehoe of requiring staff to report on the claimant's conduct.

248.6. The claim that the respondent/Ms Kehoe undermined the claimant's authority fails on the facts. Ms Kehoe was critical of the claimant when his performance as store manager fell short in some respect, or was inconsistent with policies and procedures, praised him when he had performed well, and attempted to mediate a better working relationship between two hostile management employees. None of this conduct individually or taken as a whole amounted to undermining of the claimant's managerial authority. The evidence as a whole does not establish facts from which a tribunal could infer that any differential treatment was because of sex or disability so that this head of claim would fail at Stage 1. In our view Ms Kehoe was steering the claimant to do more to exercise his authority, and to do so appropriately, as she saw it. We consider that the claimant's view of his treatment was coloured by upset and emotion and was not a reliable account of a pattern of behaviour of this kind by the respondent. In any event we prefer Ms Kehoe's evidence that, broadly, her conduct was explicable as an attempt to manage the store through directing the claimant's and Iman's conduct as she considered appropriate given their dysfunctional relationship. Whether or not she did a good job of doing so, we find that her conduct was not in any way because of disability or sex.

January 2023

249. It is convenient to consider all three complaints relating to conduct in January 2023 because in substance they concern the process leading to and the decision to terminate the claimant's employment during his probationary period.

250. Inappropriate return to work processes: The claimant's case is that when conducting his probationary review Ms Kehoe wrongly relied as a ground for dismissal on his not participating in the Return to Work process. There were two such occasions. On 19 January 2023 and 21 January 2023. Both occasions concerned the claimant's absences on 17 and 18 January 2023. On neither occasion did he complete a Return-to-Work form. The starting point is that there was no evidence of any differential treatment of Iman, or of any hypothetical female or any non-disabled employee. In so far as the question relates to hypothetical employees without the claimant's characteristics, the claimant has not satisfied the Stage 1 burden of proof for the following reasons:

- 250.1. Completion of a RTW form was provided for in the respondent's absence procedures. On 19 January 2023 he failed to return a call from Ms Kehoe. On 21 November the email correspondence records that the claimant terminated Ms Kehoe's further return to work call. Her calls on each occasion were made in accordance with the respondent's absence management procedures, there is no basis to infer any differential treatment by reason of her making those calls.
- 250.2. We find that Ms Kehoe did not rely on the claimant's terminating the return to work call on 18 January 2023 as conduct contributing to the termination decision. He said at the time he did not want to carry on where people could hear and she accepted that as a good reason as noted in her email of 21 January 2023.
- 250.3. We find that in reaching her decision on 23 January 2023 she did rely on his conduct on 19 January 2023, and we find it likely that she had in mind the claimant's terminating the call on 21 January, although she does not specifically reference it, because she had emailed the claimant about it on 21 January 2023 and in response to the claimant's explanation as to why he had not returned her call on that occasion, she had said asked him if he understood the effect it had on the business and team.
251. In any event we are satisfied by Ms Kehoe's evidence that the reason why she expected to conduct Return to Work calls was because this was a requirement of the respondent's published policy and it was her practice to apply it to any employee for whom she had line management responsibility, and she was being advised in this regard throughout by HR. Her reason was not in any respect because of the claimant's sex or disability.
252. Disregarding sick notes: The claimant's case is that in conducting her probationary review Ms Kehoe disregarded his sick notes when calculating his absenteeism levels. In his appeal of 31 January 2023 he said that 'these January dates as used as a reason for dismissal are covered by two sick notes from my GP outlining mental illness, anxiety and stress-related issues, therefore if I am not mistaken cannot be used for grounds for dismissal.' Towards the end of the probationary review meeting Ms Kehoe referred to 5 instances of absence within a four-month period. In her dismissal letter she refers to 4 occasions of absence within 2 months. In her email to the claimant of 17 January 2023 Ms Kehoe specifically refers to the absence of 4-6 January 2023 as being signed off by doctor for 'sleep disturbance, stress, IBS flare up'. We therefore find that she did take into account all absences, including those authorised by sicknotes, but she did not disregard them. The absence level management policy required monitoring of absences and she specifically recognised that the January absences were certified. Absence levels were a factor which she was

entitled to have regard to in connection with the claimant's probationary review. There is nothing from which to infer that any other probationary employee would not have had their attendance monitored in this way, and no basis upon which to infer that the reason for Ms Kehoe's conduct in doing so was because of the claimant's sex or disability. This claim fails on the facts.

253. Unfair probation review and discriminatory dismissal: As regards the contention that the grounds relied upon to dismiss him were not relevant, we understand this to be a reference to her failing to take account of his sick notes, and legitimate reasons for absences. We have considered these above.

254. As regards the fairness of the probation review by Ms Kehoe the claimant complained that he was not allowed to speak about good things and contributions he had made during the review hearing, only about sickness absences and reporting. The letter of 18 January 2023 inviting him to the meeting explained that the meeting would include 'any and all concerns regarding your capability and conduct'. Ms Kehoe's focus of the probationary hearing was about his conduct, in particular his failures to comply with absence reporting procedures in circumstances in which he had not before the meeting given medical reasons why he had not followed procedures. When the claimant attempted to discuss the significant contribution he had made Ms Kehoe said: "That doesn't relate to this unfortunately. I'm not overlooking what you've done. This is to discuss breach of company policy". We do not consider that it was unfair for the reason submitted by the claimant. Ms Kehoe was entitled to focus a probation review on shortcomings in conduct and attendance. She acknowledged good work by the claimant on two occasions, so this aspect was not ignored.

