



# EMPLOYMENT TRIBUNALS

**Claimant:** Christopher Alexander

**Respondent:** Hexagon Housing Association

**Heard at:** London South (in public by video) **On:** 6 – 13 October 2025

**Before:** Employment Judge N Wilson  
C Edwards (non legal member)  
J Clewlow (non legal member)

## Appearances

For the claimant: Claimant (in person)  
For the respondent: Mr Andrew MacPhail (counsel)

## RESERVED JUDGMENT

- a. The claimant's claim of unfair dismissal under section 94 of the Employment Rights Act 1996 is well founded and succeeds.
- b. The claimant's claim of direct disability discrimination [in respect of his dismissal] under section 13 of the Equality Act 2010 is not well founded and is dismissed.
- c. The claimant's claim of discrimination arising from disability [in respect of his dismissal] under section 15 of the Equality Act 2010 is not well founded and is dismissed.
- d. The claimant's claim of failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 is not well founded and is dismissed.
- e. The claimant's claim of Harassment relating to race under section 26 of the Equality Act 2010 is not well founded and is dismissed.
- f. The claimant's claim of direct race discrimination under section 13 of the Equality Act 2010 is not well founded and is dismissed.

- g. The claimant's claim of direct age discrimination under section 13 of the Equality Act 2010 is not well founded and is dismissed.
- h. The claimant's claim of Harassment relating to age under section 26 of the Equality Act 2010 is not well founded and is dismissed.

## **REASONS**

### **Background**

- 1. The claimant was employed by the respondent, housing association as a neighbourhood services officer from 28 November 2018 until 17th June 2020. ACAS early conciliation started on 14 September 2022 and ended on 16 September 2022. The claim form was presented on 16 September 2022.
- 2. The claimant has been represented throughout by his brother Mr James. He represented himself during the final hearing.
- 3. The claimant is making the following complaints
  - i. Unfair dismissal under section 94 of the Employment Rights Act 1996 ('ERA')
  - j. Direct disability discrimination [in respect of his dismissal] under section 13 of the Equality Act 2010 ('EqA')
  - k. Discrimination arising from disability [in respect of his dismissal] under section 15 EqA
  - l. Failure to make reasonable adjustments under sections 20 and 21 EqA
  - m. Harassment relating to race under section 26 EqA
  - n. Direct race discrimination under section 13 EqA
  - o. Direct age discrimination under section 13 EqA
  - p. Harassment relating to age under section 26 EqA
  - q. Indirect discrimination relating to sex/age and race under section 19 EqA
- 4. The disability relied upon is sleep apnoea. Disability is admitted.
- 5. The claimant's age group is over 60 and he compares himself with people in the age groups under 40's.
- 6. The claimant describes his race as black.

### **Application to strike out and decision with reasons**

7. Before we started to hear any evidence, we had to determine an outstanding application made by the claimant.
8. The claimant makes an application to strike out the response under Rule 38 of the ET Rules of Procedure 2024. The application is dated 19 September 2025. At the time of making the application the respondent had failed to comply with the case management orders ('CMO') of EJ Reed made at a preliminary hearing on 20 December 2024. The CMO and record of that hearing was not sent to the parties until 28 May 2025.

### **Legal framework**

9. Rule 38 provides that

**38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—**

**(a) that it is scandalous or vexatious or has no reasonable prospect of success;**

**(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**

**(c) for non-compliance with any of these Rules or with an order of the Tribunal;**

**(d) that it has not been actively pursued;**

**(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).**

**(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**

**(3) Where a response is struck out, the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).**

**(4) Where a reply is struck out, the effect is as if no reply had been presented.**

10. The claimant's application is advanced under rule 38(1)(c) for noncompliance with orders of the Tribunal and under 38(1) (d) that it has not been actively pursued.
11. We have, when considering the application, on our own initiative, because it is inextricably linked to whether a lesser sanction can be imposed, also considered rule 38 (e) and whether a fair hearing is still possible.
12. The respondent has had notice of the application and has had the opportunity to make submissions in response today.
13. In deciding whether to order strike out the Tribunal should have regard to the overriding objective of dealing with cases fairly and justly set out in Rule 3 of the Employment Tribunals Rules of Procedure 2024.
14. This includes among other things ensuring so far as is practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance and avoiding delay.
15. The overriding objective requires that the proportionality of the sanction must be at the forefront of the Judge's mind having regard to the relevant default it's effect on the other side and whether a lesser sanction is available and appropriate.

### **Consideration of overriding objective**

16. In deciding whether to strike out a party's case for noncompliance with an order under rule 38 1 (c) a Tribunal will have regard to the overriding objective set out in Rule 3 of seeking to deal with cases fairly and justly. This requires a Tribunal to consider all relevant factors including:
  - a. The magnitude of the noncompliance
  - b. whether the default was the responsibility of the party or his or her representative
  - c. what disruption and fairness or prejudice has been caused
  - d. whether a fair hearing would still be possible
  - e. and whether striking out or some lesser remedy would be an appropriate response to the disobedience

### **Magnitude of the noncompliance**

17. It is not in issue that the respondent has failed to comply with the case management orders to provide disclosure, to provide a file of documents and to serve witness evidence on time (or within any permitted agreed extension period).
18. Whilst we have a witness statement from Miss McKenzie, legal representative for the respondent, it falls short in providing any real explanation as to why the legal representatives failed to comply with the orders, other than Mr Lightburn (the case handler with conduct) was unexpectedly absent from 30 September 2025, however by that date all orders had long passed and not been complied with.

**Default was the responsibility of the legal representative.**

19. The respondent is legally represented, and the failures appear to lie squarely with the legal representatives as distinct from the respondent. However, the respondent's legal representatives have also had the opportunity since the initially suggested case management orders and the first preliminary hearing to properly prepare its response to this case. It is relevant that both parties have had a number of extensions of time granted at various previous preliminary hearings culminating in the order of Employment Judge Reed dated 27 May 2025

**What disruption and fairness or prejudice has been caused. Whether a fair hearing would still be possible and whether striking out or some lesser remedy would be an appropriate response to the disobedience.**

20. Whilst the respondent refers to the claimant's failures also, they do not assert that they are prejudiced by the delay in the claimant serving a schedule of loss or his witness statement late, and they do not advance any cross application to strike out presumably because it undermines their primary position that a fair final hearing is still possible notwithstanding their late disclosure and late exchange of witness evidence.
21. The respondent asserts there is no disruption or unfairness or prejudice caused primarily relying on the fact that in respect of what would have formed the defendant's disclosure, the claimant had the bulk of those documents in any event and therefore he could have prepared adequately for this hearing based on what was in his possession. They also rely on the fact that their witness statements are short and that there is time within this trial period to give the claimant time (perhaps of a day or two) to consider those statements and to prepare.
22. They also advance the fact that the claimant has chosen not to open the disclosure and hearing bundle emails which were sent to him on the 1 October 2025 and that was his choice. It is not in issue that the witness statements were not sent to the claimant until 3 October 2025 (the Friday before the hearing was due to start on Monday).
23. Taking into consideration the purpose of case management orders is to allow the parties to be fully prepared for the final hearing, including the time they have between disclosure of documents, the provision of a hearing bundle and preparation of their witness statements - it is plain that even if the claimant is given a day or two during this hearing to read the respondent's witness statements and to some extent familiarise himself with the bundle, even with prior knowledge of some of those documents he is placed at a significant disadvantage. It is clear he will be prejudiced not only in the preparation of his cross examination but also his own witness evidence has been prepared without sight of the respondent's disclosure. The purpose of the sequential orders in relation to disclosure, hearing bundle and preparation of witness statements is so that matters arising from disclosure can be addressed by both sides in their witness evidence. Ultimately the claimant has not had that opportunity to do so. The orders allow the parties

sufficient time between each of the directions and importantly before the final hearing date precisely so they can be properly prepared.

24. It is notable there have been a number of preliminary hearings in this matter and the last CMO of EJ Reed following a hearing on 20 December 2024 made the following case management orders:
- An amended response was to be filed by 6 January 2025
  - Schedule of loss was due by 25 January 2025
  - Disclosure was due to take place by 28 March 2025
  - File of documents was to be sent to the claimant by 28 March 2025
  - The parties were to agree the final hearing bundle by 9 May 2025.
  - Witness statements were due to be exchanged by 20 June 2025
25. The Order was delayed and not issued until 27 May 2025 and was sent to the parties on 28 May 2025. Notwithstanding this the claimant and the respondent will have been informed by the Judge at the PH in December 2024 orally of the deadlines for all orders. It is clear the claimant's lay representative (at that time Mr James) and the respondent's legal representatives will have (or certainly ought to have) made a note of those dates.
26. There is no adequate reason advanced as to why the respondent failed to comply with those orders other than it was the legal representative's omission. What is more, no explanation is then advanced as to why the claimant's correspondence, which the respondent accepts they received between January 2025 and April 2025, is not replied to. It is for legal representatives to have adequate systems in place to ensure monitoring of post and compliance with orders, whoever is dealing with the claim.
27. While the claimant says EJ Reed informed the respondent they were to assist him with 'admin' in line with the overriding objective, this is not recorded in the record of that hearing. What is evident, and ought to be plain to both parties, is that they were both ordered to comply with various directions including crucially disclosure and exchange of witness evidence. What is also more likely is that the respondent would be the party who is likely to be in possession and control of most (if not all) of the relevant documents and they are also under a duty to disclose documents which do not support their case having undertaken a reasonable and proportionate search.
28. The respondent has failed to comply with those orders. They have not only failed to comply prior to receiving the CMO of EJ Reed, but once received after it is sent out on 28 May 2025 they fail to seemingly engage with the claimant or make any progress with this case until they attempt to agree some further dates in an email of 8 September 2025 (after the deadlines for compliance have already passed).
29. In submissions they refer to the claimant not engaging with them at this point. The claimant's position is that he considered them to already be out of time. It remained open to the respondent (who clearly by this time were aware of their failure to comply with orders) in order to reduce the prejudice to disclose what they had and

to provide witness statements at that time. They still failed to do so only providing disclosure and a hearing bundle to the claimant on 1 October 2025. They also do not serve their witness evidence until 3 October 2025. No real explanation is provided for this delay. There is no explanation provided as to why no application was made to the Tribunal at any time for extensions of time for compliance and/or for relief from sanctions once they were already in breach of the earlier case management orders. Given they are legally represented they ought to have known of the steps to take and importantly the risk of strike out for noncompliance. The warnings are contained in the CMOs .

