

REASONS

1. The Claimant seeks to amend his claim in terms the draft list of issues at Appendix 1. It is agreed that the amendment is sensibly made in the form of a list of issues. That highlighted in yellow is said to be agreed by way of amendment. Where victimisation is mentioned in the Claimant's draft Appendix 1 there was a reference to protected disclosures rather than protected acts. I have deleted that bit because the Claimant is not seeking to add claims of protected disclosures (whistleblowing), as I understand it. In any event I would not have granted an amendment to add a claim of whistleblowing. It is difficult to see how the Claimant might reasonably regard he was raising the public interest when the claims were about the treatment of him. A whistleblowing claim was neither intimated in the original claim form and surrounding documents nor in the Claimant's grievance. Accordingly, I focus on the rest.

2. The Claimant presented a claim form on 8 May 2025. The ACAS dates are 9 April to 8 May 2025. He was employed by the Respondent between 4 April 2015 and 5 August 2025 when he resigned. He was a store manager.

3. The claim form included claims of disability, sex, sexual orientation discrimination and unfair dismissal. In the grounds of claim the overview summary alleged that the Area Manager had pursued a sustained pattern of behaviour causing an untenable working environment leading to mental health issues. A list of key allegations was set out. A full Response was entered on 9 July 2025.

4. The key allegations were set out as follows:

KEY ALLEGATIONS

Discrimination and Harassment:

- Inappropriate comments regarding my sexual orientation ("Yeah you're not going to walk up to him on the first day and go Hi I am Mal, I'm gay")
- Systematic exclusion from team activities and events
- Pattern of derogatory comments including repeatedly conveying that colleagues thought I was "a dick"
- Insensitive remarks during family bereavements ("the grim reaper has come to get you this year")
- False accusations of theft following stock discrepancy

Breach of Duty of Care:

- Failure to implement reasonable adjustments despite medical recommendations
- Refusal to refer to Occupational Health during declining mental health
- Denial of flexible working despite caring responsibilities
- Threatening disciplinary action for legitimate sickness absences
- Refusing to classify family tragedy as "exceptional circumstance" for sick pay purposes

Contractual and Equality Issues:

- Sudden enforcement of 90-minute breaks after ten years without this requirement
- Arbitrary withholding of pay rises while colleagues received increases
- Systematic obstruction of career progression despite excellent performance ratings
- Threatening communications regarding break enforcement

Impact:

- Clinically diagnosed work-related stress requiring medication
- Severe anxiety, panic attacks, and depression
- Physical symptoms including insomnia, migraines, and hypertension
- Significant deterioration in self-confidence and quality of life

LEGAL FRAMEWORK

The allegations engage multiple legal protections including the Equality Act 2010, Employment Rights Act 1996, Health and Safety at Work Act 1974, Protection from Harassment Act 1997, and Data Protection Act 2018.

CONSTRUCTIVE DISMISSAL

The cumulative effect of these breaches constitutes a fundamental breach of the implied term of mutual trust and confidence, meeting the threshold for constructive dismissal as established in *Malik v BCCI* [1997] and *Western Excavating v Sharp* [1978].

REMEDY SOUGHT

I request a full investigation, access to employment documentation, clarification on CCTV usage, investigation into pay disparities, implementation of reasonable adjustments, and consideration of compensation for injury to feelings as established in *Vento v Chief Constable of West Yorkshire Police* [2002].

Many of the allegations are general and non-specific, making an amendment application unsurprising.

5. A disability impact statement was provided in advance of the first Preliminary Hearing which took place on 8 January 2026. At that Preliminary Hearing before Employment Judge Dawson, agreed directions were made for the filing of an agreed list of issues in advance of the next Preliminary Hearing.

6. On 29 January 2026 the Claimant made an application to amend his claim. It contained allegations of victimisation, failure to make reasonable adjustments

and sexual orientation discrimination. The amendment was objected to not wholly but in significant part.