255. The statement of reasons given in the outcome letter were not in our view a comprehensive statement of the full reasons why Ms Kehoe decided to terminate the claimant's contract. The stated reasons were i) failure to follow reporting procedures on 16, 22, 28 November, 4,9 17 and 18 January ii) four absences within 2 months iii) unauthorised and un-notified absence on 27 December and iv) lates on 16, 22 and 28 November. However, she had mentioned at the end of the hearing that she believed he did not appreciate that his conduct while acting as a manager set a bad example to the team and was detrimental to business. She had also raised with him in the meeting a serious concern about his inducing Iman to cover up his absence. We think this too was an active factor in Ms Kehoe's mind. However, the claimant was given a chance to comment on both of these matters in the meeting.

256. As well as an incomplete statement of reasons, there is another element of concern about the fairness of the procedure and the decision to

terminate. Although the claimant had previously provided no medical justifications for his non-compliance and had not engaged with offers of support, in the course of the meeting the claimant did introduce (although he downplayed somewhat) potential explanations based on mental health symptoms – anxiety, panic attacks and oversleeping – and explained that his out of work life was leading to extreme stresses. This was additional material that on the face of it ought to have signalled that there might have been medical reasons why the claimant had not followed the notification procedures. But Ms Kehoe did not undertake a structured review of the factors set out in the absence management policy before reaching her decision to terminate: for example considering the likelihood of further absences, or whether there was any underlying medical condition and offering the claimant an opportunity to have a medical examination or to disclose medical records as an alternative to a decision to dismiss.

257. This procedural shortcoming is something from which a tribunal might infer a discriminatory reason for the termination decision.

258. However, because the claimant was on probation the respondent was not required to undertake each of the steps prescribed in the absence/sickness management policy strictly. Ms Kehoe said that the claimant was dismissed for non-compliance. We consider that in reality Ms Kehoe simply did not believe the claimant's explanations for his failures to call in and that is why she did not go through these steps. We so conclude because, his position as previously stated had been that there was no medical reason for not reporting in changed during the meeting, and it is clear from the exchanges in the review meeting that Ms Kehoe was not satisfied that the claimant had not previously honestly reported to her on the circumstances of his absences, and he had sought to collude with Iman to mislead.

259. Ms Balsom for her part, in upholding the termination, took the view that the claimant's behaviour in relation to reporting absences savoured of defiance.

260. Nevertheless, even if there were procedural concerns about the decision to terminate, which were not cured on Appeal, we are satisfied that the reasons for Ms Kehoe's decision to terminate were not in any way because of the claimant's protected characteristics. We are satisfied that Ms Kehoe would have conducted herself in the same way towards another store manager who was female and/or who did not have the same impairments as the claimant whose conduct was as we have found.

261. For completeness we would add that in so far as, as she stated in her evidence, her actions were influenced by a third party – namely staff within the respondent's HR department – there were no submissions and no evidence that, any third party directing Ms Kehoe's actions was acting for

any proscribed reasons, and there was no basis for any such inference. Any such claim, if advanced, and we were not specifically addressed on the point, would not satisfy the Stage 1 burden of proof.

262. Accordingly, the claim for direct discrimination is not well-founded and is dismissed.

Discrimination arising from disability (EQA s 15)

Applicable Law : Discrimination Arising from Disability

263. Section 15 of the Equality Act 2010 provides that it will be unlawful for an employer or other person to treat a disabled person unfavourably not because of that person's disability itself (which would amount to direct discrimination under S.13 EQA) but because of something arising from, or in consequence of, the person's disability. Claimants bringing a claim of discrimination arising from disability under S.15 are entitled to point to treatment that they allege is unfavourable in its own terms, they do not need to 'compare and contrast' the treatment with the treatment of other employees.

264. The word 'unfavourably' is broadly analogous with concepts such as 'disadvantage' or 'detriment' found in other provisions of the EQA. The EHRC Employment Code provides helpful advice as to the relatively low threshold of disadvantage required to engage section 15

265. The phrase 'something arising in consequence of' the disability should be given its ordinary and natural meaning: T-Systems Ltd v Lewis EAT 0042/15 the EAT. The EHRC Employment Code — para 5.9 states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability'. The claimant relies upon her periods of sickness absence as the 'something' arising from her disability.

266. It is necessary to identify two separate causative steps for a claim under S.15 EQA to be made out. These are that: (i) the disability had the consequence of 'something', and (ii) the claimant was treated unfavourably because of that 'something'. It does not matter in which order those questions are asked. The tribunal must:

266.1. identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. Then:

266.2. establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range

of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator: see Mrs Justice Simler in Pnaiser v NHS England and Anor 2016 IRLR 170, EAT

267. An employer has a defence to a claim under s.15 of the EQA if it did not know that the claimant had a disability — S.15(2). This stipulates that subsection (1) does not apply if the employer shows that it '*did not know, and could not reasonably have been expected to know*', of the employee's disability. However, the employer cannot simply ignore evidence of disability. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14. But failure to enquire into a possible disability is not by itself sufficient to vest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry.
268. An employee's reluctance to discuss an impairment or, if questioned, to provide full information about the impact of the impairment on the ability to carry out day-to-day activities may fairly lead to the conclusion that, even though the employee was disabled, the employer did not have actual or constructive knowledge of this at the relevant time.
269. An employer has a defence to a claim under section 15 if it succeeds in showing that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim. The burden is on the employer to prove that the aim was legitimate and the means adopted proportionate. Legitimacy and proportionality are objectively assessed. The business need justification relied upon is to be objectively assessed by the tribunal itself. It need not have been in the mind of the employer at the time, although the burden remains on the employer and it will be more difficult to prove an objective justification that was not in the employer's mind, or if the employer does not lead evidence of how, as part of the process leading to dismissal, its decision-makers considered other, less discriminatory, alternatives. The procedure leading to a dismissal may be relevant to the balancing exercise, so long as the tribunal remains focused on the question of whether the outcome of the decision-making process was capable of justification.
270. To be proportionate, the employer's actions have to be both an appropriate and reasonably necessary means of achieving its legitimate aim and, for that purpose, it is relevant for the tribunal to consider whether

any lesser measure might have served that aim. When considering that particular question, the tribunal should give a substantial degree of respect to the judgement of the employer's decision maker as to what was reasonably necessary to achieve the legitimate aim (provided the decision maker has acted rationally and responsibly), but the tribunal applies an objective test.

