EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss D Udekwu	**v**	BCA Logistics Limited

Heard at: Cambridge

On: 16, 17, 18, 23, 24 and 25 February 2026
1 April 2026 am

In Chambers: 1 April 2026 pm and 2 April 2026

Before: Employment Judge Tynan

Members: Ms M Harris and Ms L Davies

Appearances
For the Claimant: In person (16, 17, 18, 23, 24 and 25 February 2026)
Ms Gilbert, Counsel (1 April 2026 – closing submissions)
For the Respondent: Ms Harty, Counsel

RESERVED JUDGMENT

1. The Claimant's claim that the Respondent discriminated against her, by failing to comply with its s.20 Equality Act 2010 duty to make reasonable adjustments, succeeds in respect of the second and fourth PCPs, as set out in the Tribunal's Reasons below.

2. The Claimant's claims that the Respondent discriminated against her in contravention of s.15 and s.26 of the Equality Act 2010, succeed in respect of Issue 5.

3. Whilst the Claimant's claim pursuant to s.26(2) of the Equality Act 2010 in respect of certain of Mr Asghar's conduct in or around early September 2022 (Issue 12) is potentially well-founded, the Tribunal has no jurisdiction in the matter, the claim having been presented outside the time limit for presenting such claims in s.123 of the Equality Act 2010. The Tribunal determines that it would not be just and equitable to extend time for the Claimant to bring that claim.

4. The Claimant's remaining claims that:

4.1. she was discriminated against contrary to s.13, 15, s20/21, s.26 and s.27 of the Equality Act 2010;

4.2. the Respondent made unlawful deductions from her wages; and

4.3. she is owed holiday pay,

are not well founded and are dismissed.

REASONS

Introduction

5. The Respondent describes itself as a UK wide provider of vehicle remarketing logistics services for customers in the automotive sector. Its Cinch brand is well known within the sector. The Claimant was employed as a Driver (Vehicle Handover Specialist) for Cinch from 8 November 2021 until 17 June 2023, having previously worked for the business on a self-employed basis since 2019.

6. It is common ground that the Claimant was disabled throughout her employment with the Respondent by reason of palindromic rheumatism, a form of arthritis characterised by recurring bouts of inflammation and joint pain. The Claimant also has a bladder-related condition, albeit she has not relied upon the condition in support of her claim to be disabled.

7. On 17 June 2023 the Respondent terminated the Claimant's employment summarily, that is to say without notice or payment in lieu of notice, following the delivery of an incorrect vehicle to a customer. The Claimant claims that she was discriminated against as a disabled person; her claim in this regard extends to her dismissal. She additionally claims that unlawful deductions were made from her wages and that she is owed holiday pay. At times, the Claimant has struggled to grasp the legal issues that arise from her claims, including for example what victimisation amounts to in law. She has also struggled to explain why she believes she may be owed wages and holiday pay. This is partly because she has a history of self-employment rather than regular employment, though the Respondent's slightly unusual sick pay arrangements have undoubtedly added to her confusion in the matter, even though, as we shall come back to, they have been clearly explained by the Respondent.

Evidence

8. The principal hearing bundle runs to 971 numbered pages. There is a small supplementary bundle, further supplemented in the course of the final hearing by various additional documents. Unless otherwise indicated, the page references that follow correspond to the principal hearing bundle.

9. The Claimant gave evidence. On behalf of the Respondent we heard evidence from,

a. Jonathon Maw, who was employed by the Respondent until August 2023 as an Operations Manager. He and the Claimant evidently enjoyed a very positive working relationship, with the Claimant referring to him affectionately as "Sir Jon" or "Sir Jonathon".

b. Osman Asghar, who is now employed by the Respondent as an Operations Manager, but at the relevant time worked as a Team Leader, along with Jamie King, Jordi Hortin and Jack Larkin. The Team Leaders reported to the Operations Managers, who at the time were Mr Maw and Paul Jones.