7. The matter came before Employment Judge Hastie on 9 February 2026 who listed the present hearing. At that hearing claims of sex discrimination and harassment were withdrawn. One issue for this hearing was whether the Claimant was a disabled person. That has now been resolved as have the directions bringing the matter to a final hearing. The amendment and therefore the list of issues are the outstanding matters.

8. The Claimant, represented by Mr Holland, has refined his amendment in accordance with Appendix 1 hereto. I acknowledge that some steps have been taken to simplify the matter as well as add to matters from the original grounds of complaint. Additions to the original application to amend have been set out in bold. Mr Holland has sought to set out once and for all the claim the Claimant wishes to make. That is a useful and necessary exercise.

8. Mr Holland has also put before me the Claimant's internal grievance dated 16 April 2025. It is an extensive and comprehensive document setting out the types of allegation the Claimant wishes to pursue in these proceedings. Sections included those concerning an alleged pattern of coercive and controlling behaviour; sexual orientation discrimination; bullying and victimisation following previous complaints; failure to implement reasonable adjustments; break enforcement; pay discrimination and career obstruction. The grievance document intimated a constructive dismissal but was sent before the Claimant resigned in the hope that he would not have to resign. The grievance was not successful in preventing the Claimant's resignation. It seems that the Respondent was aware of detailed issues raised by the Claimant before these proceedings were brought.

The discretion to permit amendment

9. The Respondent submits that the amendment application seeks to admit new causes of action which are brought out-of-time and so should not be permitted. That a claim is sought to be admitted out-of-time is certainly a factor to be taken into account in the discretion whether or not to allow the amendment; but the issue remains the balance of justice. Time limits are not a trump card held by a Respondent. Important guidance on this issue is provided by HHJ Talyer in Vaughan v Modality Partnership UKEAT/0147/20/BA(V) (9 November 2020). He said the following in seeking to summarise the guidance:

21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege

prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

23. As every employment lawyer knows the Selkent factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.

24. It is also important to consider the Selkent factors in the context of the balance of justice. For example: 24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing. 24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim. 24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

27. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

10. In arriving at that position, HHJ Talyer cited Underhill LJ in Abercrombie and others v Aga Rangemaster Ltd [2014] ICR 209 (CA). Underhill LJ referred to Selkent, at paragraph 47:

If the final sentence of point (5) (a) is taken in isolation it could be understood as an indication that the fact that a pleading introduces "a new cause of action" would of itself weigh heavily against amendment. However, it is clear from the passage as a whole that Mummery J was not advocating so formalistic an approach. He refers to "the ... substitution of other labels for facts already pleaded" as an example of the

kind of case where (other things being equal) amendment should readily be permitted – the contrast being with "the making of entirely new factual allegations which change the basis of the existing claim". (It is perhaps worth emphasising that head (5) of Mummery J's guidance in *Selkent* was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4).

Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in *Harvey on Industrial Relations and Employment Law* para. 312.01-03. We were referred by way of example to my decision in *Transport and General Workers Union v Safeway Stores Ltd* (UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as *British Printing Corporation (North) Ltd v Kelly* (above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)

Decision on this application

11. I grant permission to amend in the claim of constructive unfair dismissal as set out by Mr Holland. Constructive dismissal was intimated by the grievance and mentioned in the original claim form even if the Claimant had not actually resigned by then. The claim is confirmed by the amendment. The matters said to amount to breaches of the implied term of trust and confidence relate to 2024 and 2025. They are thus relatively contemporaneous and many were the subject of the grievance. The Respondent can deal with them evidentially and is not materially prejudiced. The Claimant would be genuinely disadvantaged if he could not pursue the claims he wishes to bring.

12. Similarly, reasonable adjustments claims were intimated by the original grounds of claim and the grievance. The Respondent can deal with them evidentially and is not materially prejudiced. I grant permission. The Claimant would be genuinely disadvantaged if he could not pursue the claims he wishes to bring.

13. Similarly, the allegations of direct sexual orientation discrimination, most of which the Respondent does not object to. The Respondent can deal with them evidentially and is not materially prejudiced. I grant permission. The Claimant would be genuinely disadvantaged if he could not pursue the claims he wishes to bring.