271. When assessing the proportionality of any dismissal pursuant to a sickness or absence management policy, the terms of the policy will be relevant to the assessment of whether any discretions or options short of dismissal allowed for by the policy have been considered by the employer before reaching the decision to dismiss: Department for Work and Pensions v Boyers 2022 EAT 76.

272. EHRC Employment Code sets out guidance on objective justification which broadly reflects the case law. In summary:

272.1. the aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration.

272.2. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29).

273. As regards proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

274. The claimant also referred us to Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 for the proposition that using disability-related absences for disciplinary action without proper consideration may constitute discrimination under section 15 of the EQA.

Discrimination Arising from Disability – Analysis and Conclusions

275. Our conclusions below are expressed without prejudice to our primary finding that the claimant was not disabled by reason of any mental health impairments.

276. Terminating the claimant's employment does constitute unfavourable treatment of the claimant by the respondent. The decision to terminate was taken by Ms Kehoe and was endorsed by Ms Balsom.

277. The 'something arising' from his disabilities upon which the claimant relies are (i) his absences (ii) his late arrivals and (iii) his failures to report absences.

278. As regards the claimant's absences:

278.1. The absence on 28 November 2022 was due to gastrointestinal issues/ diarrhoea. This absence was in consequence of the claimant's disability of bowel dysfunction.

278.2. The claimant's absence between 5 and 7 December 2022 was due to cold/flu. The claimant wrongly suspected he had Monkey pox. This absence was not in consequence of any disability;

278.3. The claimant's absence between 4 and 6 January 2023 was due to a combination of bowel problems, insomnia and stress. This absence was in consequence of both the claimant's bowel condition disability and mental health impairments.

278.4. The claimant's absences on 9, 17 and 18 January 2023 and until 2 February 2023 were as set out in the GP's fit-note of 6 January 2023: "sleep disturbance; stress-related problem: IBS flare up". We find that these absences were as a consequence of his physical and mental health impairments.

279. As regards the claimant's lateness:

279.1. The claimant's late arrival on 16 and 17 November 2022 was not in consequence of any disability;

279.2. The late on 22 November 2022 was in consequence of taking sleeping pills to address insomnia. This absence was in consequence of a mental health impairment;

279.3. The late on 27 December 2022 was attributed by the claimant to oversleeping. This lateness was in consequence of a mental health impairment.

280. As regards failures to report absences:

280.1. The failures to comply with reporting requirements on 16, 17, and 28 November 2022 were not in consequence of any disability;

280.2. The failures on 22 November, 27 December 2022 to report in advance were in consequence of a mental health impairment, insomnia in particular. We are not satisfied on the claimant's evidence that the failure to call in was in consequence of any impairment or disability.

280.3. The failures to report absences in January 2023 were all in consequence of mental health impairments. The claimant had begun to report panic attacks, blackouts and a more general breakdown in mental stability to his GP. We did consider whether the claimant's evidence was reliable in relation to the reasons he gave, and there were

inconsistencies in his accounts of how he experienced his symptoms at this time, and also inconsistent behaviours (for example calling the store first thing, but then forgetting to call). On balance we think that he would not have jeopardised his employment by simply not bothering to call if he could have.

281. Turning to the thought processes of Ms Kehoe:

281.1. We find that she had knowledge of the claimant's physical (bowel) and anxiety impairment by the time she took the decision to terminate.

281.2. The dismissal outcome letter expressly referenced the following as reasons for the decision to terminate (i) failure to follow the absence reporting policy on 16, 22 and 28 November 2022, 4, 9 and 17 January 2023 (ii) the 4 occasions of absence within 2 months (iii) an unauthorised absence on 27 December 2023 and (iv) Poor timekeeping: late arrival on 16, 22 and 28 November 2022. All of these were relevant factors in her mind. But the principal reason relied upon by Ms Kehoe was said to be the claimant's failure to call her to report his absences and lates. In this regard she did not expressly rely on, and did not in practice enforce, a requirement for the claimant in all circumstances to report his absences in advance. He was told that the expectation was to do so two hours before his shift so that arrangements for replacements could be made, but it was not required by the policy nor applied in practice that he report in advance in circumstances in which the claimant could not do so because it was not reasonably possible. The problem for the claimant was that his explanations for failing to call were not initially attributed by him to any medical conditions and when he changed his position in the meeting Ms Kehoe did not believe his explanation that his anxiety (or insomnia) conditions prevented him from calling in at all. As we have set out above, we find that Ms Kehoe also considered, though did not reflect in the outcome letter, that the claimant's management performance and conduct were unsatisfactory in various other respects.

282. Applying an objective test, we find that the decision to dismiss was not in consequence of the claimant's physical disability, but it was (although only in part) in consequence of a mental health impairment – namely anxiety.

283. For the reasons set out above, we find that although the respondent knew of the claimant's impairment of anxiety by 23 January 2023, it did not know that this amounted to a disability.