c. Mr Jones, who continues to be employed by the Respondent as an Operations Manager. Mr Jones took the decision to terminate the Claimant's employment.

d. Andrew House, Head of Operations at Cinch. Mr House heard the Claimant's appeal against her dismissal.

e. Mr King, now employed by the Respondent as an Operations Supervisor. Mr King was the note taker at an appeal meeting on 18 February 2023 at which Mr Maw considered the Claimant's appeal against the imposition of final absence warning. The Claimant alleges that Mr King subjected her to harassment in May 2023 by reason of comments he made in the course of an email exchange regarding her health situation.

f. Tanya Grove, Payroll Lead. Ms Grove provides an overview of the Respondent's pay practices, specifically its sick pay arrangements, together with a detailed explanation of the Claimant's pay.

<u>The Law</u>

10. The List of Issues in the case is to be found at pages 85 – 90 of the bundle.

11. Ms Harty has set out the law and relevant legal principles in her written closing submissions. Whilst there is little we can add to what she says, given the extent to which the Claimant has struggled with the legal issues, but also in case she intends to consult Ms Gilbert again in the matter, we set out the law below.

<u>Sections 20 and 21 Equality Act 2010 ("EqA 2010")</u>

12. Section 20 of EqA 2010 defines the duty to make adjustments as follows,

Duty to make adjustments

(1) …
(2) …
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a

> substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

13. It is not necessary in this case for the Tribunal to have regard to the second or third statutory requirements.

14. The Claimant relies upon four PCPs as follows:

    14.1. Failing to progress an OH assessment and report;

    14.2. Requiring the claimant to drive manual gear cars;

    14.3. Requiring the claimant to drive long distances;

    14.4. Requiring the claimant to change to a work rota of 4 days on and 2 days off.

15. What amounts to a PCP is not defined within the Equality Act 2010, though the expression is to be construed broadly, avoiding an overly technical or pedantic approach, something we bear in mind in particular when considering the fourth PCP. According to the EHCR's Employment Code, a PCP extends to any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. In <u>Carerras v United First Partners Research Ltd EAT 0266/15</u> the term "requirement" was said to be capable of incorporating an "expectation" or assumption", which might be sufficient to establish the existence of a practice. Something may be a practice if there is some indication that it will or would be done again were a hypothetical similar case to arise – <u>Ishola v Transport for London</u> [2020] IRLR 368.

16. The existence or otherwise of a PCP is to be assessed objectively. It is principally a question of fact.

17. As regards the question of what steps ought reasonably to have been taken by an employer to avoid an employee being put at a substantial disadvantage, in <u>Smith v Churchills Stairlifts plc</u> 2006 ICR 524, CA, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters. The Claimant does not have any burden in the matter, since the duty, once triggered, is an employer's. Whilst the Equality and Human Rights Commission's statutory Code of Practice on Employment includes examples of matters that a tribunal might take into account (see para 6.28), our focus is on the practical result of the measures that could be taken. In <u>Burke v The College of Law and anor</u> 2012 EWCA Civ 37, CA, the Court of Appeal made it clear that a holistic approach should be adopted when considering the reasonableness of adjustments in circumstances where it takes a number of adjustments, working in combination, to ameliorate the substantial disadvantage suffered by a claimant.

18. In Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10, the EAT confirmed that there does not necessarily have to be a good or real prospect of an adjustment removing a disadvantage for that adjustment to be a reasonable one. Instead, it is sufficient for the tribunal to find that there would have been a prospect of the disadvantage being alleviated, a point also made in Noor v Foreign and Commonwealth Office 2011 ICR 695, EAT. These decisions were endorsed by Elias LJ in Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA, in which he observed:

> 'It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'

Section 15 EqA 2010

19. Section 15 of EqA 2010 provides,

> Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

20. The things that are said to arise from the Claimant's disability are:

20.1. recurring sickness absence;

20.2. difficulties in driving manual gear cars and long distances; and

20.3. difficulties in working a rota which changed from 4 days on and 4 days off to 4 days on and only 2 days off.