30. The magnitude of the lack of compliance must be assessed in the context of its effect.
31. Even if the parties can get over the initial lack of compliance due to the delay in the provision of the CMO following the PH in December 2024, they are clearly on notice of the orders when the CMO is sent on 28 May 2025. The claimant has clearly made efforts to engage with the respondent prior to the CMO being sent out. The respondent does not reply at all. The only attempt appears to be an email sent on 8 September 2025 in which a new timetable is proposed. This is actually not permitted to be agreed between the parties in any event as they only had permission to vary the dates up to 14 days between themselves. If the order was not received until after that permitted extension period legal representatives ought to know that they should have applied to the Tribunal to seek to vary the orders/for an extension of time for compliance/for relief from sanctions (as may be appropriate in the circumstances).
32. The respondent's legal representatives knew by that email of 8 September 2025 that none of the directions had been complied with by them yet still make no attempt to do so until 1 October 2025.
33. Had they served everything late, but the claimant still had sufficient time to prepare prior to this final hearing so that a fair hearing was still possible then we may accept that strike out was too draconian a step.
34. However, the ultimate question as is clear from case law is whether a fair trial is still possible notwithstanding the failure to comply.
35. We find it is clearly not still possible for the claimant to have a fair trial. The lesser sanction of costs penalties could properly be considered to be appropriate if a fair trial was still possible. The starting point remains is a fair trial still possible. The options available for us today are to allow the claimant some time in this 6-day trial period to prepare for a final hearing when he has only received the hearing bundle and disclosure on 1 October 2025 which is only 3 working days before this final hearing was due to start. He did not receive the witness statements until 3 October 2025, less than one clear working day before the final hearing was due to start. He is not legally represented. Even if he had opened the documents and bundle link on 1 October 2025 it is still plain this is insufficient time for a legally represented party to be suitably prepared never mind a non represented party. It will not be possible to place the parties on an equal footing by simply giving the claimant time

within this trial period to read the documents and statements. First of all, there is clearly insufficient time to do so. The bundle is over 700 pages and whilst he may be familiar with a number of documents even 2 or 3 days is not sufficient time. He will also need to be able to amend his witness statement potentially to address any matters arising from the respondent's late disclosure which has possibly not already been addressed in his statement. Even if the claimant himself was informing us he could do that in this timescale (which he is not), this will have already taken up half of the allocated 6 days for his final hearing, if not more, and it will certainly be no longer possible to conclude this hearing in the remaining time. The likely outcome will be the hearing going part heard in those circumstances. In any event we find this option is not viable as we are not persuaded that allowing a few days preparation only will place the parties on sufficient equal footing and that the claimant will get a fair trial as a result. The other option is to relist the final hearing. The issue with this is that the events which are the subject matter of these claims occurred several years ago. The claim was issued in 2022. We are now 3 years on from that. It will be another 18 months to 2 years at least before this case can be relisted. It is plainly not in the interests of justice to adjourn this case for that length of time. The cogency of the evidence will be significantly impacted, and we are therefore not persuaded that either party will receive a fair trial if we were to adjourn the hearing and simply apply the lesser sanction of costs. In applying any lesser sanction, the effect is either the claimant does not receive a fair trial in this 6-day listing or neither party receives a fair hearing by an adjournment which results in a further period of delay because the matter will not be listed for a further not insignificant period.

36. The respondent raises the claimant's failures, and we have also considered those. The claimant's failures to comply can to a large extent be explained by the fact that
- a) as a litigant in person, he was without the CMO which recorded the actual orders made until after 28 May 2025 albeit we accept he should have known what orders were made and the deadline for compliance as he/his lay representative ought to have made a note of the deadlines for compliance during the hearing.
  - b) between the PH in December 2024 and the order being sent out he makes clear attempts to agree a timetable so that directions can be complied with, but the respondent fails to engage or respond.
  - c) he is not legally represented so on balance it is understandable why he would not provide his evidence or disclosure unilaterally.
  - d) He has still served his schedule of loss and witness statement albeit it late and the respondent does not say they are prejudiced as a result of any late service in this regard. The respondent to the contrary argues a fair trial is still possible in this current listing so clearly, they do not consider themselves to be conversely prejudiced by the claimant's late compliance.
37. We have considered the relevant case law and considered lesser sanctions, and we find that lesser sanctions would ultimately result in the parties not being on an equal footing and a fair trial not being possible. We have considered if strike out is proportionate and we find that it is based on the facts of this case.

38. The respondent's response is accordingly struck out under Rule 38 1(c) and 38 (1) (e).
39. The effect is as if the respondent has never filed a response.
40. The claimant still has to discharge his burden of proof in relation to this complaints and therefore in accordance with the overriding objective we consider it is appropriate to allow the respondent to cross examine the claimant limited to his witness statement and ET1/particulars of claim, to assist the Tribunal in making its decision but the respondent will not be permitted to lead evidence or rely on their disclosure documents.
41. The claimant has failed to provide any disclosure of his own and as such neither party will be permitted to rely on any documents, and the matter will therefore proceed with the claimant's oral evidence and his witness statement alone.

**Application to rely on disclosure documents – decision with reasons**

42. The respondent's application for permission to rely on their documents to the extent that they are referred to in the claimant's witness statements was also refused.
43. The respondent makes an application to rely on documents either by way of, during cross examination, being permitted to refer to relevant contemporaneous documents which have previously been disclosed to the claimant and which he has seen and referred to in his witness statement or by being permitted to rely on the capability documents (both the informal and formal processes) which form part of their disclosure and are contained in the hearing bundle. We considered both parties submissions.
44. Mr MacPhail argues that following a strike out Rule 38 (4) indicates the next step is Rule 22 and Rule 22 (3) reflects how the respondent may only participate to the extent permitted by the Tribunal. Rule 22 (2) highlights the ET must decide whether on the available material a determination can properly be made. Mr MacPhail states that under Rule 22 (3) the respondent can make an application to participate and rule 22 (2) would appear to suggest that all available material is taken into account. He suggests a reasonable inference is available material will probably be in a bundle prepared for the Tribunal. The respondent states they did not have the opportunity to make representations on not allowing documents to be relied on.
45. It is plain that the effect of strike out of a response under rule 38 (3) is as if no response has been presented as set out in rule 22.
46. Rule 22 (2) therefore comes into play in circumstances where no response has been received, the response is rejected, or the case is not contested.

47. It therefore envisages a situation where, because there is no response, where the ET can on the available material make a determination a judgment can be issued. In other words, based on what may be in the claim form and/or the particulars of claim. The wording '*which may include any further information*

*which the parties are required by the Tribunal to provide*' again is in the context of no response having been received/the response has been rejected. The reference to the respondent being able to participate to the extent permitted again envisages remedy as distinct from leading evidence on liability. If it did not it would make no sense for the wording to appear in a rule governing situation where a response is not filed or is rejected.

48. The decision on the strike out application was to strike out the response. The effect of this strike out is that the claim proceeds as if the response has not been filed and the respondent can therefore not lead evidence nor rely on their disclosure provided in support of any response. That is the effect of the strike out (unless the Tribunal requires further information from the parties and the circumstances in which that information will be required from the respondent is in relation to remedy nor liability). The claimant does not seek to rely on the documents the respondent seeks permission to refer to in cross examination and submissions. The Tribunal has already permitted the respondent to cross examine the claimant as it will assist the Tribunal with regard to the issues to determine in the case. The result of allowing the respondent to be able to rely on their disclosure documents by reference to rule 22 (2) is to essentially allow them to get around the fact they cannot lead evidence or rely on their disclosure in defence of the claim. That cannot plainly be right or the intended purpose of Rule 22 (2) and Rule 22 (3) and the application is accordingly refused. It is not that the ET will have a one-sided view which is not in the interests of justice as Mr MacPhail argues, but it is that the response has been struck out and therefore the respondent has lost the chance to positively challenge the claimant's case.
49. The respondent's argument that dealing with the case based on the claimant's witness statement alone in absence of available contemporaneous documentation being contrary to the interest of justice is not accepted. The effect of strike out of the response is that the respondent cannot lead evidence.
50. The Tribunal can determine the issues based on the claimant's witness statement and oral evidence. The respondent essentially would get a windfall from still being able to rely on documents which the claimant was not disclosed until 1 October 2025 and whilst the respondent states he had seen a lot of those documents beforehand they have not satisfied us of the precise extent and degree of the claimant's knowledge of those documents.

#### **Indirect discrimination claim**

51. We decided not to allow any new information to be relied upon about the indirect discrimination complaint and to proceed on the basis of what is in the case management order and anything in the claimant's witness statement about the indirect discrimination complaint.
52. Following a case management hearing which took place before Employment Judge Evans on 4 October 2023 (the case management order is dated 4 October

2023 and at page 85 of the bundle) the claimant was ordered amongst other things to provide the following further information and clarification in relation to the section 19 indirect discrimination complaints:

- At paragraph 9.1.1 [page 98] the claimant was to clarify the origin of the obligation to conduct an audit of equality diversity or inclusion if he says it was a legal obligation.
- At paragraph 9.4.1 the claimant was to provide details of the particular disadvantage to which the PCP would put people who had his disability
- At paragraph 9. 4.2 the claimant was to provide details of the particular disadvantage to which the PCP put people who were black
- At paragraph 9.4.3 the claimant was to provide details of the particular disadvantage to which the PCP put people who were in his age group..

53. The order of EJ Heath dated 15 April 2024 [page 180] at paragraph 2 makes it clear that the issue at paragraph 9 of the list of issues was a claim of indirect race, age and disability discrimination. Those claims it is recorded are the ones the claimant sought to bring by amendment.
54. EJ Evans it is noted listed the matter to amend the claim to include the indirect discrimination complaints as set out at paragraph 9 of the list of issues if the respondent objected to the application to amend. The Order of EJ Evans sets out at paragraph 31 and 32 the discussion of the list of issues and it was explained to the claimant that the claim currently was as set out in the claim form and not in later documents prepared by the claimant. It was explained to him that if he wanted to pursue claims not set out in his claim form then he would need permission of the Tribunal to amend. Consequently, the list of issues is set out in his Order against this background. The section 19 indirect discrimination complaints are therefore ones which required permission to proceed as they were not in the original claim form. The order of EJ Heath also makes this clear at paragraph 2.
55. At the hearing on 15 April 2024 EJ Heath deals with the application to amend and states that any allegations for the indirect discrimination claim which was not set out in the List of Issues within EJ Evans' CMO was refused. What EJ Heath ordered was for the claimant at para 32 to provide the information required in paragraphs 9.4.1. to 9.4.3 of the Order of EJ Evans by 27 May 2024. It is notable the claimant was informed at that hearing that within the application to amend to include the indirect discrimination complaint the Judge struggled to understand or follow the indirect discrimination claim and struggled to understand what the PCP was even after asking the claimant to clarify it. The application to amend was refused so the only indirect discrimination claim permitted to proceed is as set out in the list of issues in the Order of EJ Evans.
56. The claimant has been put on notice since the first day of this final hearing that it appears this further information has not been provided by him. He was given a number of opportunities over the course of Monday and Tuesday (first and second days of this final hearing) to to clarify the following:

- a. whether he has provided a response in compliance with the order of Employment Judge Heath and has provided the information requested in the Order of Employment Judge Evans by 27 May 2024.
  - b. if he has provided this information he has been asked to direct the Tribunal to where in the bundle evidence of that compliance is contained or to refer to any e-mail or letter that he has sent to the Tribunal and/or the respondent setting out this further information.
  - c. finally in addition the claimant was given the opportunity by me to articulate as best as he could what the disadvantage was in relation to each protected characteristic in relation to the PCP he relies on.
57. The claimant has therefore had sufficient opportunity to confirm and evidence to the Tribunal his compliance with this request for further information and clarification as ordered by EJ Evans.
58. The claimant says he believed these orders have been complied with and he was not aware there was anything outstanding at the start of this hearing. He also mentioned believing that either subsequent applications or subsequent hearings meant this had been dealt with or was no longer outstanding.
59. It is difficult to understand if the claimant believes that he has clarified the disadvantage why he has been unable to refer to which letter to the Tribunal this clarification can be found in. It is noted he refers to April May and June 2024 being particularly challenging for him for personal reasons and this may have impacted his recall about that time.
60. There is a significant amount of correspondence received from the claimant in this matter throughout these proceedings. I cannot find any clear clarification of the particular disadvantage in relation to the PCP amongst the correspondence received. Whilst there is a lot of general narrative about what PCPs are in broad terms and what the claimant considers to be indirect discrimination in the claimant's separate application to amend his claims, to include new section 19 claims, that application was refused by EJ Heath. Further there is no express reference to the disadvantage specifically in relation to the PCP he relies on for the original section 19 complaint as set out in the order of EJ Evans and nor can it be reasonably inferred from the application to amend that he brought. Notably EJ Heath was unable to understand the PCP or the disadvantage from the application and sought to similarly clarify this with the claimant as part of that application to amend. This clarity was clearly not provided at the hearing before EJ Heath given at paragraph 32 of his Order he specifically asks the claimant to provide the information required in paragraphs 9.4.1 to 9.4.3 of the Order of EJ Evans by 27 May 2024. It is evident by virtue of this Order that by the date of this hearing and/or during the hearing itself therefore the claimant had not provided this information certainly not in a way which could be properly understood by the Judge.
61. Importantly when given the opportunity during this final hearing to try and articulate what the disadvantage is that he is asserting for each protected characteristic, the claimant was unable to articulate this for the Tribunal on day 2 of this 6-day hearing.

62. In any event the claimant's position is that he has addressed this in his witness evidence. He specifically referred us to his witness statement.
63. We do not find that the claimant has evidenced that he has provided clarification of the particular disadvantage as requested at paragraph 9.4.1, 9.4.2 and 9.4.3 of the Order of EJ Evans by the deadline imposed by EJ Heath in his Order dated 15 April 2024 for the claimant to provide this further information by the 27 May 2024 (set out at paragraph 32 and page 184 of the bundle).
64. The claimant also mentioned that he thought EJ Reed during the PH in December 2024 said words to the effect that they will 'start afresh'. The record of that hearing does not say that there was any variation or setting aside of any previous Orders. There is further time given for compliance with service of a schedule of loss, disclosure, preparation of hearing bundles and exchange of witness evidence so on balance that is likely what the Judge had been referring to if he had mentioned 'starting afresh'. If the Judge had however varied any order of EJ Evans in relation to the request for further information, it would have been referred to in the record of that hearing as any variation would most certainly have been recorded. We are not persuaded the claimant had good reason to believe that between the Order of EJ Heath and the Order of EJ Reed there became no requirement for him to provide the information he had been ordered to by EJ Evans.
65. In terms of the sanction for failure to comply with the orders, we find a lesser sanction than strike out is appropriate based on the nature of the noncompliance and its impact. The PCP has been identified, and it is only clarification of the legal obligation that was not provided. The disadvantage in relation to the PCP has not been clarified nor was the claimant able to properly articulate the disadvantage when given the opportunity. However, he maintains that he refers to the section 19 claim and provides this information in his witness statement. We therefore consider the appropriate lesser sanction is to stand back from strike out and to permit the claimant to proceed with his section 19 indirect discrimination complaint but he is limited to the matters set out in the list of issues for this claim as set out in the Order of EJ Evans and limited to the evidence he has provided in his witness statement (with any clarification in oral evidence) about this complaint. He cannot now add any new information to the complaint.
66. We started hearing evidence on day 3 of this 6-day final hearing having spent the preceding time dealing with various applications as aforementioned. This contributed to why oral Judgment was not able to be delivered and the Judgment being reserved.
67. The 714-page hearing bundle was not referred to save for the claimant's pleadings. The claimant's witness statement was the only witness statement admitted in evidence.
68. We heard sworn evidence from the claimant.

## Findings of fact

69. We disregarded the respondent's response, disclosure made by the respondent (and therefore the 714-hearing bundle save for the ET1/particulars of claim and the relevant list of issues) and we considered the claimant case against his witness statement and oral evidence when determining the claims.
70. The respondent was treated as though Rule 22 applied albeit we permitted questions of the claimant based on his witness statement and the list of issues to assist the Tribunal.
71. Rule 22 is not a default judgment, and the claimant does not automatically win all of his claims as a result of the response being struck out. The claimant is still required to prove the facts relied upon for his claims on the balance of probabilities. Where he bears the burden of establishing that treatment happened and that treatment could have occurred because of discrimination relating to a protected characteristic, he needed to give coherent evidence about those issues.
72. The claimant accepted in oral evidence that he started his employment with the respondent on 28 November 2018.
73. His probation period was extended by 3 months.
74. In June 2021 Ms Michelle Francis became the claimant's line manager.
75. The claimant accepted Ms Francis conducted monthly 1-1 meetings with him.
76. In October 2021 Ms Francis put in place a performance improvement plan for the claimant referred to as a PIP.
77. The claimant gave permission to the respondent to refer him for an occupational health ('OH') assessment in October 2021.
78. There was an OH assessment telephone call on 5 January 2022.
79. On or around 7 January 2022 Ms Francis conducted a review of the PIP with the claimant and the claimant accepted after that review the matter became more formal by way of a capability process which Ms Francis's manager conducted with him and it is agreed that the first one of those formal capability meetings took place on 3 March 2022 and the second one was on 27 April 2022.
80. The capability meeting on 3 March 2022 was conducted by Ms Rebecca Outram.
81. There was then a capability hearing on 13 June 2022. The claimant asserted this meeting was to decide if he was to be dismissed. There was a panel at this meeting comprising of Kerry Heath and Mr Nasser. We accept the unchallenged evidence

of Mr Alexander that Ms Rebecca Outram and Ms Francis also presented the case for the claimant's dismissal at this hearing.

82. The claimant in oral evidence accepted 'I imagine I would be' in response to being asked if he had been provided with various documents in advance of the meeting on 13 June 2022.
83. He accepted he was given a dismissal letter on 17 June 2022 following which he appealed the decision to dismiss but he did not proceed to the appeal hearing.
84. The claimant accepted his probation had been extended because he was informed by his line manager at that time that he had let himself down with poor record keeping and poor organisation. Mr Alexander accepted he was informed he should improve those things.
85. The claimant in oral evidence accepted that he may have informed Ms Francis during the 1-1 meetings in August and September 2021 that his diary management was patchy. He said he was not totally happy with the way he was working. He had been affected by sleep apnoea and not sleeping well. He also had personal issues with his family which took his time and effort, and he accepted that affected his performance.
86. The claimant recalled that during the 1-1 meetings, before the formal capability process, Ms Francis said he was not meeting KPI's (key performance indicators) and needed to improve. He recalled being informed he was not getting back to tenants. His evidence is that it became more challenging due to increasing calls coming in at the time of the lockdown period due to Covid 19.
87. The claimant informed both Ms Francis and Ms Outram of his sleep apnoea. He says on one occasion when he explained how he had to prepare to sleep they giggled. We accept he felt embarrassed. There is nothing in his witness statement or oral evidence that gives other examples of other occasions when they may have been in his words 'amused' by his sleep apnoea. His oral evidence was that it happened a few times, but it was not every day. His oral evidence was that he felt at the time it was because they were unfamiliar with the condition (of sleep apnoea). It is however notable he did not raise any informal or formal complaint(s) at the material time. Nor did he provide any details of other incidents where they were 'amused' or laughed aside from this one.
88. The claimant clearly did not consider the completion of the PIP was beneficial to him. His evidence was that it was a distraction from his role and it was merely a time and motion exercise. We accept his unchallenged evidence that he informed Ms Francis he did not consider it to be helpful. He stated he only completed one sheet.

89. Ms Francis raised the fact she did not think he had improved sufficiently in the review meeting held in January 2022 and Mr Alexander accepted in oral evidence that she drew the conclusion because he had not completed the forms.
90. By the time of the November 2021 1-1 meeting the claimant had been referred to OH and although he could not confirm if the ASB (Anti Social Behaviour) training came up in this meeting he accepted there were several discussions about the ASB training as it was an integral part of his duties. He recalled having to do the training which was a modular exercise. The claimant did not complete all the exercises; he said he recalls he fell behind and did not meet the deadline for completion of all the exercises.
91. By the time of the December 2021 1-1 meeting therefore his ASB training remained incomplete.
92. The claimant did not articulate a cogent explanation as to why the training was not completed. His evidence was initially that the training was not taxing, and he was not learning anything from it and it was too easy therefore he did not prioritise it. He also stated there were more critical duties and that is how in his words 'it came to be I wasn't interested in doing it'. This is at odds with him accepting the ASB training was integral to his duties.
93. He later gave a slightly different answer to this, namely that because of the challenges he was facing with his health and workload it wasn't a priority. On balance we are persuaded that he simply thought the training was too easy and therefore chose to not make it a priority to complete notwithstanding the course was integral and important to his role and that he knew this.
94. In the December 2021 1-1 meeting Ms Frances made a suggestion to the claimant to take naps during the day. We find this was a genuine offer, despite what the claimant says, given he himself in his witness statement says that she asserted it was permissible under the respondent's hybrid working policy. It is clear based on his own evidence that he has by this time made her aware of his sleep difficulties. It is difficult to understand why he would conclude this was a dismissal of his struggles when she refers to a working policy which presumably could make adjustments to accommodate napping during the day. Admittedly she may not have understood his condition fully, but this does not mean the offer was not a genuine attempt at a solution. Given the context he provides for the comment we find it was a genuine attempt by Ms Francis to offer a solution to someone describing difficulties with sleep and ensuing tiredness during the day.
95. There was an OH report produced on 5 January 2022. The claimant was provided with a copy of this report. He has not disclosed it as part of his disclosure, and he objected to the respondent relying on their disclosure documents during an earlier application. We assume this OH report was part of the respondent's disclosure but in any event the claimant in evidence confirmed he was given the report and

therefore presumably it was in his possession, and he could have therefore disclosed it in support of his case.