14. As to the victimisation claim: this was intimated in the internal grievance. The detriments relied upon are mostly repeats of allegations already made. This is predominantly a re-labelling exercise in terms of the detriments alleged. I see no point, however, in relying on protected acts pre-2023. The detriments alleged are 2024 and 2025, Accordingly, I do not give permission to rely upon any alleged protected act pre-2023. The Respondent can deal with these allegations evidentially and is not materially prejudiced. The Claimant would be genuinely disadvantaged if he could not pursue these claims he wishes to bring. I grant permission for the victimisation claim.

15. As to the discrimination arising from disability claim, I agree with Mr McHugh that these are inadequately pleaded. For example, what is the 'something arising from disability'? The Claimant has his failure to make reasonable adjustments claim. He has always intimated that. I refuse permission to bring claims under s.15 of the Equality Act 2010. They are inadequately pleaded and incoherent.

16. Accordingly, I give permission to the claimant to argue the claims set out at Appendix 2.

Employment Judge Smail
Date: 19 April 2026

Judgment sent to the parties on
27 April 2026

APPENDIX 1

MALACHY MCGUILE-PROBYN v SUPERDRUG STORES PLC
PROPOSED LIST OF ISSUES

(Parts in bold relate to further refinements to the Application to Amend; parts highlighted in yellow represent what the Respondents accept by way of amendment)

Was the Claimant dismissed?

1.1.1 Did the Respondent breach the Claimant's contract of employment?

1.1.2 If so, was that breach serious enough to be a repudiatory breach?

1.1.3 Did the Claimant waive the breach?

1.1.4 Did the Claimant resign in response to the breach?

1.1.5 the Claimant relies on the acts set out below as being breaches of the implied term of trust and confidence

The detrimental treatment relied upon:

a) 18 June 2024 - Doug Stewart sent email to third party informing them that Claimant's brother-in law had taken his own life, breaching confidentiality without Claimant's consent

b) 24 July 2024 - Comment made about Claimant's sexual orientation (admitted by Respondent in Grounds of Resistance)

c) 26 July 2024 - Contradictory and conflicting information provided by multiple HR sources regarding breaks policy causing confusion, distress, and anxiety

d) 14 August 2024 - Flexible working request denied just weeks after family bereavement; email from Caroline King (Senior HR) confirmed "30 minute break down to Doug and not a HR decision" demonstrating arbitrary and discriminatory application of policy used to deny request

e) 11 March 2025 - Email to Doug Stewart regarding decline in mental health and requesting support; no support provided, instead Claimant experienced the opposite

f) 23 April 2025 - Reasonable adjustments meeting conducted in hostile manner; Doug Stewart opened meeting with hostile tone, failed to ask about Claimant's wellbeing despite reviewing medical recommendations, manifested anger requiring Claimant to ask him to lower his tone, prioritized "business and money" over medical advice; both Occupational Health reports rejected in their entirety despite clear medical recommendations; meeting so distressing Claimant was physically sick afterwards

g) 15 May 2025 – C. discovered via Subject Access Request that internal emails had been circulated discussing "how my daughter was conceived" as a gay man and email from Doug Stewart stating "because I don't want him there" regarding Claimant's attendance at workplace events, demonstrating discriminatory animus and exclusion

h) 08.August 2025- C's grievance appeal was closed before being heard on basis that Claimant was signed off sick and would not participate during sick leave, creating impossible catch-22 situation

i) In addition, The Respondent deliberately refused to implement reasonable adjustments the Claimant requested and set out in an OH report dated 12th March 2025 and a further supporting OH report dated 1st May 2025 namely;

- To arrange for the Claimant to return to work after a period of sickness absence (25th March 2025 – resignation on 8th August 2025) via a phased return to work**
- To remain at 30 minute breaks only**
- Compress working days to a 4 day week**
- Mediation with C's line manager before returning to work.**

Was any dismissal fair?