Section 26 EqA 2010

21. Sections 26(1) and (4) of the Equality Act 2010 provide,

> (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.

22. In Governing Body of Windsor Clive Primary School & Anor v Forsbrook & Anor [2024] EAT 183, the EAT has recently considered the question of how tribunals should approach the question of whether unwanted conduct is "related to" a relevant protected characteristic. His Honour Judge Beard said:

> "29. … It is clear that "related to" is a broad concept, as set out in Haringey v O'Brien. However, the concept cannot be so broad as to be meaningless. I am of the view that, as Ms Roddick argues, the conduct must relate to the protected characteristic, here disability, in some clear way. It is for the ET to spell out that relationship between the conduct and the disability. It will be necessary, therefore, for an ET to identify with some clarity the precise conduct which creates the prohibited environment. This will also be true in deciding whether that conduct is unwanted in the sense that the statute applies to it."

The case concerned correspondence issued by the employer in the context of its attendance and wellbeing policy. HHJ Beard went on to observe:

> "38. It seems to me that the difficulty with the lack of reasons in respect of unwanted conduct may relate to a reluctance for the ET to describe the use of the absence process as unwanted conduct. In my judgment, properly constructed, the statute provides that unwanted conduct is based on the subjective view of the claimant. It is only in the unlikely circumstances that the "purpose" of the use of the absence procedure is to create the prohibited environment that a claim could succeed without more. In dealing with the "effect" of the conduct the claimant's perception is subjected to the test of reasonableness pursuant s.26(4). It is through that subsection that the effect of unwanted conduct is to be viewed."

23. As to the effect of s.26(4), in Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence; it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> …dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

24. In Warby v Wunda Group Plc UKEAT/0434/11/CEA, Mr Justice Langstaff observed that "context is everything".

The section 13, 15, 26 and 27 Equality Act 2010 complaints

25. As regards the section 13, 15, 26 and 27 Equality Act 2010 complaints, our starting point is paragraph 2.1 of the List of Issues, which outlines 14 matters which are said by the Claimant, in each case, to amount to less favourable treatment for the purposes of s.13 EqA 2010, unfavourable treatment for the purposes of s.15 EqA 2010, unwanted conduct amounting to harassment for the purposes of s.26 EqA 2010, and detrimental treatment amounting to victimisation for the purposes of s.27 EqA 2010. As Ms Harty did, we shall refer to these matters as Issues 1 to 14. Our primary findings in respect of them are as follows:

Issue 1

Fail to progress an Occupational Health (OH) assessment after it was agreed one was necessary in meetings with John Lynott on 23 May 2022 and 29 June 2022 so that, by the date of her dismissal, no such assessment had been carried out

26. Mr Lynott worked for the Respondent as an Operations Manager. In paragraphs 12 and 13 of her witness statement, the Claimant provides a reasonably detailed account of a meeting with Mr Lynott, she says in late April or early May 2022 (which she clarified at Tribunal had taken place on 23 May 2022), during which she says she opened up to him about her health issues. She claims that Mr Lynott produced six or so forms for her to complete to enable an occupational health referral to be made. The Claimant believes that she completed the relevant forms and recalls being told by Mr Lynott that she would hear back within ten days, but that she then heard nothing further. We conclude that she has become confused around both the timing and the detail. The document at page 1 of the supplementary bundle is a note of a "concerns" meeting she had with Mr Jones, rather than Mr Lynott, on 23 May 2022. The note is signed by them and also by Rohan Bhakoo who was also present at the meeting. During that meeting, the Claimant and Mr Jones discussed the Claimant's alleged refusal to do a job that had been assigned to her, and the fact she had allegedly communicated her dissatisfaction within the hearing of others, rather than trying to resolve it privately with the Lead Driver. The meeting notes confirm that, amongst other things, the Claimant and Mr Jones discussed that if the Claimant felt unwell at work, this should be raised with the Lead Driver to enable them to take appropriate action. There is no documented discussion within the meeting note of a potential occupational health referral; logically, if the meeting had included discussion of the Claimant's health issues, this is when any discussion of a potential referral would have taken place. Instead, the note evidences a low-key discussion of concerns, with no further action being indicated or agreed upon. We do not uphold the first part of the Claimant's complaint, namely that the Respondent failed to progress an occupational health referral after one was agreed to be necessary on 23 May 2022.