96. Mr Alexander confirmed that Ms Francis on 7 January 2022 told him he was being moved to a formal capability process because she was unsatisfied with his performance at the time. Mr Alexander said in oral evidence he needed more help than what the respondent was offering, but he gives no evidence either orally or in his witness statement about what measures the OH report stated the respondent should take which they did not put into effect. We are left with no evidence about what the outcome of the OH referral actually was in terms of whether any adjustments were indeed recommended and what they were. Nor was the claimant in oral evidence, when asked about this, able to articulate what he is saying the OH report suggested he needed which was not done or followed by the respondent.
97. We accept during the 1-1 meetings Ms Francis was informed of the claimant's sleep apnoea.
98. We accept Ms Outram was also aware of the claimant's sleep apnoea prior to the decision to dismiss.
99. The claimant collapsed at work on 27 September 2021. In his witness statement at paragraph 25 the hospital diagnosed dangerously high blood pressure, and his GP was therefore prompted to reassess his hypertension medication. This therefore appears to be the result of a separate condition to the sleep apnoea but the claimant at paragraph 28 of his witness statement says he believed the exhaustion and sleep apnoea had contributed to his collapse. It is however notable there is no medical evidence to support his and nor does the claimant himself say he was informed of this link by the hospital (nor notably that he informed the hospital of this and queried if for example the collapse could be related to the sleep apnoea). On balance we conclude the collapse related to his unrelated high blood pressure.
100. On 15 January 2022 the claimant's son was admitted to hospital requiring surgery. The claimant accepted this inevitably impacted him and preoccupied his mind at that time.
101. Following this the claimant caught Covid 19 (a positive test on 13 February 2022). The claimant accepted the respondent delayed the planned formal capability process following his getting Covid 19 until March 2022.
102. The claimant was off sick with Covid 19 and we accept he returned to work before he felt fully better. We find this was due to Ms Francis (when he tested positive for Covid 19) having raised his sickness absence and mentioning to him that his sickness record could trigger disciplinary action. The claimant returned to work after 8 days. We accept the claimant's evidence that she also later informed him

he had not met the threshold for triggering any disciplinary based on the actual days off sick he had taken in the relevant period.

103. We find the claimant was worried about his sickness absence and the information Ms Francis had given him regarding potentially triggering the disciplinary policy for sickness absence. Accordingly, we accept the claimant returned from having Covid 19 sooner than feeling fully fit because of this worry.
104. Whilst the February 2022 capability meeting was therefore delayed by the respondent, the respondent did immediately hold the capability meeting on the claimant's first full day back at work after being off sick with Covid 19 on 3 March 2022. We accept the claimant's evidence that he informed Ms Outram at this meeting he had not slept the night before and was exhausted but the meeting continued despite him not having a companion with him.
105. In relation to the companion issue the claimant was allowed to have permitted people to accompany him to the meetings. They had to be either a Union representative or another employee.
106. At the meeting on 3 March 2022 the claimant was asked by Miss Outram what reasonable adjustments he needed. Mr Alexander in his evidence stated he did not understand what she meant by this. He said he later found out it related to his disability, and his evidence is that her asking in this way was not helpful.
107. In oral evidence the claimant states the meeting was hostile. He did not raise this as a complaint at the material time. We accept his evidence that he felt the tone of the meeting was hostile.
108. We do not however understand why he would not understand the request for reasonable adjustments. By the time of this meeting Mr Alexander had received his OH report. He will have known the contents and what steps, if any, the OH report recommended his employer make if any adjustments were indeed recommended for his role in light of his disability. Mr Alexander points to no such adjustments being recommended and not implemented by the respondent in either his witness statement or his oral evidence.
109. Mr Alexander's witness statement refers to being told what to do when referring to the way in which he was doing his estate inspections in a 'condescending way'. This reference appears to relate to a conversation where the claimant was explaining why he was doing the estate inspections as he was doing and why he could not stay on the estate as Ms Outram was suggesting. The claimant says this was because it put him at risk as a lone worker. The claimant notably in oral evidence states Ms Outram said, 'you will do as you told' or 'words to that effect'. We cannot therefore be certain that this is precisely what was said. The claimant clearly states it was 'words to that effect' therefore he is subjectively interpreting what she said to be 'you will do as you told'.

110. What we do find from the oral evidence is the claimant accepted during the meeting (on 3 March 2022) there was discussion about the claimant's objectives and he was informed that he will be dismissed if he failed to meet the targets. One of those objectives was that he was given direct instructions to use I Auditor in a particular way, but he considered that it was a more effective use of his time to do it in the way he had explained to the respondent and he also considered the way they wanted him to use it placed him at risk.
111. He was also informed there had to be a reduction in complaints and making sure he was getting back to customers. An objective was also set around ASB training and case management.
112. At the end of the 3 March 2022 meeting, he was asked if he required any support to meet the objectives and he states admin support. His evidence does not expand on what he specifically requested /required or what it was required for specifically. We have to conclude he made a general request for admin support without clarity about what specifically that looked like or which objectives such support was required for.
113. After this meeting there was a 1-1 meeting with Ms Francis on 9 March 2022, and the claimant accepted they discussed how he could be better organised. It is clear therefore there was an ongoing issue with his organisational skills.
114. His oral evidence changed and initially differed from his witness statement in relation to the videos he was asked to watch during this meeting which showed tools for organisation. His oral evidence initially was that they watched them for a couple of seconds. He then went on to say they watched various videos, and it took about 5-15 minutes. His witness statement says he watched them for 15 minutes and he accepts they were to address training on work organisation and prioritisation.
115. It is more likely than not that they watched a number of video clips based on his evidence for around 15 minutes and what is clear from his oral evidence was that they watched a part of each video and then discussed each one and he was told to look at them independently in his own time. He also accepted it was clear Ms Francis was attempting to assist him with organisation.
116. The claimant's evidence is that he felt positive leaving his meeting. It was after this meeting on 9 March 2022 that the claimant says as they left the meeting Ms Francis made the remark 'I do not think you are that old anyway'. He says at the time he was taken aback and felt uneasy about the appropriateness of the comment. His oral evidence accepted he did not raise any issue about the comment being made during the meeting on 13 June 2022 or as part of the appeal process. He stated why would he – he just wanted to get on with his work. He makes the comment in his witness statement that he believed from her comment she may have had conversations with her superiors regarding his age and suitability for the position, but we are not persuaded that this comment is evidence of this. This is Mr

Alexander making an assumption that is not supported with the surrounding facts. He accepts that Ms Francis was trying to support his organisation, he felt the meeting was positive and there is no other evidence to support age being an issue that was in the mind of the respondent during any of the meetings the claimant has had with them. We find this was a one-off comment made relating to age and we do not quite understand its context particularly where the claimant states the meeting was positive. We do not find as the claimant asserts that this hints at underlying bias related to his age and suitability for his role. Particularly where he accepts the maker of the comment Ms Francis had been supportive and positive and attempting to help him in this meeting.

117. Following this meeting the claimant's brother in or around 22 March 2022 suffered with some personal issues due to the repossession of his house and the claimant accepted in oral evidence that he was distracted by those issues and his witness statement confirms he was extensively engaged with his brother during that time assisting him especially around court dates involving his brother on 12 April and 25 April 2022.
118. We accept the claimant was on leave on 25 April 2022 to assist his brother but still took work calls. Later the respondent instructed him to take time off in lieu given he had worked on a day off.
119. The concluding meeting of the capability process was scheduled and took place on 27 April 2022.
120. The claimant accepted he was due to have ABS training on 25 April 2022, but it was postponed because of his personal matters. He also accepted between the 3 March 2022 meeting and 27 April 2022 meeting he knew he was meant to be completing the objectives which had been set.
121. We accept the claimant was keeping the respondent informed of the personal issues he was facing with his brother outside of work during this time.
122. In the capability meeting held on 27 April 2022, he was asked how he had got on over the relevant 7-week period. He mentioned in the meeting that he had been ill with Covid 19 prior to the 3 March 2022 meeting and due to the difficulties he faced he had not been able to complete all the tasks. However, his evidence is that he felt that he had made progress and was looking forward to working. He 'imagined' Ms Outram will have asked him to what extent he had completed the objectives. He considered they did not take account of his distractions when considering whether or not each of the objectives set had been hit. The claimant however accepted Ms Outram's explanation about not hitting objectives was a fair one. His oral evidence was that he only said this because he was being cordial and wanted to get on with his work. He says he felt energised and more positive because certain matters had been dealt with. It was unclear whether 'certain matters' pertain to his personal life outside of work. We have considered why he felt more positive about the job role particularly in relation to the objectives that were not

met. On balance we find his positivity must have related to personal issues outside of work having improved.

123. In this meeting Ms Outram informed the claimant that she would phone the claimant the following day. The claimant accepted he was shown a capability policy which was a written document setting out what steps they should take for underperformance. The claimant does not suggest the respondent failed to comply with any part of their own policy in his witness statement and nor did he say this in his oral evidence.
124. Ms Outram called the claimant on 28 April 2022 and the claimant says that she said to him she was going to be referring the claimant for dismissal.
125. The claimant was sent a letter with the decision on either the 28 or 29 April 2022. At one point in his oral evidence he said that he could not recall the letter saying Ms Outram was recommending a capability hearing be arranged and repeatedly said that the letter referred to his dismissal, but later in his evidence when referred to paragraph 57 of his witness statement in which he refers to the letter mentioning another hearing he had to accept the letter did indeed refer to a capability hearing. It is plain that the letter referred to a capability hearing being the outcome of the capability review meeting of 27 April 2022 and that he knew about this, because first of all a capability hearing is held on the 13 June 2022 and secondly the claimant stated in his oral evidence that he went to see HR later the same day to ask them what the process was.
126. The claimant believes the respondent was expecting him to just leave but there is simply no evidence of this other than this being his interpretation of what we find is a perfectly reasonable explanation of the process between himself and Ms Tracey Inniss the HR manager. First of all, it is evident the claimant approached HR. He asked Ms Inniss what the procedure was. It is therefore clear there was not yet any decision to dismiss and we find the claimant was being referred to a capability hearing which later did indeed take place. He asks Ms Inniss about the procedure, and she explains just that. The claimant's oral evidence about what Ms Inniss informed him was that she told him there would be a capability hearing and if he was not successful at that hearing then there would be an appeal, and he would have a right to attend. She said if he was unsuccessful at the capability hearing and then at the appeal, if future employers asked for a reference, the respondent would have to tell them he had been dismissed.
127. There is nothing to suggest that explanation was in anyway an attempt to get the claimant to leave. To the contrary, the evidence Mr Alexander gave about what Ms Inniss explained to him is that she simply clearly explained exactly what the procedure was as he had asked. His evidence changed later to say Ms Inniss tried to dissuade him from going down that course (in relation to the capability hearing and appeal). He was asked specifically about what it was about what she said that made him believe he was being dissuaded. His response was that it was Ms Inniss'

comment that if he was not successful and he was to ask for a reference then they would tell them he was dismissed. Given the context of the conversation and the fact the claimant approached HR and asks Ms Inniss for details of the process we find Ms Inniss on balance was simply informing him of the process. There is nothing about what the claimant says she said that persuades us this was an attempt to get him to leave.