284. In the alternative it was argued on behalf of the respondent that the requirement to call to report absences and lates was justified. It pleaded as legitimate aims the need for policies to be consistently followed and standards observed and upheld. In its submissions it relied upon, as being

reasonably necessary in pursuit of a legitimate aim, the need for the respondent's managers to have knowledge of any problems which a staff member might have which prevented them from attending work on time or at all, for pastoral reasons, and also for the efficient running of the business. It submitted that the requirement to phone in and tell the line manager directly is a proportionate means of achieving these aims.

285. We find that such a requirement was imposed for the purposes of pursuing a legitimate aim. The legitimacy of the aims is underpinned by their being referred to in broad terms in the respondent's policy documents. We are satisfied that Ms Kehoe's and Ms Balsom's reasons show they had this legitimate aim (amongst others) in mind.

286. Recognising that it is a finely balanced judgment, we are also persuaded that the unfavourable treatment of termination was a proportionate (in the sense of being both reasonably necessary and appropriate) means of achieving that legitimate aim. Our reasons are:

286.1. We recall that the test is an objective one, but that we should accord a substantial degree of respect to the decision makers' view of what was reasonably necessary.

286.2. A decision to terminate employment for failure to comply with reporting policy appears on the face of it a harsh one. Efforts might have been expected to have been taken beforehand to encourage an employee to accept offers of support or of an OH assessment before reaching a decision to terminate. Different but equally effective means of personally reporting absences might have been considered and might have been practicable as a temporary measure (eg reporting to someone else, reporting via a colleague initially or by a later time).

286.3. However, account must be taken of the wider context.

286.3.1. The claimant had also previously been referred to but had declined to engage with OH and with the EAP support facility.

286.3.2. The claimant was a probationer on a limited duration contract.

286.3.3. Ms Kehoe and Ms Balsom both had concerns about the effects of the claimant's overall management and other aspects of his conduct on the team and the business. Both were also uncertain whether the claimant's account that he was unable to call in was true. This reserve was reasonable in light of inconsistencies and changes in his position, his reluctance to disclose how his mental health impairment was affecting him and in light of their perception that he had covered up a reason for an earlier absence.

287. Accordingly, the respondent has made out a defence of justification.

288. The claim for discrimination arising from disability is therefore not-well founded and is dismissed.

Failure to make reasonable adjustments: EQA s 20 / 21 - Applicable Law

289. The duty to make adjustments under S.20 EQA applies where a provision, criterion or practice (PCP) has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

290. A failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person: EQA s.21. The claimant also referred us to Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744 – for the proposition that withdrawal of previously successful adjustments without justification may constitute direct discrimination.

291. A ‘substantial disadvantage’ is something that is ‘more than minor or trivial’: EQA section 212(1). The tribunal must identify the nature and extent of the disadvantage to which the claimant is subjected with some degree of precision. The substantial disadvantage must be established by comparison with ‘persons who are not disabled’, so the duty to make reasonable adjustments is only triggered if it is established that the relevant PCP causes greater disadvantage to the disabled claimant than it does to non-disabled people to whom the requirement is applied, not by reference to non-disabled persons generally. 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: Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT. Section EQA 20(3) therefore does not contain a strict causation test but a causative link has to be shown between the PCP and the disadvantage suffered by the employee to inform the determination of what adjustments an employer was obliged to make.

292. The tribunal must state how the adjustment that it considers reasonable would actually have alleviated the claimant’s substantial disadvantage: Environment Agency v Rowan 2008 ICR 218, EAT.

293. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred — absent an explanation

— that the duty has been breached.

294. Once satisfied that the section 20 duty has potentially been triggered, the tribunal will consider what adjustments could and should have been made. It will need to identify the 'step' or 'steps', if any, the employer could reasonably have taken to prevent the claimant suffering the disadvantage in question. Again, the onus falls on the claimant, not the employer, to identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage. Having done so, the burden then shifts to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

295. The section 20 duty only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. Reasonableness may require an employer to take positive steps that entail treating a disabled employee more favourably than others in order to alleviate the consequences of the disability: O'Hanlon v Revenue and Customs Commissioners 2007 ICR 1359, CA. Reasonableness is assessed from the point of view both of the claimant and the respondent.

296. The test of reasonableness in this context is an objective one: Smith v Churchills Stairlifts plc 2006 ICR 524, CA, and so may require a tribunal to substitute its own view for that of the employer. In assessing reasonableness in the context of S.20, it is necessary for the tribunal to look at the proposed adjustment from the point of view of both the claimant and employer and then make an objective determination. The focus must be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about the proposed adjustment. The courts have held that one factor above all others is crucial: the effectiveness of the proposed step or steps. The EHRC Employment Code (see para 6.28) suggests examples of reasonable adjustments in practice and of matters that a tribunal might take into account in determining reasonableness of the adjustments: a) the effectiveness of the step; b) the extent to which it was practicable for the employer to take the step; c) the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities; d) the extent of the employer's financial and other resources or the availability to the employer of financial or other assistance in respect of taking the step; e) the nature of the employer's activities and the size of its undertaking; f) 'What is a reasonable step for an employer to take will depend on all the circumstances of each individual case'. The claimant also drew our attention to Kenny v Hampshire Constabulary [1999] ICR 27.

297. An employer has a defence if it does not know and could not reasonably

be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP: see EQA s 20(1)(b) and Schedule 8. The question is what objectively the employer could reasonably have known following reasonable enquiry. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP would be likely to place that employee at a substantial disadvantage: eg. If it did not have actual or constructive knowledge of the particular disadvantage upon which the claimant relies, even if it knew that the claimant was disabled in some way: Glasson v Insolvency Service 2024 EAT 5.