27. The second part of the Claimant's complaint concerns a return to work meeting on 29 June 2022, following sickness absence between 22 and 24 June 2022. This meeting was with Mr Lynott. The notes of the meeting are at pages 234 – 236. The reason for absence was noted as follows:

> "antibiotics for chest infection, GP referred for scans and blood tests as she also has an overactive thyroid".

We are satisfied that the note accurately captured what the Claimant told Mr Lynott when they met. In particular, we do not consider the reference to an overactive thyroid to reflect some misunderstanding on Mr Lynott's part as the Claimant alleges. On the contrary, we refer in this regard to the transcript of the Claimant's own recording of her conversation with Mr Lynott, (at page 231) and also to the notes of the later absence meeting on

7 November 2022 (at page 312), both of which make also reference to a thyroid issue.

28. In terms of what the company could do to help the Claimant, it was noted in the completed return to work interview form: "Long trips if possible but is ok now". The absence was noted to be unrelated to work ("Not at all.")

29. The Claimant and Mr Lynott spoke again on 30 June 2022. Again, the conversation was recorded by the Claimant. The transcript of the recording is at pages 237 – 242. It evidences that Mr Lynott endeavoured to gain a fuller understanding of any health issues affecting the Claimant, and it reinforces that this was not something they had previously discussed on 23 May 2022. Even then, Mr Lynott did not suggest during this further discussion on 30 June 2022 that the Claimant would be referred for an occupational health assessment. Instead, he told the Claimant that he would need to speak to HR about any next steps and that it might be Mr Asghar who would get back to the Claimant since he was about to go on holiday.

30. In the event, it was Mr Maw who sent the Claimant an occupational health referral form to complete, (page 244). He did so on 18 July 2022. There is no evidence that this was agreed to on 30 June 2022, rather we conclude that it was something that was recommended by HR and then actioned by Mr Maw on Mr Lynott's behalf, possibly during his absence on leave.

31. As part of the occupational health referral process, the Claimant completed a medical consent form on 2 August 2022. We find that the Claimant then began to have certain reservations in the matter, which in turn led the occupational health provider, AXA, to conclude that she had withdrawn her consent to the referral, (page 586). This was certainly the Respondent's understanding by 22 September 2022, since it prompted a further discussion, we believe between the Claimant and Mr Maw, with a view to getting the referral back on track – see pages 798 and 799. The last available email communication on the issue is from the Claimant, namely on 21 October 2022, when she told Mr Maw that the request had seemingly been closed by AXA and that the Respondent would need to generate a new referral. Mr Maw has no recollection as to whether or not he took any further action on the matter. There is no evidence within the bundle that the matter was progressed on either side. Mr Maw subsequently asked HR on 25 October 2022 whether they could move forward on the basis of the information already provided. It is apparent that he was asking whether the review of the Claimant's absences could be brought to a conclusion notwithstanding the lack of an occupational health report on the Claimant. There is no response to his email in the bundle.

32. In the meantime, on 6 October 2022, the Claimant had been informed by Mr Larkin that she had reached a level of absence to trigger an Absence Review Meeting under the Respondent's Sickness Absence Policy. In

other words, the 22 to 24 June 2022 absence, and indeed any other absences which had counted in triggering the review, were being treated by the Respondent as ‘regular’ absences. An absence investigation meeting took place on 7 November 2022, at the conclusion of which a First Absence Warning was issued, which would remain live for six months. The meeting was chaired by Mr Larkin, with Mr Asghar taking notes. The Claimant was informed that she could appeal against the warning, but that it was not a disciplinary warning. The notes of the meeting with the Claimant confirm that there was no further discussion of a potential occupational health referral.