128. The claimant also accepted he did not complain about this conversation to anyone, which we find on balance he is more likely to have done if he had at the time indeed believed it was an attempt to get him to leave.
129. Ahead of the capability hearing on 13 June 2022 the claimant makes a number of requests from his employer, and he accepted the respondent sent him various answers and provided him with documents he had requested in early May 2022. He also received a leaflet about the capability procedure. He was also given notes of the capability meetings which took place on 3 March 2022 and 27 April 2022
130. He asked for a McKenzie friend (a barrister) to accompany him to the meeting as he felt overwhelmed. He accepted there were no missing documents that he had asked for ahead of the 13 June 2022 meeting aside from the job description which he says he located himself in any event.
131. The claimant received advance notification of the capability hearing on or around 17 May 2022.
132. The claimant only recalled in evidence the letter setting out who would be holding the meeting and not what grounds were recorded. His witness statement does not refer to the 13 June meeting 2022.
133. The claimant was sent a link to the audio recording of the 13 June 2022 meeting, and he did not raise any complaint about it. He says this was because whilst he had asked for an appeal, for a number of reasons he did not go forward with the appeal. His oral evidence was that the first appeal hearing was arranged with insufficient time frame for him to be able to prepare. And by the time the respondent postponed that appeal to give him longer to prepare, his evidence is that he believed it would not serve his best interests to pursue it. The appeal therefore never reached a hearing.
134. The claimant accepted he did not make any complaints about the way the 13 June 2022 hearing was conducted. Despite having lodged an appeal this is not a complaint raised by him. The only complaint /matter he raised in oral evidence was being unhappy about not being allowed a companion in the meeting. He did accept he was told he could have a trade union representative or another member of staff with him, so we find he was not denied having someone attend with him. However, his case is that he is not a member of a Trade Union and the only other member of staff he would have asked was off sick and under management scrutiny themselves.

135. The claimant says the problem for him leading up to the 13 June 2022 capability hearing was he did not have time to prepare because of his work demands. He asked Ms Inniss when he spoke to her on 28 April 2022 if he would have time off to prepare for the meeting and she said that he would, but it did not happen. He then accepted he had sufficient notice of the hearing, but his issue was he did not get days off to prepare. This is contrary to what he asserts at paragraph 59 of his statement which clearly records he asked Ms Inniss for adequate 'time' to prepare for the capability hearing which at that time had not yet been scheduled. She assured him he would have time, but he says it was never broached again. He says his work schedule allowed little time for preparation. His oral evidence initially was he asked for time off then he changed his evidence to say he asked for time as per his witness statement. Yet he accepts he had plenty of notice and moreover he does not ask to postpone the hearing on 13 June 2022 if he had not had time to prepare for the meeting. Nor does he inform the respondent that he requires time to prepare for the hearing and that his workload is not permitting this.
136. He says he did not speak up adequately for himself in this hearing. He accepted the respondent gave him time to look for evidence on his laptop, but this was only about 15 minutes of time. We accept he felt uncomfortable during the meeting. Given he was still looking for evidence on his laptop, by now it certainly ought to have been evident to the respondent he was not perhaps as prepared as he ought to be given the outcome of the meeting could be dismissal.
137. He accepted he had been given the opportunity to be accompanied by the permitted people at the hearing. He was declined bringing someone else as McKenzie friend because he asked to attend with a barrister. We do not find this unreasonable given he was given the opportunity to have someone accompany him.
138. He was informed on the same day i.e. 13 June 2022 by HR that the hearing had been unsuccessful and he was given his dismissal letter at the same time. He then said in his oral evidence that he went to see Ms Francis who informed him this was his last working day and to clear his desk and to leave.
139. On the same day Ms Judith Harries e-mailed members of the housing team saying that the claimant had been dismissed (after his dismissal). The claimant says this was contrary to what the respondent did with others but refers to nowhere where this is either against the capability policy or procedure nor does he give any evidence of others who have been dismissed where emails were not sent. On balance we did not find it unreasonable nor out of the ordinary for an employer to email members of the team to inform them of someone in the team being dismissed. In any event we do not find the claimant was treated differently to how someone else would have been treated in the same circumstances. He gave no cogent evidence of how others were treated differently or what the usual practice was. The same can be said for him being escorted from the building. His list of issues refers to being frogmarched but notably his witness statement refers to him being escorted. We are not persuaded that this is different to how others in the

same circumstances would have been treated by the respondent. He gives no evidence of being escorted in this way being against any procedure nor of anyone else being treated differently despite referring to this being contrary to normal practice.

140. The claimant accepted in evidence that the dismissal letter referred to 3 failures. While we accept, he does not agree with those failures he recalled them in evidence as being related to failure to meet the objectives set during the capability process and that he had failed to complete estate inspections to the required standards as a result of poor organisation and time management.
141. Before leaving the premises on the date of dismissal the claimant asked for time to complete some arrangements for a case he was handling, which was given to him. He then says he was instructed to handover his laptop and personal items in front of colleagues and was escorted from the building. He gives no example in his witness statement or oral evidence of who he was treated differently to with regard to this specific process. We find it is more likely than not that someone in the same position would have similarly been asked to handover their possessions and be escorted from the premises. There is no evidence to persuade us the manner in which this was done was aggressive for example. We do not find this was unusual in the circumstances nor are we persuaded this was unique to Mr Alexander. Nor crucially that any of this related to any protected characteristics.
142. The claimant in his ET 1 states just because the respondent has black people on the internal capability hearing panel this does not make them less racist if the culture of the organisation is racist. When asked to explain what he meant by this he accepted Ms Kerry Heath and Mr Nasir were the panel for the capability hearing on 13 June 2022. He described Ms Heath as mixed race but not black and Mr Nasir he states was either middle eastern or mediterranean but also non white and in the claimant's words 'not black in appearance'.
143. Mr Alexander's oral evidence was that they were either racist or they colluded. He did not expand on who they colluded with and how or why. When asked about whether he was discriminated against therefore because of race by the panel on 13 June 2022 he changed his answer to it being more about the disability.
144. However, his ET1 when referring to the capability hearing panel clearly only advances the allegation that they were racist. There is simply no evidence the claimant advances to support this allegation other than he believes it because there was at a least one racist incident.
145. The only reference to alleged racist incidents in the claimant witness statement and the List of Issues is that on 17 June 2022 whilst he was awaiting to see Ms Francis, Mr Beasley the Income Team leader said in response to the claimant inquiring about setting up a rent account for a new tenant 'I'm fed up with you lot'. He says he felt violated, but it is wholly unclear what the context to that

conversation or remark was. His oral evidence about the comment gave no further context either. He believes the 'you lot' reference is to people of his racial background. We are not satisfied that it was. The claimant clearly speaks to Mr Beasley about something work related. Mr Beasley on balance could have been referring to any number of things when using the words 'you lot'; for example, the people doing the same role/job as the claimant or people asking him for things which he was fed up with. There is wholly insufficient context given by the claimant nor clarity about what specifically was said by the claimant before the comment, whether this was the first thing Mr Beasley responded with or whether a wider conversation was had to enable us to make any finding that this comment related to race.

146. In oral evidence he refers to a comment he says was belittling, which Mr Beasley made earlier (but gives no date for this allegation) when he allegedly remarked 'what going back and forth to the fridge'. He says this was made in a sneering way and in his oral evidence he gave the context to the conversation being that they were talking about walking and the claimant was saying how many steps he had done when Mr Beasley cut in with this remark. Again, there is nothing from this comment made in this context that enables us to find the comment related to race.
147. Mr Alexander accepted he never raised any complaints about these comments to the respondent and nor are they referred to in his ET1.

## Legal Framework

### Direct discrimination – age/race/disability – section 13

148. Under s.13(1) of the Equality Act 2010 read with s.9 EqA, direct discrimination takes place where a person (A) treats another (B) less favourably because of a protected characteristic - in this case race, age and disability- than that person treats or would treat others.
149. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.
150. In terms of the relevant legal framework, the matters which the Tribunal have had regard to when arriving at our decision are set out below.
151. We have considered the "mental processes" of the alleged discriminator pursuant to the case of **Nagarajan v London Regional Transport [1999] IRLR 572.**
152. This is often referred to as "motivation".
153. A few points to note about motivation: Motivation is not the same as motive.

154. We have also considered significant influence that is that the protected characteristic need not be the only reason for the less favourable treatment. It may not even be the main reason. Provided that the decision in question was significantly that is more than trivially influenced by the protective characteristic the treatment will be because of that characteristic it is important to identify the person who is alleged to have acted with the discriminatory motivation.
155. In this case the claimant clearly asserted in his oral evidence that Ms Francis was the perpetrator of age discrimination. He said Ms Outram was the perpetrator of the racist conduct. The list of issues makes it clear there are allegations of racist conduct against Mr Beasley. He also asserted Ms Inniss was the perpetrator of disability discrimination.
156. We have therefore considered the motivation of these individuals in relation to the discriminatory complaints based on the evidence from the claimant.
157. The claimant must establish that he was objectively treated in a less favourable way. It is not sufficient for the treatment to simply be different. The claimant relies on a hypothetical comparator, and we have to consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have had the protected characteristic relied upon.
158. The phrase *because of* is a key element of a direct discrimination claim. In **Gould v St Johns Downshire Hill [2021] EAT** Mr Justice Linden said in respect of determining ‘because of’

‘It has therefore been coined the ‘reason why’ question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a ‘significant influence’ on the decision to act in the manner complained of. It need not be the sole ground for the decision... the influence of the protected characteristic may be conscious or subconscious.”

159. Under section 136(2) Equality Act 2010 the claimant needs to show facts found on the balance of probabilities which could lead the Tribunal to properly conclude that the discrimination has occurred before any other explanation is taken into account. If the claimant succeeds with this then it is for the respondent to show that the contravention has not occurred. The Tribunal must first consider whether the burden does shift to the respondent. The claimant must show more than simply

there is a protected characteristic and a difference in treatment (**Madarassy V Nomura international PLC [2007] IRLR 246**). The operative point is whether the Tribunal could conclude there had actually been discrimination not simply that there might have been.

160. Section 136 clearly sets out a two-stage test. But the Tribunal is cautioned against applying that test in a way which is too mechanistic. This is important to ensure that discrimination is not incorrectly imputed into circumstances where the case is simply about unreasonable treatment for other reasons or unfortunate circumstances. There is a manifest difference between unreasonable treatment of a claimant and unlawful discrimination.
161. Once the burden has shifted, if it does, the respondent must show that the treatment was in no sense whatsoever due to the protected characteristic (**Igen Ltd v Wong [2005] IRLR 258**).
162. If the claimant successfully proves facts from which the Tribunal could properly conclude that there was less favourable treatment because of the protected characteristics relied upon than the respondent is unlikely to discharge its obligation under the shifted burden of proof because the response is struck out.

## **Harassment – section 26**

### Definition:

163. The EqA, creates three technical definitions of harassment.
164. In this case there has to be unwanted conduct related to the claimant's protected characteristic of sex
165. The relevant section of the EqA for the purposes of this claim is:

## **Section 26 Equality Act 2010:**

- (1) A person (A) harasses another (B) if-
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) The conduct has the purpose or effect of-
    - (i) Violating B's dignity, or
    - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

Unwanted conduct

166. It is important to note that just because a claimant may have laughed along with any harassment, that it was not unwanted. Equally, just because the claimant did not reject the harassment or take a grievance, does not necessarily mean it was unwanted. There are many reasons why someone may feel it is too hard to speak out or waits until they have nothing left to lose.