1.2.1 Was there a potentially fair reason for the Respondent's conduct?

1.2.2 If there was, was the dismissal reasonable?

DISCRIMINATION - DISABILITY

Jurisdiction

2.1.1 Was the claim form submitted more than 3 months after some of the conduct complained of?

2.1.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

2.1.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

2.2 Was the Claimant disabled?

2.2.1 Did the Claimant have a physical or mental impairment?

2.2.2 Did that impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

2.2.3 Was that adverse effect long-term?

2.2.4 Was the Claimant disabled at all relevant times?

Failure to Make Reasonable adjustments

2.2.5 Did the Respondent know/could the Respondent reasonably have been expected to know that the Claimant had a disability? If not, when ought the Respondent to have been aware of the Claimant's disability?

2.2.6 a) The PCP of not allowing a 'disabled' employee to return to work on a phased return

b) The PCP of insisting that all employees work a 90 minute break

c) The PCP of insisting that employees only work a rigid 5 day week

d) The PCP of not permitting mediation with the line manager in cases where the employee

2.2.7 Did the Respondents know or could they reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?:

2.2.8

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

a) To arrange for the Claimant to return to work after a period of sickness absence (25th

March 2025 – resignation on 8th August 2025) via a phased return to work;

b) To remain at 30 minute breaks only;

c) Compress working days to a 4 day week;

d) Mediation with C's line manager before returning to work;

2.2.9 Was it reasonable for the Respondents to have to take those steps and when?

2.2.10 Did the Respondents fail to take those steps?

Jurisdiction

3.1.1 Was the claim form submitted more than 3 months after some of the conduct complained of?

3.1.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

3.1.3

If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

4 DISCRIMINATION S13. – SEXUAL ORIENTATION

5 Did the Respondent treat the Claimant less favourably (S13 Equality Act 2010) because of his sexual orientation by subjecting him to the following detriments:

6.

The Claimant suffered the following comments and conduct:

a. ("Yeah you're not going to walk up to him on the first day and go Hi I am Mal, I'm gay") - Doug Stewart - 25.07.2024

b. Systematic exclusion from team activities and events - Every Christmas Conference - Doug Stewart - 14-16 September 2022 , 18-19th September 2024, 20-21 September 2023.

c. Doug Stewart made a pattern of derogatory comments including repeatedly conveying that colleagues thought:

d. Throughout his employment, The Claimant, was repeatedly described as "a dick" by Doug Stewart. For example, he said this to the Claimant after a visit with the CEO and Operations

Director in the store in October 2022 and in his PDR on 15.7.24.

e. On 15th July 2024 Doug Stewart made insensitive remarks during family bereavements ("the grim reaper has come to get you").

f.

Doug Stewart made false accusations of theft following a stock discrepancy. In failing:

g. to arrange for the Claimant to return to work after a period of sickness absence (25th March 2025 -) via a phased return to work.

h. Allowing the Claimant to remain at 30 minute breaks only

i. To compress the Claimants' working days to a 4 day week

j. To arrange mediation with C's line manager before a return to work.

The Claimant also alleges that the acts set out at 1.1.5 constitute discrimination on the basis of the protected characteristic of sexual orientation or disability contrary to section 13 of the Equality Act 2010.

7. Does the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his sexual orientation as a homosexual man?

8. If so, what is the respondent's explanation, does it prove a non- discriminatory reason for any treatment?

9. The Claimant relies on a hypothetical 'straight' man as a comparator.

Jurisdiction

10.1.1 Was the claim form submitted more than 3 months after some of the conduct complained of?

10.1.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

10.1.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

11. S. 27 Victimisation: 'protected acts'

Did the Claimant do a 'protected act'?