<u>Issue 2</u>

Rohan [Bhakoo], the claimant’s team leader, telling the claimant that Francesco had lodged a formal complaint about her time off and not being a team player after a period of sickness absence around June 2022

33. Francesco Pietrafesa, otherwise known as Fapi, conducted the Claimant’s return to work interview on 21 June 2022 following absence between 13 and 16 June 2022. There is no indication in the contemporaneous notes of the interview, or in any other documents in the bundle, that he had any particular concerns about the fact the Claimant had had time off, let alone that he raised a formal complaint about the matter or about the Claimant allegedly not being a team player. We accept that the Respondent has no record of having received a formal complaint from Mr Pietrafesa about the Claimant. The Claimant’s account at paragraph 17 of her witness statement differs from how the matter is captured in the List of Issues. The Claimant alleges in her statement that Mr Pietrafesa consulted Mr Bhakoo and others before submitting a formal complaint, a copy of which was shown to her by an unnamed colleague.

34. As regards the allegation that Mr Bhakoo told the Claimant that Mr Pietrafesa had lodged a formal complaint about these matters, this aspect is barely addressed in the Claimant’s witness statement.

35. The Claimant has the burden of proof in the matter and has failed to discharge it. We do not uphold her allegations, let alone conclude that what happened was related in some impermissible way to her disability.

<u>Issue 3</u>

Rohan [Bhakoo] telling the claimant on or around 4 September 2022 that Osman, his line manager, was going to fire her, adding that Osman “f..ing hates sick people”

36. The complaint is about what Mr Asghar is alleged to have said rather than the fact that Mr Bhakoo relayed what he had allegedly said to the Claimant.

37. The Claimant deals with the matter at paragraph 39 of her witness statement, and Mr Asghar at paragraph 35 of his witness statement. We

accept that Mr Bhakoo made comments to the Claimant along the lines that she recalls. However, we are much less confident that he accurately conveyed what Mr Asghar had said. We find instead that Mr Asghar expressed some frustration about the impact of the Claimant's absence, in the context of his lack of experience and confidence in managing absences. In the course of his evidence at Tribunal, Mr Asghar said that he tends to focus on operational issues, leaving people management issues to others. We are satisfied that whatever his frustrations or anxieties in the matter, he did not tell Mr Bhakoo that he was going to fire the Claimant. If this is what Mr Bhakoo relayed to the Claimant, then that was his own impermissible gloss on the matter for which Mr Asghar was not responsible.

Issue 4

Allowing rumours to circulate so that the claimant was told by colleagues that they heard she had been dismissed in September 2022

38. The Claimant does not say who allowed rumours to circulate that she had been dismissed, or indeed what she means when she says rumours were allowed to circulate. For example, she does not clarify whether she alleges that rumours were positively encouraged or instead that one or more individuals in positions of authority failed to act on becoming aware that rumours were circulating. An employer is not liable simply because there is a gossip within a workplace. The only specific evidence in the matter is an iMessage from the Claimant's colleague Mohammed in which he said, "I heard you got fired!!??" (page 273). It is unclear whether he actually believed the Claimant had been dismissed or instead if he was joking about the fact she had been away from the office for a couple of days; the use of exclamation marks most likely indicates that he was joking. But if he did think the Claimant had been dismissed, he did not indicate the source of this information. The Claimant's response indicates that she perceived it as a light-hearted, jokey exchange, since she too used an exclamation mark in her initial response and thereafter 'lol". She did not raise any concerns about the matter at the time. Her complaint about the matter is seemingly not directed at Mohammed but even if it were, there is nothing to support his comment being related in some impermissible way to her disability. Beyond this single message, the Claimant has failed to substantiate her claim that one or more individuals allowed rumours to circulate, and she has offered no explanation or evidence whatever that it was somehow related to her disability or any protected acts of hers. The complaint is not well founded.