Related to a protected characteristic

167. The first type of harassment is “related to a... protected characteristic”. The phrase is relatively wide. It allows for a looser connection between the conduct and the protected characteristic than the “because of” test in direct discrimination.
168. Unlike with direct discrimination, it is not necessary to consider whether the alleged perpetrator would have treated someone without the relevant protected characteristic in the same way. Nevertheless, it is still useful evidence if it is shown that the perpetrator would not have done so.

Purpose or effect

169. Unwanted conduct comes within section 26 if it is **either purposefully intended** to violate dignity or create the relevant environment; **or** it has that **effect**. Harassment may therefore be intentional or unintentional.

Violating dignity/Creating an intimidating etc environment

170. Each type of harassment has the **purpose or effect of** either violating the employee’s dignity or creating one of the kinds of environment listed in section 26.

Proscribed effect: two-step test

171. Most harassment complaints are brought on the basis that the unwanted conduct had the *effect* of creating the relevant adverse environment. Section 26 has been interpreted as creating a two-step test for determining whether conduct had such an effect. The steps are:

171.1 Did the claimant genuinely perceive the conduct as having that effect?

171.2 In all the circumstances, was that perception reasonable? (**Pemberton v Inwood [2018] EWCA Civ 564**)

## Unfair Dismissal – section 94 ERA 1996

172. Unfair dismissal is governed by the Employment Rights Act 1996 ('ERA').
173. The Tribunal must find whether the claimant was dismissed and what was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996?
174. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses

## Discrimination arising from disability - section 15

175. Under S.15(1) EqA, a person (A) discriminates against a disabled person (B) if:

A treats B unfavourably because of something arising in consequence of B's disability, and

A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

176. Section 15(2) goes on to state that '[S.15(1)] does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability'.
177. It is therefore unlawful under S.15 for an employer 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. However, the employer can only be liable if it knew, or could reasonably be expected to have known, that the worker has a disability.
178. The first element of a claim under S.15(1) EqA is that the disabled employee must have been treated 'unfavourably'.
179. For a S.15 claim to succeed, the unfavourable treatment must be shown by the claimant to be 'because of something arising in consequence of [his or her] disability'. In other words, the discriminatory treatment must be a result of something arising in consequence of the claimant's disability, not the claimant's

disability itself. Or to put it another way, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability.

180. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, Mrs Justice Simler summarised a number of key points that govern the correct approach to a S.15 claim. The Tribunal must first identify whether there was unfavourable treatment and by whom. It must then determine what caused the impugned treatment, or what was the reason for it, focusing on the conscious or unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the impugned treatment and, as in a direct discrimination case, the 'something' need not be the main or sole reason for the unfavourable treatment but must have at least a significant (or more than trivial) influence so as to amount to an effective reason for or cause of it. The tribunal will then have to determine whether the reason or cause is 'something arising in consequence of' the claimant's disability.
181. The outcome of many claims under S.15 EqA turns on the question of whether the unfavourable treatment can be justified as 'a proportionate means of achieving a legitimate aim'.
182. Case law on S.15 has recognised a range of legitimate aims, including health and safety, safeguarding, protection of the public, protection of the employer's reputation, and the operational needs of the business.
183. As to proportionality, the EHRC Employment 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.
184. An employer has a defence to a claim of discrimination arising from disability if it did not know and could not reasonably have been expected to know that the claimant had a disability – S.15(2) EqA. However, the employer cannot simply ignore evidence of disability.

### **Indirect discrimination - disability/race/age – section 19**

185. All four conditions in S.19(2) must be met before a successful claim for indirect discrimination can be established. That is, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.
186. Section 136 EqA, which applies to any proceedings brought under the Act, requires the claimant to show 'prima facie evidence' from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed

an act of discrimination. S.136 goes on to provide that once the claimant has shown a prima facie case, the tribunal is obliged to uphold the claim of discrimination unless the respondent can show that no discrimination occurred

### **Reasonable adjustments – sections 20 and 21**

187. Under S.20 of the Equality Act 2010 (EqA), employers are required to make reasonable adjustments to alleviate disadvantages suffered by employees with disabilities. This duty is in effect a requirement to take 'positive action' to accommodate the specific needs of those who have the protected characteristic of disability. The duty may entail the modification of any provision, criterion or practice applied by the employer that places a disabled employee at a substantial disadvantage, as well as the provision of auxiliary aids and/or changes to the physical features of the workplace. In contrast to other areas of discrimination law, the duty to make reasonable adjustments can require an employer to treat a disabled person more favourably than it would treat others.
188. The duty to make adjustments under S.20 EqA comprises three discrete requirements, any one of which will trigger an obligation on the employer (or other person subject to the duty) to make any adjustment that would be reasonable. Under S.20:
- 188.1 the first requirement 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
  - 188.2 the second requirement applies where a physical feature of the workplace puts a disabled person at a similar substantial disadvantage in relation to a relevant matter, and
  - 188.3 the third requirement applies where the lack of provision of an auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter.
189. para 20(1) of Schedule 8 to the EqA provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know:
- in the case of an applicant or potential applicant for work, that an interested disabled person is or may be an applicant for the work in question – para 20(1)(a)
  - in any other case, that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid – para 20(1)(b).

190. In determining a reasonable adjustments claim, a tribunal will therefore have to consider the nature and extent of the substantial disadvantage relied on by the employee, make positive findings as to the state of the employer's knowledge of the nature and extent of that disadvantage, and assess the reasonableness of the adjustment (i.e. 'step') that it is asserted could and should have been taken in that context

## **Conclusion**

### **Direct race discrimination**

191. The claimant's direct race discrimination claim in the List of Issues asserts the following conduct:
- a. at the end of April 2022 did the claimant approach Ms Tracy Inniss the head of personnel and ask her for assistance when the respondent had begun its capability procedure if so did she tell the claimant that if he opposed dismissal or appealed again any dismissal any request for a reference would be responded to by the respondent saying that the claimant had been dismissed.
  - b. on 17 June 2022 did Mr Stephen Beasley the manager responsible for income shout very loudly at the claimant and say 'I am fed up with you lot' when the claimant approached him about a new rent account for a tenant.
  - c. on 17 June 2022 did Ms Judith Harries e-mail members of the housing team saying that the claimant had been dismissed because of capability (contrary to the normal practice of not emailing members of the housing team in this way when someone was dismissed).
  - d. on 17 June 2002 did Ms Harries 'frogmarch' the claimant from the building (contrary to the normal practice of not treating dismissed employees in this way).
192. In our Judgment the claimant gave no evidence which could lead us to conclude that he may have been the victim of discrimination because of his race. The claimant needs to prove facts from which the Tribunal could properly conclude that there was less favourable treatment because of race. It is only if he successfully does this that the burden of proof shifts to the respondent. Based on our findings of fact we do not find Ms Inniss said what is alleged in the list of issues. The claimant's own oral evidence fell considerably short of saying that she said if he opposed dismissal or appealed that they would give him an adverse reference. This is not what the claimant said Ms Inniss said, even when asked by me what

was it about the conversation that made him believe the respondent wanted him to leave. Based on what we have found she informed him we do not find the information given by Ms Inniss in relation to the capability procedure amounted to less favourable treatment. It was a proper response to an inquiry made by the claimant into precisely what the capability process was in light of the letter he had received referring him to a capability hearing. We do not consider the claimant has established facts from which we could conclude that the information provided by Ms Inniss was discriminatory before we consider the respondent's explanation. The claimant relies on a hypothetical comparator for his discriminatory complaints. We find a hypothetical comparator would have been given the same information. We are not persuaded that the claimant was being dissuaded of anything by Ms Inniss giving him this information. These are not facts from which we could reasonably conclude discrimination so as to shift the burden of proof on to the respondent. There is nothing compelling from the wider evidence the claimant gives which would allow us to find such facts.

193. Similarly with the comment ascribed to Mr Beasley- him shouting at the claimant saying 'I am fed up with you lot' there is simply no context given by the claimant to this conversation which allows us to find that this amounted to less favourable treatment which could in the absence of any other explanation be related to race. The reference to 'you lot' could be referring to any number of things including people in the same role as the claimant given it was said in response to a work query the claimant was making at the time. The claimant has given insufficient context or evidence about this comment which satisfies us that the comment could be related to race. The wider evidence about the comment Mr Beasley made about the 'steps conversation' also does not persuade us of this.
194. In relation to the two actions of Ms Harries, again we do not find the claimant has established facts from which we could reasonably conclude the treatment could be because of race. There is simply no wider evidence to support this. There is no evidence given about Ms Harries or any other interactions she may have had with the claimant. We empathise that the claimant may have considered it unnecessary or unreasonable or indeed embarrassing but there is nothing which persuades us the actions of Ms Harries could be motivated by race.
195. We do not find there are primary findings of fact from which the burden of proof can properly be shifted to the respondent. The claimant has failed to discharge his burden of proof and this claim fails.

### **Direct Disability Discrimination**

196. The claimant's disability is accepted as sleep apnoea. We find the respondent likely had knowledge of it at the time of dismissal based on the claimant's evidence of him informing both Ms Inniss and Ms Francis of the condition.

197. However, we do not find the claimant has discharged his burden in relation to facts from which the dismissal could have been tainted by disability. To the contrary his own oral evidence clearly points to the respondent raising concerns about his performance surrounding the estate inspections, his organisational and time management skills. We find the dismissal was because of his under performance. Based on the evidence heard we do not conclude that there are facts from which we could conclude in the absence of any explanation from the respondent that he was dismissed because of his disability.
198. The claimant has failed to discharge his burden of proof and the claim fails.

### **Direct Age Discrimination**

199. In the list of issues for this complaint the claimant says the respondent's Ms Francis suggested on a number of occasions between December 2021 and April 2022 that he should take a nap in the middle of the day.
200. His list of issues also says Ms Francis on a date in March 2022 when she and the claimant were walking away from a room where they had met says to him 'I don't think you are that old anyway'.
201. We have found that Ms Francis did make the comment 'I don't think you are that old anyway'. We do not understand the context for the comment as Mr Alexander's own evidence was the meeting it was said after was very positive and Ms Francis was trying to support him with his organisational skills at the material time. We do not find facts from which we could properly conclude it was less favourable treatment because of age. The claimant's evidence was lacking as to why this was less favourable treatment because of age. His witness statement suggests he felt this meant she may have been having conversations with her superiors regarding his age in relation to suitability for the position, but this is not raised by him in any of the meetings nor when he lodges the appeal. We find on balance this is an assumption the claimant makes but the wider evidence he gives does not support that the respondent did not consider him unsuitable for his role because of his age. It is plain from the evidence we heard the claimant was under performance management for his organisational skills and time management and for not meeting targets and for the way he was doing his estate inspections. There is no reference to age or any assertion made by the claimant about these matters relating to age at all in his wider evidence. We do not find on balance that it was less favourable treatment. The comment appears to be an attempt by Ms Francis to say something positive albeit perhaps misguided. The comment itself, again without sufficient surrounding context and based on the claimant himself reporting that it came after a very positive supportive meeting with Ms Francis, we can not properly conclude was less favourable treatment because of age.
202. In the list of issues, the claimant refers to Ms Francis suggesting he takes naps in the middle of day between December 2021 and April 2022 however his witness

statement only refers to one occasion when napping is mentioned namely during a 1-1 meeting on 13 December 2021. He also gave no cogent evidence of other instances in oral evidence. He states Ms Francis in this 1-1 meeting suggested he consider taking naps during the afternoon. He states he felt unappreciated when she recommended this and that the comment felt less like genuine concern and more like a dismissal of his struggles. However, in the same paragraph (39) of his witness statement he refers to having previously mentioned his difficulties with sleep and he makes it clear her suggestion is in response to him expressing those difficulties. It is also clear she made the comment in the context of saying it was permissible under the respondent's hybrid working policy. On the balance of probability, we find the comment was clearly suggested as a viable option permitted within the respondents own policy and it is more likely than not given the claimant had been explaining he had sleep difficulties this was indeed a genuine attempt at a solution albeit perhaps it may have belied a lack of understanding of sleep apnoea. At this time of course the claimant had not had his OH assessment so the respondent will not properly have understood the claimant's condition. There are no facts from which we can properly conclude that this could be unfavourable treatment because of age. Even his statement does not link the suggestion to age. The claimant has failed to discharge his burden of proof in relation to both age discrimination allegations and the claim fails.