298. The claimant also referred to Archibald v Fife Council [2004] UKHL 32 for the principle that the duty to make reasonable adjustments extends to making substantial adjustments including in relation to working arrangements.

Reasonable Adjustments – Analysis and Conclusions

Knowledge of disability

299. As stated above:

299.1. the respondent had actual knowledge of the claimant's bowel condition disability from August 2022.

299.2. As regards mental health impairments:

299.2.1. The respondent did not know of the claimant's PTSD or depression impairments at any time as being a possible cause of any absence or failure to report.

299.2.2. It had learned on 9 January 2023 that the claimant had experienced a panic attack which was associated with a late arrival, and on 11 January the claimant, whilst stating that he was experiencing stress and that there was no medical reason why he could not report his absences to Ms Kehoe, said that anxiety about having been late allowed time to run away before he could report in. The respondent knew of the claimant's anxiety impairment and that he attributed his failures to comply with reporting requirements to anxiety by 23 January 2023.

299.2.3. We are not satisfied that the respondent had actual or constructive knowledge that the claimant's anxiety amounted to a disability.

300. Without prejudice to our conclusion as to lack of knowledge of any mental health disability, we record our relevant findings in relation to PCPs

and reasonable adjustments as follows.

PCPs

a. Requirement to start work at 9:00am.

301. The respondent accepted it had this practice. It was a change from the previous opening time of 9.30 am. In practice the change required the claimant to arrive 15 minutes earlier than previously.

b. Requirement to telephone for absence reporting:

302. The respondent accepted that it had this practice. We have found that the claimant knew of it and was reminded of it on several occasions by Ms Kehoe. As stated above we find that whilst the PCP envisaged both in person telephone reporting and reporting in advance, in practice the requirement to report in advance was a requirement to do so only in so far as it was possible to do so, but to report as soon as practicable.

c. Requirement for the claimant to work alone for much of the time:

303. We find that community door stores typically had a practice whereby more staff were lone working than other types of store, and the claimant's rota anticipated some lone working, although this was not 'for much of the time'. The respondent said that the claimant's rota anticipated that he would work alone for two hours per week.

304. However, a PCP requiring the claimant to work alone was not applied to him. We find that he had management authority and discretion not to schedule himself in that way, and when he raised the point his manager supported not rota-ing himself alone, and we were not taken to any evidence to show that he was scheduled to work alone after he raised the point. Ms Kehoe's offer or response when the claimant raised the issue of lone trading was to state that "*we will amend the rota where possible to avoid lone trading*". This was the same formulation which the claimant alleged during the hearing as having been previously agreed by Ms Blum which he contended was withdrawn by Ms Kehoe (although we find that no such reasonable adjustment was in fact requested by him or put in place by Ms Blum). There was an exchange in oral evidence in which the claimant asserted that there were budget constraints imposed on him which limited his ability to reduce lone working by engaging additional staff as cover, but we were not taken to any documentary evidence of such constraints existing or being applied. We find that whilst he may have felt that he needed to manage store operating costs there was no evidence of constraints imposed on him that precluded him from scheduling himself with other staff if and when he considered it necessary.

d. Rigid break scheduling:

305. There was a WhatsApp post by Ms Kehoe on 23 November 2023 to staff generally which stated that while lone trading closures for lunch were “advised to be two 30 minute breaks”. However, we were not taken to any evidence to support a finding that this advice was rigidly enforced or that any other ad hoc breaks were rigidly scheduled.

306. The respondent submitted, and we accept that the claimant as store manager was entitled to schedule breaks both for his staff and himself as and when needed, including for management of any symptoms or effects of impairments. An example was the agreement by Ms Blum and Ms Kehoe that the claimant could close the store to deal with his need to access a toilet.

307. We find there was no such PCP, or if there was it was not applied to the claimant.

Substantial disadvantage

308. The PCPs of starting at 9 am and of requiring the reporting of absences by telephone did not put the claimant at a substantial disadvantage compared to non-disabled persons by reason of his physical (bowel-related) disability.

308.1. On the one occasion during his employment when he was absent for gastro-intestinal reasons (22 November 2022) the claimant was able to take a day off to recover, so the starting time was irrelevant. There was no evidence that the claimant was unable to start 15 minutes earlier because of any effect of his bowel dysfunction;

308.2. The claimant did not contend that any bowel related impact prevented him from reporting his absences.

309. Assuming in the claimant’s favour for the purpose of analysis only (and contrary to our conclusions above) that the claimant was disabled by reason of anxiety/PTSD/depression and that the respondent knew of those disabilities and that the PCPs which were applied to the claimant would have been likely to put him at a disadvantage:

309.1. The claimant did not establish that a PCP requiring him to start work 15 minutes earlier than previously would have put him at a substantial disadvantage compared to a non-disabled person. In periods where there were not exceptional external stresses the claimant appeared generally to be able to attend work for his rota’d shifts. The instances where he failed to attend at all or was late because of the claimed effects of mental health disabilities (or medications taken to address them) resulted in his being late by several hours. The claimant was responsible for organising the store rota himself. If there were impacts which made it difficult for him to arrive by 8.30, or 8.45 he was

in a position to make such arrangements.

309.2. A requirement to report absences only by telephone would have put the claimant at a substantial disadvantage compared to a non-disabled person because the need to do so could, on his account, trigger a panic attack or memory loss arising from anxiety, and he would thereby be potentially exposed to the risk of disciplinary sanctions.