It is averred, that the Claimant by complaining about a failure to make reasonable adjustments and other instances of discrimination undertook 'protected acts' under s27 Equality Act 2010 (victimisation). In particular on the following occasions:

1. 22 March 2018 - Email to Stella Duncan raising awareness of mental health decline, complaining about withholding of pay rise and bonus, and complaining about Doug Stewart taking CCTV to his house for week-long review constituting targeted surveillance
2. 04 December 2023 - Email to Doug Stewart about mental health deterioration requesting support
3. 08 July 2024 - Flexible working request submitted
4. July-August 2024 - Multiple emails to HR (Erin, Holly Nahar, Michele Gough, Caroline King) challenging discriminatory and inconsistent application of breaks policy
5. 05 March 2025 - GP letter submitted to Respondent requesting Claimant to remain at 30-minute breaks as medical necessity due to anxiety and fatigue
6. 11 March 2025 - Email to Doug Stewart raising mental health decline and requesting support
7. 12 March 2025 - Receipt of first Occupational Health report recommending reasonable adjustments including: 30-minute breaks only, phased return to work, 4-day week compression, and mediation with line manager; Claimant requested implementation of these recommendations
8. 23 April 2025 - Reasonable adjustments meeting attended where Claimant asserted rights to implementation of Occupational Health recommendations
9. 24 April 2025 - Formal grievance filed complaining about discrimination on grounds of disability and sexual orientation, harassment, and failure to make reasonable adjustments

10. 01 May 2025 - Receipt of second Occupational Health report confirming and reinforcing recommendations from first report; Claimant requested implementation

11. 08.05.25 - ET1 claim filed with Employment Tribunal

12. 09 July 2025 - Grievance appeal submitted

13. 2017-2025 - Multiple ongoing complaints about Doug Stewart's discriminatory conduct including targeted surveillance, bullying, harassment related to disability and sexual orientation.

If so, was there detrimental treatment on the ground that he had made a protected disclosure(s) or made a protected act?

The detrimental treatment relied upon:

- a) 18 June 2024 - Doug Stewart sent email to third party informing them that Claimant's brother-in law had taken his own life, breaching confidentiality without Claimant's consent
- b) 24 July 2024 - Comment made about Claimant's sexual orientation (admitted by Respondent in Grounds of Resistance)
- c) 26 July 2024 - Contradictory and conflicting information provided by multiple HR sources regarding breaks policy causing confusion, distress, and anxiety
- d) 14 August 2024 - Flexible working request denied just weeks after family bereavement; email from Caroline King (Senior HR) confirmed "30 minute break down to Doug and not a HR decision" demonstrating arbitrary and discriminatory application of policy used to deny request
- e) 11 March 2025 - Email to Doug Stewart regarding decline in mental health and requesting support; no support provided, instead Claimant experienced the opposite
- f) 23 April 2025 - Reasonable adjustments meeting conducted in hostile manner; Doug Stewart opened meeting with hostile tone, failed to ask about Claimant's wellbeing despite reviewing medical recommendations, manifested anger requiring Claimant to ask him to lower his tone, prioritized "business and money" over medical advice; both Occupational Health reports rejected in their entirety despite clear medical recommendations; meeting so distressing Claimant was physically sick afterwards
- g) 15 May 2025 – C. discovered via Subject Access Request that internal emails had been circulated discussing "how my daughter was conceived" as a gay man and email from Doug Stewart stating "because I don't want him there" regarding

Claimant's attendance at workplace events, demonstrating discriminatory animus and exclusion

h) 08.August 2025- C's grievance appeal was closed before being heard on basis that Claimant was signed off sick and would not participate during sick leave, creating impossible catch-22 situation

i) 08 August 2025 - Claimant forced to resign due to cumulative effect of detriments

j) 13 September 2025 - Following resignation, Doug Stewart sent internal email praising another departing manager while mocking Claimant's performance despite Claimant having role model

Performance Development Reviews, demonstrating victimisation continued even after employment ended.

k) In addition, The Respondent deliberately refused to implement reasonable adjustments the Claimant requested and set out in an OH report dated 12th March 2025 and a further supporting

OH report dated 1st May 2025 namely;

- To arrange for the Claimant to return to work after a period of sickness absence (25th March 2025 –

resignation on 8th August 2025) via a phased return to work

- To remain at 30 minute breaks only
- Compress working days to a 4 day week
- Mediation with C's line manager before returning to work.