### **Discrimination arising from disability - section 15**

203. The claimant says an inability to meet his performance targets arose in consequence of his disability.
204. We heard no cogent evidence to persuade us he did not meet his targets because of his disability.
205. The evidence focused on him being given a performance improvement plan due to issues he was having with organising and diary management. He led no evidence that this was due to his sleep apnoea. In relation to the failure to meet the objectives once the formal capability process had begun with the 3 March 2022 meeting ending with the meeting on 27 April 2022, his oral evidence was that he had difficulties in this period due to Covid 19 and family issues with his brother. He stated in oral evidence that in the meeting on 27 April 2022 he informed the respondent that because of all that had happened that the respondent was aware of (referencing his family issues), he had not realistically been able to complete all the tasks (namely the objectives set). He went on to say he told them (in the meeting) he had done a lot of work over the weekend resolving issues which would prevent him from doing his work which gives rise to the inference that the things that were preventing him from doing his work tasks and meeting his objectives even on his own evidence were the things that had happened with his family (not his disability). If he was referring to his sleep apnoea preventing him from meeting targets it is difficult to understand why this was not what he said in his oral evidence. His witness statement refers to navigating personal and medical challenges. He does not refer to his sleep apnoea specifically preventing him from

meeting targets when giving oral evidence. We also know he had other medical difficulties during the period including Covid 19 and high blood pressure (which had caused him to collapse). Most significantly during the period he was given to meet objectives, it is clear from the claimant's own evidence that it was his brother's difficulties which were his main focus and required his extensive engagement. It is clear on the balance of probabilities his inability to meet his targets and objectives during the relevant period was related to personal family matters which understandably was taking up most if not all his time. We are not satisfied the inability to meet his targets as set by the respondent arose in consequence of his disability as distinct from personal circumstances relating to his brother. During the 1-1 meetings between the claimant and Ms Francis which took place monthly since she became his line manager his organisational skills and diary management is an issue. We did not hear any evidence from the claimant nor have any medical evidence (which presumably was within his control, and he was able to disclose it as part of his disclosure if it supported this assertion), that the sleep apnoea resulted in any inability to meet his targets. We note that the claimant had a copy of his OH report and whilst he did not disclose it and therefore does not rely on it in as part of his evidence, he does not say in his witness statement, nor did he say in oral evidence that his inability to meet targets arose in consequence of his disability. The reasons for his performance management he accepted related to poor diary management and organisation skills and again the claimant gives no clear evidence to support that these failings occurred in consequence of his disability (albeit he does not make this specific allegation in his list of issues).

206. The claimant has failed to discharge his burden of proof and the claim fails.

### **Failure to make reasonable adjustments -section 20 and 21**

207. We find the respondent had knowledge of the claimant's disability certainly from the time he began to have monthly 1-1s with Ms Francis in or around August 2021, after she became his line manager. His evidence that he informed her of his sleep difficulties is accepted and not able to be challenged by the respondent.

208. The PCP relied on is 'performance targets which applied to all employees holding the role which the claimant had'. Neither his witness statement nor his oral evidence clearly clarifies what performance targets the claimant was referring to. In his witness statement he focuses on the ability to complete estate inspections but then states only two of the six neighbourhood officers completed their estate inspections in the previous quarter. He says the excessive workload was resulting in the inability to meet the targets, but the PCP refers to the targets not the workload.

209. In any event crucially the claimant gave no evidence about how the PCP placed him at a substantial disadvantage compared to someone without his disability. His list of issues states the disadvantage was that he was less able to meet them

because he worked more slowly. There is simply no clear evidence he advanced to support this. The claimant does not contend in his witness statement that he had to work more slowly because of his disability. To the contrary in his oral evidence he clearly stated on 27 April 2022 he was positive and wanted to return to work and family matters which had taken up much of his time and efforts since the events involving his brother on or around 22 March 2022 had been resolved and he felt positive and energetic and felt he had made progress. There is no mention even in his own evidence that his disability meant he had to work more slowly nor that the targets placed him at a disadvantage because he had to work more slowly due to his disability. Similarly in the meeting on 9 March 2002 in his witness statement at paragraph 49 he says he felt optimistic about resolving his performance issues. Nothing is mentioned about what was done to address any slowness in meeting targets due to his disability. It is not plausible that he would be positive about resolving his performance issues or meeting his targets if nothing was done to address him working more slowly if this was indeed something which arises in consequence of his disability.

210. However, he merely points to not being able to realistically complete his objectives because of the other issues outside work preventing from doing his work and notably refers to those being resolved implying an end to those circumstances not an ongoing state of affairs due to any disability. It is more likely than not if the claimant was working more slowly due to his disability this would be an ongoing state of affairs and that he would have mentioned it at the capability meeting and importantly it would have been in his witness statement.
211. We find the claimant has accordingly failed to discharge his burden of proof in relation to this claim. We are not satisfied the PCP placed him at any substantial disadvantage based on the wider evidence heard and our findings that his inability to meet his objectives/targets certainly during the formal capability process was due to unrelated family and personal issues. He makes no mention in his witness statement that during any 1-1 meeting he informs Ms Francis that he cannot meet targets due to his disability resulting in him having to work more slowly. If the sleep apnoea was resulting in such a disadvantage, it is more likely than not it would have been referred to by him when he was given the PIP and certainly during those 1-1s. The claimant does not mention it at all in any of the numerous meetings he had with the respondent and on balance we do not accept his inability to meet targets related to him working more slowly nor that he was working more slowly because of his sleep apnoea.
212. He has failed to discharge his burden of proof in relation to this complaint and the claim fails.

**Harassment related to race -section 26**

213. The claimant relies on the same conduct that he relies on for the direct race discrimination complaint as set out above.
214. I will not repeat our findings in relation to those separate allegations. We found none of the allegations related to the relevant protected characteristic of race.
215. It is important to note the claimant accepted in his oral evidence he did not complain about any of the allegations he made at the material time nor did he raise the conduct in the capability hearings or the appeal process.
216. Bearing in mind our primary findings of fact in relation to the conduct asserted against Ms Inniss we do not find this was unwanted conduct related to race. It cannot be reasonably concluded that giving information about the capability process in response to being asked by the claimant what the process was, that it had the purpose of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant. We also do not find it had that effect. The claimant in evidence stated he considered the giving of the information was to dissuade him from proceeding with the process however we were not persuaded by his evidence in this regard. Considering the account he gave regarding the information given to him by Ms Inniss in direct response to him asking what the capability process involved, there is nothing from this conversation which persuades us on the balance of probabilities that the conduct related to race. We are not persuaded that it had the effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant. It is notable at the time he does not raise it either informally or formally. He does not bring it up at the capability hearing nor does he raise it as part of the appeal process. We find on balance that if it had this significant an effect on him it is more likely than not that he would have raised it, certainly as part of the appeal process if not sooner.
217. Even if we were persuaded that the information given by Ms Inniss in relation to the capability process, in particular the information provided about informing those asking for a reference of the reason for any dismissal (if he ended up being dismissed) had the effect of violating his dignity or creating an intimidating hostile degrading humiliating or offensive environment, given our primary findings of fact we do not find it was objectively reasonable for the information given by Tracy Inniss to have had that effect on the claimant.
218. The claimant has therefore not discharged his burden of proof in relation to establishing that any of the alleged conduct he relies on for this complaint related to race and therefore the harassment relating to race complaint is not well founded and is dismissed.

**Harassment related to age -section 26.**

219. The claimant relies on the same conduct that he does for the direct age discrimination complaint for the harassment relating to age complaint.
220. I will not repeat our findings of fact in relation to the two allegations made against Ms Francis which are set out above.
221. However, we found Ms Francis suggested on one occasion in December 2021 during a 1 to 1 meeting to the claimant that he take naps in the middle of the day which could be permitted under the respondent's hybrid work policy.
222. It is clear in the context of the conversation Ms Francis was endeavouring to provide solutions to the claimant's sleep difficulties which he accepts he had informed her off. There is simply no evidence that this is unwanted conduct relating to age. Again, the claimant notably does not complain or raise this comment either immediately or at any time during the capability process which followed. We do not find the comment had the purpose of violating the claim's dignity or creating an intimidating hostile degrading humiliating or offensive environment. Similarly, we cannot find that it had that effect. The claimant continues to work on after this comment, in fact notably at the meeting on the 27 April 2022 his evidence is that he was feeling positive and energised and there is simply no evidence that he provides that could reasonably lead to the conclusion that the comment had this effect on him.
223. In any event even if we had found it had the effect, we do not find objectively it was reasonable for the conduct to have had this effect given the context of the suggestion made by Ms Francis.
224. Similarly with the comment which the claimant states was made in March 2022 following a meeting he himself states was very positive we have accepted his evidence that Ms Francis said, 'I don't think that you are that old anyway'. What we do not have is the full context for this comment. On balance it is more likely than not given the claimant's own evidence that this meeting left him feeling very positive that the comment did not have the purpose of violating his dignity or creating an intimidating hostile degrading humiliating or offensive environment for him. The claimant states that he felt immediately uneasy and was taken aback. It is related to the protected characteristic of age. The claimant's unchallenged evidence is that he did not respond because he was taken aback. This did not mean that it did not therefore have the proscribed effect on him. However, in the circumstances of this case bearing in mind the wider evidence we heard we do not consider the perception was reasonable. It is clear the claimant himself stated they were both in good spirits and the meeting was positive. The claimant gives no context for example that Ms Francis had either before or during the meeting made any other age-related comments.