309.3. The issue of lone trading was the subject of considerable discussion at the hearing. The claimant contended strongly that being allowed to close the store so that he could use the toilet was not sufficient or practical because if he needed to visit the toilet urgently he would not be able to do so if there were people in the store: he could not just throw everyone out. He therefore needed to have someone working with him. For the reason set out above he did not satisfy us on the evidence that a PCP of lone trading was in fact applied to him. But we would add that at no point before 11 January 2023 did he mention to his managers that closing the store might not be a practical or adequate response to his physical disability. We infer from this that the bowel problem he experienced was not in fact, or he did not believe it to be, one which presented so urgently that he would not have time to clear then close the Store such that it necessitated working with a colleague. In any event, even if it did, the respondent did not know that this condition continued to present with any such urgency after about August 2022, and the claimant did not establish factual grounds sufficient to support an inference or finding that the respondent ought to have enquired further and if it had done so, it would have found out that fact.

309.4. Further, the claimant did not establish on the evidence before us what adverse impacts flowed from his mental health impairments that prevented him from working alone or with scheduled breaks. He referred to a need for support from other staff, but his evidence was that he enjoyed the work when he was present (subject to his difficulty with, and with managing Iman) and he frequently worked extra hours and lates voluntarily.

Breach of Duty to make Reasonable Adjustments

310. The respondent pointed out in its submissions that the claimant's list of suggested reasonable adjustments was produced for the first time at the Case Management Hearing on 23 May 2025. This may be so, but we note that the claimant had asked for an adjustment of no lone trading on 11 January 2023.

311. The claimant suggested that the following reasonable adjustments were required: a. Flexible start times b. Alternative communication methods c. Support staff presence/no lone working d. Flexible break arrangements.

312. In light of our conclusions above an adjustment of flexible start time falls away. Even if the claimant had been required to ask for permission to make that change, he did not ask to do so, or explain to the respondent (or adequately explain to the tribunal) why a flexible start time was reasonable and how it would address the particular impairment he relied upon as requiring such an adjustment. In practice a flexible start time would not appear to address any disadvantage identified as experienced by the claimant. The difficulty he relies upon is that insomnia, or insomnia medication changes, cause him on occasion to wake up late for work. If he could predict when this would occur, for example when he chose to try or was prescribed a new medication (a fact the Welfare Policy expected him to notify), then a later start on the following day would be a reasonable course of action to adopt. But to respond to those predictable occasions he was able to adjust the rota himself. If on the other hand he could not predict when this would occur, the only solution to such unpredictability would appear to be a late start time, not a flexible one. The timing of his pattern of absences and reporting arising from this cause suggests that a start time relatively late in the morning or at around midday would be required. In effect this would require a substantially different rota in which other staff are always present for the morning and/or to be responsible for opening the store every morning. Having regard to the claimant's role as a temporary store manager, an adjustment which required other staff to open the store every day for an undefined and unlimited period would exceed what is required for a reasonable adjustment.
313. Similarly, for the reasons set out above there was no basis for requiring flexible break arrangements as an adjustment. In any event, we infer from Ms Kehoe's response to his request to avoid lone working that if the claimant had requested an adjustment in this respect to avoid a substantial disadvantage arising from a disability it would have been agreed to.
314. Alternative Communication Methods. The claimant suggested that his inability wake up predictably on time on occasion, and/or his symptom of panic attacks or inability to recall whether or not he had reported his absence, meant that it was in practical terms impossible for him to report his absence by telephone in advance. This needs to be broken down. An inability caused by his disability to report *in advance* could reasonably be addressed by permitting him to report by telephone as soon as practically possible. In practice this was the policy the respondent adopted on occasions when the claimant informed his manager that he had been unable to report absence in advance. The respondent did not sanction the claimant for not reporting his absences or lates *in advance*, it did so because he failed to report them by telephone or on occasion at all. In any event the starting point is that there are objectively reasonable reasons to require an employee, in particular a store manager, to report absences as soon as practicable: for example the Area Manager needs to arrange staff cover and to confirm who is present in Store for safety reasons. It would

not be reasonable to expect the respondent to remove entirely the requirement to report absences. One possible adjustment which might be made if an employee is by reason of a disability unable to report an absence promptly or at all (eg because they could not recall if they had called or not or was panicked and not able to report to a superior) could be an arrangement for other staff to be briefed to report an employee's absence. However, the claimant specifically complained about Ms Kehoe asking other staff members to monitor and report on his absences. So either that practice was in place anyway, or we infer that the claimant would not accept it was a reasonable adjustment.

315. The alternative adjustment contended for by the claimant appeared to be that he should be allowed to report his absences by WhatsApp, Teams or email and by telephone later when medically possible. The basis for this was that his mental health impairment compromised his ability to recall whether he had reported at all or his inability to report in person by telephone because his anxiety about being late triggered a panic attack. The claimant's point was that Ms Kehoe did not consider, particularly after 9 January 2023 and in reaching the decision to dismiss him, reasonable alternatives.

316. The starting point is that there were objectively reasonable reasons which were explained by Ms Kehoe and set out in the policy for a requirement on an employee to report absences in advance and by telephone: the respondent needed to monitor that the employee was in fact unwell and not simply getting someone else to report their absence for them, and to be able to discuss the likely length of any absence and any health or support adjustments that might be necessary. Ms Kehoe also gave as a reason that Teams messages might not be seen.

317. In practice, before the probation interview, the above was what Ms Kehoe in fact implemented although she continued to remind him of his obligation to report by telephone and that reporting by WhatsApp/Teams *alone* was not acceptable. Furthermore, he was not precluded from using WhatsApp/Teams and it was not clear to us how, if the claimant had reported his absence by WhatsApp/Teams and thereby created a record of his report, his impairment of memory would not have been assisted by the creation of such a record such that he would not then be reminded to call in later.