13.3 In addition, The Claimant's grievance appeal was closed before being heard.

13.4 The Claimant was forced to resign.

14. The Claimant relies on the following breach(es) of her contract/ the implied term of trust and confidence:

Discriminatory Constructive dismissal S13/15

Did earlier discriminatory acts (**set out at 1.1.5 and 6 a-j above**) sufficiently influence the overall repudiatory breach and/or was the final repudiatory breach discriminatory?

Further and/or in the alternative the discriminatory acts set out at 1.1.5 and 6a-j constituted unfavourable treatment for the purposes of s.15 of the Equality Act 2010

The Claimant relies upon the continuing harassment/ detriments and failure to make reasonable adjustments pleaded above as breaches of the implied term of trust and confidence.

In addition, The Claimant claims wrongful dismissal and/ or an unlawful deduction of wages **in that the Claimant's final pay was paid at statutory sick pay only and should have been his normal monthly pay.**

REMEDY

What financial loss, if any, has the Claimant suffered as a result of any unlawful conduct by the

Respondent?

Has the Claimant failed to take reasonable steps to mitigate that loss?

Is there a chance that the Claimant would have been fairly and lawfully dismissed anyway, or for some other reason?

If so, should the Claimant's compensation be reduced? By how much?

What award, if any, should be made for injury to feelings?

Should interest be awarded? How much?

APPENDIX 2: The List of Issues going forward to the final hearing

1. Time limits

1.1 The claim form was presented on 8 May 2025. The claimant commenced the Early Conciliation process with ACAS on 9 April 2025 (Day A). The Early Conciliation Certificate was issued on 8 May 2025 (Day B).

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

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

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

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

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

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

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

2. Constructive unfair dismissal

2.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows:

a) 18 June 2024 - Doug Stewart sent email to third party informing them that Claimant's brother-in law had taken his own life, breaching confidentiality without Claimant's consent

b) 24 July 2024 - Comment made about Claimant's sexual orientation (admitted by Respondent in Grounds of Resistance)

c) 26 July 2024 - Contradictory and conflicting information provided by multiple HR sources regarding breaks policy causing confusion, distress, and anxiety

d) 14 August 2024 - Flexible working request denied just weeks after family bereavement; email from Caroline King (Senior HR) confirmed "30 minute break down to Doug and not a HR decision" demonstrating arbitrary and discriminatory application of policy used to deny request

e) 11 March 2025 - Email to Doug Stewart regarding decline in mental health and requesting support; no support provided, instead Claimant experienced the opposite

f) 23 April 2025 - Reasonable adjustments meeting conducted in hostile manner; Doug Stewart opened meeting with hostile tone, failed to ask about Claimant's wellbeing despite reviewing medical recommendations, manifested anger requiring Claimant to ask him to lower his tone, prioritized "business and money" over medical advice; both Occupational Health reports rejected in their entirety despite clear medical recommendations; meeting so distressing Claimant was physically sick afterwards

g) 15 May 2025 – C. discovered via Subject Access Request that internal emails had been circulated discussing "how my daughter was conceived" as a gay man and email from Doug Stewart stating "because I don't want him there" regarding Claimant's attendance at workplace events, demonstrating discriminatory animus and exclusion

h) 08.August 2025- C's grievance appeal was closed before being heard on basis that Claimant was signed off sick and would not participate during sick leave, creating impossible catch-22 situation

i) In addition, The Respondent deliberately refused to implement reasonable adjustments the Claimant requested and set out in an OH report dated 12th March 2025 and a further supporting OH report dated 1st May 2025 namely;

- To arrange for the Claimant to return to work after a period of sickness absence (25th March 2025 – resignation on 8th August 2025) via a phased return to work
- To remain at 30 minute breaks only
- Compress working days to a 4 day week
- Mediation with C's line manager before returning to work.