**Indirect disability/race/age discrimination – section 19**

225. The claimant's claim was not struck out despite the fact we were not satisfied he had complied with the case management order of EJ Evans in clarifying the PCP nor the disadvantage in respect of each protected characteristics for this complaint.
226. We stood back from strike out and allowed the claimant to establish the claim by reference to his witness statement given his position is that he had included this information in his witness statement.
227. The claimant says the respondent had a PCP of not conducting an audit of equality diversity or inclusion. The claimant does not address either in his oral or written evidence that the PCP was applied to all employees.
228. We cannot reasonably make any positive findings in relation to what the disadvantage was. It is not explained by him in his witness statement. Nor did he give any cogent oral evidence to enable us to find that the PCP applied to all employees who had his disability, who were not black and who were not in the claimant's age group. His witness evidence simply does not address this PCP at all. His oral evidence was similarly lacking in this regard.
229. The claimant further fails to articulate either in his written statement nor in oral evidence what the particular disadvantage was that this PCP put people who had a disability, who were black and who were in his age group under. Nor did he give any evidence that he was put under any disadvantage or what that was.
230. For indirect discrimination claims, the claimant is required to show that any such application of the PCPs to those sharing the claimant's characteristics served to put the whole group at a disadvantage. The claimant talks only about himself as an individual in the particular circumstance he found himself in in this evidence. There is no evidence he gave from which we can reasonably infer and apply to all of those sharing the claimant's race age or disability. The claimant has failed to establish all four conditions in S.19(2). For this reason, also, the indirect discrimination claims must fail, and they do.
231. We cannot make any positive findings based on the lack of cogent evidence relating to the section 19 complaint and the claimant has failed to discharge his burden of proof and the claim must accordingly fail.

**Unfair dismissal**

232. The principle reason for dismissal was the claimant's underperformance. The decision makers were the respondent's panel comprising of Mr Nasir and Ms Heath.
233. Capability to perform his work is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

234. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
235. In **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**, Lord Bridge observed that in the great majority of cases employers will not be considered to have acted reasonably in dismissing for incapability unless they have given the employee fair warning and a chance to improve.
236. So far as capability warnings are specifically concerned, the ACAS guide suggests that an employee should be given an 'improvement note' setting out details of the performance problem, the improvement that is required, the timescale for achieving this improvement, a review date, and any support (including training) that the employer will provide to assist the employee. This is the equivalent of a first written warning. The employee should be informed that the note represents the first stage of a formal procedure and is equivalent to a first written warning, and that failure to improve could lead to a final written warning and, ultimately, dismissal. A copy of the note should be kept and used as the basis for monitoring and reviewing performance over a specified period.
237. The claimant was dismissed following a capability meeting held on 13 June 2022. This meeting was held after the claimant was put on a performance improvement plan informally during 1-1 meetings with his line manager Ms Francis between August 2021 and January 2022. There is no evidence that the PIP amounted to a first warning. We therefore find it was not. Following this period the respondent moved him to a formal capability process commencing with the meeting on 3 March 2022 following which he was set objectives and provided with training materials and links to resources including watching some clips of videos and being given some suggestions by Ms Francis.
238. He had a 7-week period between this meeting and the next formal meeting and knew he had to demonstrate improvement or dismissal was a possible outcome.
239. He did not meet the objectives set, and we have found this was primarily because of intervening events including his brother and personal family matters which took his time and attention. We did not find this failure was because of his disability or anything arising in consequence of his disability.
240. The claimant had sufficient notice of the meeting on 3 March 2022 however we find he had returned to work earlier than he felt well enough from being off sick with Covid 19. The 3 March 2022 meeting was also held on his first full day back following an initial phased return from his Covid absence.
241. We accept the respondent knew of the claimant's sleep apnoea and sleep difficulties by the time of this first formal meeting.

242. We accept the claimant's unchallenged evidence that he informed the respondent at the outset of the meeting of his lack of sleep the previous night. Given his recent return from a period of sickness absence and him notifying them he had not slept we find it was not reasonable for the respondent to have pressed ahead with this meeting.
243. We do find he was given support by his line manager Ms Francis in the next 1-1 meeting on 9 March 2022 where the respondent addressed training on work organisation and prioritisation. The claimant's own evidence is following this meeting he felt optimistic about resolving his performance issues within the stipulated time frame and therefore there is no suggestion the time given to show improvement was unreasonable nor that the objectives were unrealistic.
244. Unfortunately, the rest of the time he had (the relevant 7-week period) to demonstrate the improvement was significantly impacted by the personal issues involving his brother.
245. We accept that the claimant informed the respondent of these difficulties during the relevant period and at the meeting on 27 April 2022 where he was informed he had not met his objectives we find he explained he had not been able to do so because of the personal issues and that he went further to explain that those external issues would no longer be a problem and he felt positive and informed Ms Outram he no longer had any distractions.
246. It was open to the respondent at this time to give the claimant a further reasonable period of time to demonstrate improvement and meet the objectives which had been set given he had clearly had outside personal issues. They did not and moved the matter to a formal capability hearing. He could similarly have been given a final written warning, but we heard no evidence that this step was taken. Warnings are important in this context where it is in the employees' power to improve their performance. In this case the reason given for the failure to meet the objectives was a transitory state of affairs involving his family which coincided with the period he was given to demonstrate improvement and meet his objectives. The claimant himself states those outside matters which were preventing him from complying with the objectives had resolved.
247. We find no reasonable employer would have proceeded with the meeting on 3 March 2022. The claimant had returned earlier than he felt ready to from Covid 19 due to Ms Francis raising that his sickness absence could trigger the disciplinary process. We accept his evidence that she informed him his sickness absence ((if it met the threshold) could trigger the disciplinary process, but later (after he had returned to work) she informed him absence from Covid 19 did not count as part of that sickness absence tally. We accept he returned to work sooner than he felt fully well. The 3 March 2022 meeting was held on his first full day back and he informed the respondent he had not slept. We accept he informed them of this and they did not minute this information based on his unchallenged evidence. They knew of his sleep apnoea also and on balance it was not within the range of

reasonable responses to proceed with that meeting given after this meeting his objectives were set and failure to meet them could result in dismissal.

248. Furthermore, we accept his unchallenged evidence that he informed his employers daily of the situation with his personal life and his brother which took up his time and attention from 22 March 2022. He informed them at the meeting on 27 April 2022 that he had not been able to therefore meet the objectives which had been set following the 3 March 2022 meeting. He informed them the issues outside work which were preventing him from meeting those performance objectives had been resolved.
249. He was clearly not prepared for the meeting. He needed time and was given 15 minutes to find information on his laptop. A reasonable employer in the circumstances would have delayed the meeting to allow him to be better prepared and would have given him a further period of time to meet those objectives given the reasons he provided for not being able to meet the objectives were a transitory state of affairs and importantly that those reasons had now resolved.
250. The ACAS code recommends employees should usually be given more than one warning ie a first warning followed by a final warning. We cannot find any warnings were given to the claimant in writing. He was informed verbally in the March 2022 meeting that not meeting the objectives could lead to dismissal but there is no evidence that this constituted a formal warning. Significantly no final written warning was given. We cannot accordingly find he was sufficiently aware of the relevant timescales for improvement before dismissal would be the outcome without any final written warning. We find it would have been reasonable to have given a final warning in the 27 April 2022 meeting given that by the April meeting the respondent was aware of the reasons for noncompliance with the objectives.
251. What we do not have are documents to show the claimant had been given a performance warning in writing. We have no evidence that he was given any final written warning where there was no satisfactory improvement. The claimant's evidence was that he felt he had made some improvements. The respondent cannot rebut that.
252. We have no evidence that a final written warning was given so that the claimant was made aware that if no improvement occurs within a certain period of time he may suffer the next stage action e.g. dismissal or some other lesser sanction.
253. The claimant in oral evidence stated he asked for admin support to achieve the objectives and there was no evidence this was provided before it was decided that he had not satisfactorily met his objectives in the relevant period.
254. The reasonable employer ought to have considered the mitigating circumstances in this case of a) the sleep apnoea and b) the claimant's personal circumstances

to assess if, given their transitory nature, giving a further period of time for meeting objectives would be reasonable. We have no evidence the respondent considered either of these things before making the decision to dismiss.

255. There is no evidence before us to satisfy us that the claimant was clearly made aware of what was expected of him and the specific time frame within which improvements needed to be made. His employers were aware of the intervening personal difficulties he was dealing with during the same period he had been set objectives. It is unclear why they pressed ahead with the meeting on 3 March 2023 when he informed them he had not slept the night before. There is no written record before us of what was discussed at the meeting and the claimant does not recall any timescales he was given to improve his performance; he has some recollection of the word dismissal being used if he did not meet targets. Absent the timescale being clear for improvement, and a clear final warning being given we cannot find the respondent acted reasonably in dismissing him in all the circumstances when they did.
256. We have no evidence about whether a lesser sanction than dismissal was considered or if any different work might have been possible.
257. On balance we do not find he was given sufficient time and importantly support to correct the poor performance against the background of the effects of his sleep apnoea, his Covid 19 and his personal problems during the relevant period.
258. A reasonable employer in similar circumstances we find would have allowed the claimant a further period of reasonable time to improve when faced with similar circumstances.
259. For those reasons we find the dismissal was unfair. A reasonable employer would on balance have delayed the March 2022 meeting and the setting of the objectives until the claimant was fully recovered from the effects of Covid 19. A reasonable employer would have issued a final written warning once the objectives set had not been met by the time of the 27 April 2022 meeting given the reasons for this failure provided by the claimant which the respondent had prior notice of. We do not find on balance the dismissal was within the range of reasonable responses based on the circumstances.
260. We have considered the size of the respondent's undertaking, and they have not been able to adduce any evidence that its size or resource justified the actions in this case.
261. Had the respondent followed a fair procedure, delayed the capability meeting on 3 March 2022, given the claimant sufficient formal warnings and /or given the claimant more time to try and meet his objectives we find that he is still likely to have been dismissed. The claimant gives no evidence which suggests that he had managed to overcome his organisational and time management skills. He

remained adamant in evidence that he would carry out the estate inspections in the way he thought best despite instructions to the contrary. He stated the training was either too easy or not beneficial. It is difficult to envisage therefore if he was given more time to prepare for the capability meetings and /or more time to meet the objectives how he would have achieved those bearing in mind his clear reluctance to follow the respondent's instructions and/or see the benefit in the steps they wanted to implement to assist him with improving his performance. He readily accepted the PIP was not beneficial to him.

262. We find it is more likely than not he still would have been dismissed. We place this at 60% likelihood, and his award will therefore be reduced by 60% to reflect this.

### Remedy

263. The claimant has not succeeded in any of his discrimination complaints. His remedy is therefore limited to the basic and compensatory awards that flow from his unfair dismissal subject to our findings relating to the Polkey deduction. His award will therefore be reduced to 40% accordingly.

264. The Tribunal may also reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act.

265. Section 122(2) provides as follows:

*"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."*

266. Section 123(6) then provides that:

*"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

267. We heard no evidence to enable us to find the dismissal was caused by any blameworthy conduct on the part of the claimant.

268. The matter will be listed for a separate hearing to deal with remedy. The parties will receive directions to comply with ahead of that hearing.

269. The decision of this Tribunal was a unanimous decision.

**Public access to employment tribunal decisions**

All judgments and written reasons for the judgments (if provided) are published in full, online at [www.gov.uk/employment-tribunal-decisions](https://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the parties in a case.

Employment Judge N Wilson  
Dated: 20<sup>th</sup> November 2025

Sent to the parties on:  
20<sup>th</sup> January 2026

For the Tribunal Office