318. To the extent that his anxiety impairment meant that he could not face reporting or discussing his absence by telephone initially, then in striking the balance between a reasonable need for an in person report at some point, it seems to us that once the claimant had disclosed that he experienced PTSD/anxiety/blackouts/panic attacks to Ms Kehoe an arrangement could reasonably have been put in place, at least on a temporary basis and informed/supported by an OH assessment, for a

systematic review of any absence reports on other channels by Ms Kehoe, HR or other staff and for the respondent pro-actively to contact the claimant in person as necessary. Ms Kehoe did not appear to have considered whether such reasonable adjustment should in the past have been put in place around reporting absences before deciding to terminate in part for not complying with absence reporting requirements. Ms Balsom during the Appeal hearing also focussed on the claimant's understanding of the existing absence reporting procedure and his obligations under it. She did not consider whether and if so what reasonable adjustments might have been required to address his disclosed impacts. However, it is not clear to us, in the absence of an OH assessment or clearer evidence that pro-active contact by the respondent might not also trigger a panic response.

319. Staff support/lone working. The difficulty with the claimant's claim that the respondent should have applied a reasonable adjustment to provide for additional staff presence to support the claimant is that he had, in our judgment, authority and discretion to make that arrangement himself. If and in so far as there was a requirement on him to obtain consent, which was not established on the evidence we were taken to, when he first asked for approval to avoid lone working, Ms Kehoe agreed to it. We therefore find that the respondent did not fail to provide this adjustment.

320. The claim for failure to make reasonable adjustments is therefore not well-founded and is dismissed.

321. Our recognition that alternative temporary arrangements might have been reasonable adjustments to respond to the claimant's mental health impairment of anxiety which resulted in a panic attack does not avail him because i) he has not satisfied us that the impairment amounted to a disability or that the respondent knew that it did so. It was not clear either exactly how the claimant's impairment affected his ability to report in person, how long the effect lasted, how long the impairment was expected to last and whether any adjustment would be practicable given that an adjustment that excluded any requirement to report in person would likely not be a reasonable one.

Harassment (EQA s 26)

322. S 26 of the Equality Act provides relevantly as follows:

(1) A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (a) violating B's dignity, or (b) creating an intimidating hostile degrading humiliating or offensive environment for B.

(4) In deciding whether the conduct had the effect referred to in sub-section (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 that conduct to have that effect.

323. In determining whether the conduct is “related to” the protected characteristic in issue, a phrase which is broader than ‘because of’ in section 13, the tribunal must identify some feature of the factual matrix which has led it to the conclusion that the conduct is related to that protected characteristic: Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor [2020] IRLR 495. The focus of the Tribunal must be on the specific conduct complained of when assessing whether it is related to the protected characteristic: Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40 at paragraph 9. The EHRC Code states that the necessary connection with a protected characteristic can arise where ‘*the unwanted conduct is related to the protected characteristic, but does not take place because of the protected characteristic*’— para 7.10.

324. The language of section 26 (1) b) is strong and looks for effects which are serious and marked. It is wrong to cheapen them. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: Omooba v Michael Garret Associates [2024] IRLR 440 per Eady J at [103] citing Elias LJ in Grant v HM Land Registry [2011] EWCA Civ 769 (paragraph 47) and Langstaff P in Betsi Cadwaladr University v Hughes UKEAT/0179/13 (paragraph 12).

325. The word ‘environment’ signifies a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration. A comment made ‘once or twice’ might not cause real offence, but if used more often could lead to a finding that the remarks created an intimidating, hostile, degrading, humiliating or offensive environment. Some of the factors a tribunal might take into account in deciding whether an adverse environment had been created include the fact that the relevant conduct was not directed at the claimant, that the words objected to were used only occasionally and that the claimant made no immediate complaint (although tribunals should be cautious of placing too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint.): Weeks v Newham College of Further Education EAT 0630/11 and Pemberton v Inwood 2017 ICR 929, EAT.

326. Where a claim is brought on the basis that the unwanted conduct had the purpose of violating the employee’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, the tribunal needs to examine the perpetrator’s intentions and is likely to need to draw inferences from the surrounding circumstances. If it finds that the conduct had the purpose of violating a claimant’s dignity – for example where conduct is repeated when a claimant has clearly objected to it - it is not necessary to establish that it also had the proscribed effect.

327. Where a claim depends on whether the conduct has had the proscribed effect, the focus is on the effect. The effect can be produced whether the perpetrator intends it or not, and regardless of whether the perpetrator knows that the claimant had the protected characteristic.

328. In deciding whether the conduct has the relevant effect, tribunals must take into account the claimant's perception, the other circumstances of the case, and 'whether it is reasonable for the conduct to have that effect' — S.26(4). The test therefore has both subjective and objective elements. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser had on the claimant, while the objective part requires the tribunal to ask itself whether it was reasonable for the claimant to feel the effect complained of. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so. The tribunal must also take into account all the other circumstances: Pemberton v Inwood 2018 ICR 1291, CA. The subjective element of the harassment definition means that conduct related to a protected characteristic that is not intentionally harmful can still have a damaging effect. The 'other circumstances' of the case to be taken into account under section 26(4) may be used to shed light both on the complainant's perception and on whether it was reasonable for the conduct to have the effect. The EHRC Code notes that relevant circumstances can include those of the complainant, such as the claimant's health, including mental health; mental capacity; cultural norms; and previous experience of harassment. It can also include the environment in which the conduct takes place: see para 7.18.

Harassment related to disability EQA s 26 – Analysis and Conclusions

329. We are satisfied that at no stage were the actions of Ms Kehoe or Ms Balsom intended to, nor did they have the purpose of having the proscribed effect.