2.2 The Tribunal will need to decide:

2.2.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust

and confidence between the claimant and the respondent;
and

2.2.2 Whether it had reasonable and proper cause for doing so.

2.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

3. Direct sexual orientation discrimination (Equality Act 2010 section 13)

3.1 The Claimant describes him as gay/perceived gay.

3.2 Did the Respondent do the following things:

a. ("Yeah you're not going to walk up to him on the first day and go Hi I am Mal, I'm gay") - Doug Stewart - 25.07.2024

b. Systematic exclusion from team activities and events - Every Christmas Conference - Doug Stewart - 14-16 September 2022 , 18-19th September 2024, 20-21 September 2023.

c. Doug Stewart made a pattern of derogatory comments including repeatedly conveying that colleagues thought:

d. Throughout his employment, The Claimant, was repeatedly described as "a dick" by Doug Stewart. For example, he said this to the Claimant after a visit with the CEO and Operations

Director in the store in October 2022 and in his PDR on 15.7.24.

e. On 15th July 2024 Doug Stewart made insensitive remarks during family bereavements ("the grim reaper has come to get you").

f. Doug Stewart made false accusations of theft following a stock discrepancy. In failing:

g. to arrange for the Claimant to return to work after a period of sickness absence (25th March 2025 -) via a phased return to work.

h. Allowing the Claimant to remain at 30 minute breaks only

i. To compress the Claimants' working days to a 4 day week

j. To arrange mediation with C's line manager before a return to work.

- 3.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
- 3.4 If so, was it because of actual or perceived sexual orientation?
- 3.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to sexual orientation?

4. Disability

4.1 It is not disputed that the Claimant was disabled with depression from 2008, and with depression and anxiety from 2021, continuing to the present day. No other disability is contended for.

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

- 5.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?
- 5.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
- a) The PCP of not allowing a 'disabled' employee to return to work on a phased return
 - b) The PCP of insisting that all employees work a 90 minute break
 - c) The PCP of insisting that employees only work a rigid 5 day week
 - d) The PCP of not permitting mediation with the line manager
- 5.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?
- 5.4 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

5.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

- a) To arrange for the Claimant to return to work after a period of sickness absence via a phased return to work;
- b) To remain at 30 minute breaks only;
- c) Compress working days to a 4 day week;
- d) Mediation with C's line manager before returning to work.

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

5.7 Did the Respondent fail to take those steps?

6. Victimisation (Equality Act 2010 s. 27)

6.1 Did the Claimant do one or more protected acts as follows:

- a) 04 December 2023 - Email to Doug Stewart about mental health deterioration requesting support
- b) 08 July 2024 - Flexible working request submitted
- c) July-August 2024 - Multiple emails to HR (Erin, Holly Nahar, Michele Gough, Caroline King) challenging discriminatory and inconsistent application of breaks policy
- d) 05 March 2025 - GP letter submitted to Respondent requesting Claimant to remain at 30-minute breaks as medical necessity due to anxiety and fatigue
- e) 11 March 2025 - Email to Doug Stewart raising mental health decline and requesting support
- f) 12 March 2025 - Receipt of first Occupational Health report recommending reasonable adjustments including: 30-minute breaks only, phased return to work, 4-day week compression, and mediation with line manager; Claimant requested implementation of these recommendations
- g) 23 April 2025 - Reasonable adjustments meeting attended where Claimant asserted rights to implementation of Occupational Health recommendations

- h) 24 April 2025 - Formal grievance filed complaining about discrimination on grounds of disability and sexual orientation, harassment, and failure to make reasonable adjustments
- i) 01 May 2025 - Receipt of second Occupational Health report confirming and reinforcing recommendations from first report; Claimant requested implementation
- j) 08.05.25 - ET1 claim filed with Employment Tribunal
- k) 09 July 2025 - Grievance appeal submitted
- l) 2023-2025 - Multiple ongoing complaints about Doug Stewart's discriminatory conduct including targeted surveillance, bullying, harassment related to disability and sexual orientation.

6.2 Did the Respondent do the following things:

- a) 18 June 2024 - Doug Stewart sent email to third party informing them that Claimant's brother-in law had taken his own life, breaching confidentiality without Claimant's consent
- b) 24 July 2024 - Comment made about Claimant's sexual orientation (admitted by Respondent in Grounds of Resistance)
- c) 26 July 2024 - Contradictory and conflicting information provided by multiple HR sources regarding breaks policy causing confusion, distress, and anxiety
- d) 14 August 2024 - Flexible working request denied just weeks after family bereavement; email from Caroline King (Senior HR) confirmed "30 minute break down to Doug and not a HR decision" demonstrating arbitrary and discriminatory application of policy used to deny request
- e) 11 March 2025 - Email to Doug Stewart regarding decline in mental health and requesting support; no support provided, instead Claimant experienced the opposite
- f) 23 April 2025 - Reasonable adjustments meeting conducted in hostile manner; Doug Stewart opened meeting with hostile tone, failed to ask about Claimant's wellbeing despite reviewing medical recommendations, manifested anger requiring Claimant to ask him to lower his tone, prioritized "business and money" over medical advice; both Occupational Health reports rejected in their entirety despite clear medical recommendations; meeting so distressing Claimant was physically sick afterwards
- g) 15 May 2025 – C. discovered via Subject Access Request that internal emails had been circulated discussing "how my daughter was conceived" as a gay man and email from Doug Stewart stating "because I don't want him there" regarding Claimant's attendance at

workplace events, demonstrating discriminatory animus and exclusion

h) 08.August 2025- C's grievance appeal was closed before being heard on basis that Claimant was signed off sick and would not participate during sick leave, creating impossible catch-22 situation

i) 08 August 2025 - Claimant forced to resign due to cumulative effect of detriments

j) 13 September 2025 - Following resignation, Doug Stewart sent internal email praising another departing manager while mocking Claimant's performance despite Claimant having role model

k) Performance Development Reviews, demonstrating victimisation continued even after employment ended.

l) The Respondent deliberately refused to implement reasonable adjustments the Claimant requested and set out in an OH report dated 12th March 2025 and a further supporting

OH report dated 1st May 2025 namely;

- To arrange for the Claimant to return to work after a period of sickness absence (25th March 2025 – resignation on 8th August 2025) via a phased return to work
- To remain at 30 minute breaks only
- Compress working days to a 4 day week
- Mediation with C's line manager before returning to work.

6.3 By doing so, did the Respondent subject the Claimant to detriment?

6.4 If so, was it because the Claimant had done the protected acts?

7. Remedy

Unfair dismissal

7.1 The Claimant does not wish to be reinstated and/or re-engaged OR The Claimant wishes to be reinstated to their previous employment or re-engaged to comparable employment or other suitable employment. Should the Tribunal order reinstatement? The Tribunal will consider, in particular, whether such an order is practicable and, if the Claimant caused or contributed to the dismissal, whether it would be just to make it and upon what terms it ought to be made.

- 7.2 What basic award is payable to the Claimant, if any?
- 7.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- 7.4 If there is a compensatory award, how much should it be? The Tribunal will decide:
- 7.4.1 What financial losses has the dismissal caused the Claimant?
- 7.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 7.4.3 If not, for what period of loss should the Claimant be compensated?
- 7.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 7.4.5 If so, should the Claimant's compensation be reduced? By how much?
- 7.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
- 7.4.7 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his/her compensatory award? By what proportion?
- 7.4.8 Does the statutory cap of fifty-two weeks' pay or (£89,493 until April 2022, £93,878 until April 2023 and £105,707 until April 2024 and £115,155 thereafter) apply?

Discrimination or victimisation

- 7.5 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
- 7.6 What financial losses has the discrimination caused the Claimant?
- 7.7 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 7.8 If not, for what period of loss should the Claimant be compensated for?

- 7.9 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- 7.10 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
- 7.11 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 7.12 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
- 7.13 Should interest be awarded? How much?