330. We have found above that:

330.1. Iman did make a comment to Ms Kehoe about the claimant's bowel functions but Ms Kehoe shut down that discussion. The comment by Iman was unwanted conduct directed towards the claimant but Ms Kehoe criticised Iman for her conduct.

330.2. Ms Kehoe had occasion privately to warn the claimant about discussing bowel function with a client. This was an entirely appropriate management action to take in response to a report to her by a visiting manager who had overheard the conversation with a client. The use of

the expressions 'being vocal about your toilet habits' and 'oversharing' in this context even if they occurred was not objectively unreasonable; and

330.3. Ms Kehoe engaged in private dialogue with the claimant about his bowel condition in which she made empathetic reference to her own family's experience with conditions affecting their bowel function. She did not adopt a dismissive attitude or tell the claimant to 'get on with it' or words to that effect;

330.4. Ms Kehoe did not engage in jokes or banter about his bowel habits or their effects.

331. The claimant's written submission paper also referred to Ms Kehoe creating medical shame and professional undermining by making his workplace accommodation requests a source of workplace tension. It is not clear to us what conduct is relied upon in this regard.

331.1. In so far as it is a reference to Ms Kehoe speaking to other staff about the claimant's absences, we find that such conduct was unwanted by the claimant. However, such enquiries would reasonably be expected in circumstances where there were uncertainties about his attendance, timekeeping and appropriate absence recording. Such conduct would likely be undertaken in those circumstances in relation to any employee and are objectively reasonable management inquiries. There is no evidence that the enquiries were conducted in an inappropriate manner. It was not reasonable for the conduct to be regarded as creating the proscribed effect.

331.2. Another occasion involved Ms Kehoe rejecting visuals the claimant had created for a promotion, but we are satisfied this was because they did not comply with branding guidelines. This again is objectively reasonable and reasonably foreseeable conduct in response to an extant policy. It did not relate to the claimant's impairments or disabilities. It is not reasonable for the conduct to be regarded as creating the proscribed effect.

331.3. In so far as the complaint relates to the conduct of the mediation meeting involving Iman, we recognise that Ms Kehoe was critical of the claimant's conduct and that, for him, was unwanted behaviour. However, as we have found above, Ms Kehoe had objectively reasonable grounds for criticising the claimant's conduct in the meeting and she did not do so in an inappropriate manner. It did not relate to the claimant's impairments or disabilities. It is not reasonable for the conduct to be regarded as creating the proscribed effect.

332. It is not clear to us what was relied upon as amounting to inappropriate medical speculation by Ms Kehoe. This matter was not argued, at least not

clearly, in the course of the hearing or in submissions.

333. We are not persuaded on the evidence that in the period before he was dismissed the claimant himself considered that his dignity was violated or that he was in a hostile etc. environment which related to any of his claimed impairments. On the contrary he expressed his enthusiasm for working for the respondent at the Store – his ‘happy place’. However, we recognise that during the initial period of his employment and again particularly from January 2023 the claimant was experiencing extremely challenging circumstances outside of work. It is our judgment that these external stressors made the claimant more anxious and exacerbated his impairments and this made him particularly susceptible and sensitive to implied criticism or challenge. He plainly did not get on with Iman, and there was reciprocal ill-feeling. He also plainly did not enjoy the change from the previous relaxed management style of Ms Blum during his early months to Ms Kehoe’s more exacting and robust style of management and her focus on stricter adherence to policies, but the change of management style was not connected with any of his alleged disabilities and he did not complain about any of the matters above until after he was told he was to be dismissed (save for the conduct of the mediation meeting and then not because it related to any disability but because he felt it was one-sided). However, even if he did perceive that his dignity was violated or there was a hostile environment relating to his disabilities or impairments we consider that it is not objectively reasonable for the conduct relied upon to be regarded as having the proscribed effect.

334. In so far as the claimant relies upon his perception that Ms Kehoe adopted a dismissive attitude towards his disabilities/impairments in her conduct of the probationary review meeting and in her decision to terminate his contract early, we accept that the claimant had this perception and that it amounted to unwanted conduct. We do not accept that the process or language adopted or the decision made violated the claimant’s dignity. Whilst the hearing was a one-off event, the decision arising from it did have long term consequences and so was capable of creating an ‘environment’. But the issue therefore is whether in all the circumstances it was reasonable for Ms Kehoe’s conduct and decision to be regarded as creating the proscribed environment which related to his disabilities and impairments. On balance we are not persuaded that it should. Our reasons are:

334.1. The process was a probationary review. It was conducted broadly in accordance with the published policies, the language used was respectful, expressed a desire to be supportive and was appropriate. The claimant was offered an opportunity to take a break. The claimant himself accepted that the position ‘looked atrocious on paper’. At the time the focus of his dissatisfaction appeared to be that he felt that he had been treated more harshly than Iman, and that the meeting did not

focus sufficiently on the good things that he had achieved. It does not follow from that his disabilities were treated dismissively.

334.2. He later complained that Ms Kehoe did not take proper account of the (disability related) reasons for his non-compliance and absences. But the claimant himself had only shortly before the meeting begun to rely on a medical justification for his reporting non-compliance and was emphasising the external stress factors as reasons. Although we consider that Ms Kehoe could have paused to review options short of dismissal in light of the new points about mental health being advanced by the claimant, Ms Kehoe's assessment of the position was an objectively justifiable one on the facts as they stood before her.

335. Accordingly, the claim of harassment on the ground of disability is not well-founded and is dismissed.

Remedy

336. In light of our conclusions no remedy hearing is necessary.

Approved by Employment Judge N Cox

Date: 2 January 2026