Issue 5

Calling the claimant to excessive meetings about sickness levels between May 2022 and February 2023, culminating in her being given a final warning on 3 February 2023 by Jack Larkin which she successfully appealed on 13 February 2023

39. The bundle includes evidence of four return to work discussions/meetings with the Claimant in the period May 2022 to February 2023, namely on 21 June, 29 June, 4 September and 12 October 2022. As we have noted already, Mr Lynott and the Claimant spoke on 30 June 2022 by way of follow up to the return to work discussion the previous day. Mr Larkin chaired a meeting with the Claimant on 7 November 2022 at which a First Absence Warning was issued. On 20 January 2023, Mr Jones invited the Claimant to attend a second formal absence review meeting on 26 January 2023, (page 431); the meeting itself was chaired by Mr Larkin, with Mr Asghar acting as a note taker. The Claimant had by then been absent for a further two days on 28 and 29 November 2022 to care for her father and had also taken two days' sick leave on 9 and 10 January 2023 following an arthritis flare up. It is unclear whether either absence prompted a return to work discussion; there are certainly no completed return to work interview forms in the bundle in respect of those absences. The Claimant failed to attend the meeting on 26 January 2023. Mr Larkin proceeded in her absence and issued her with a Final Absence Warning, though his decision in this regard was overturned by Mr Maw on appeal on 18 February 2023. Mr Maw substituted a Second Absence Warning for the final warning.

40. At our request, the Respondent made available a copy of its Sickness Absence Policy in force at the relevant time, since a copy had not been included within the bundle. The Policy provides,

> "Your manager will meet you after every absence to talk about your absence and find out how you are feeling now."

41. The Policy includes a list of matters that will be discussed with employees on their return to work following sickness absence, all of which are reflected in the Respondent's pro-forma Return to Work Interview Form. Given that it is, or was, the Respondent's documented policy to hold return to work meetings following all sickness absences, the question is whether the Claimant was singled out and subjected to an excessive number of meetings. She has not put forward a positive case in this regard, for example by comparing her treatment with how other sickness absences were managed. There is no evidence before us that the Policy was not followed in practice and, accordingly, that it was being applied strictly in the Claimant's case but not to others.

42. Regardless of the provisions of the Policy, we do not consider it can be said that the Respondent acted unreasonably or oppressively in scheduling return to work interviews following each sickness absence. In the collective experience of this Tribunal, many employers adopt a similar approach to managing staff absence. And we remain satisfied that the Respondent acted proportionately in the matter even though the meetings involved discussion of disability related absences. Unless employers explore the reasons for absence with staff, it is difficult to see how they can discharge their responsibilities under the Equality Act 2010, including by ensuring that appropriate adjustments are in place for those who are

disabled. We do not consider that a reasonable worker in the Claimant's position would or might regard such a discussion as being to their detriment. On the contrary, a worker would be more likely to regard the lack of any discussion or engagement as detrimental.

43. The Respondent's Sickness Absence Policy set out the triggers for an absence review meeting, namely eight days' absence or two spells of absence in a rolling 12-month period (where, as here, the employee worked a four day on and four day off shift pattern). We calculate that by 7 November 2022 the Claimant had had 11 days of absence over the preceding 12 months. The Sickness Absence Policy provides in such circumstances that employees may be issued with a First Absence Warning setting out the required improvement in attendance.

44. A second absence review is triggered by any further period of absence whilst the First Absence Warning is live, with the option for the Respondent to issue a Final Absence Warning following this review. Putting aside whether the two-day absence in November 2022 ought to have been treated as a relevant absence for these purposes, the two-day January 2023 absence was sufficient of itself to trigger the second formal absence review.

45. We do not uphold the Claimant's complaint insofar as she asserts that there were an excessive number of meetings. We shall come back to the question of whether the Final Absence Warning and substituted Second Absence Warning amounted to discrimination.

<u>Issue 6</u>

Calling the claimant to unjustified disciplinary meetings around late October 2022 and June 2023

46. There was no disciplinary meeting in October 2022 and accordingly that part of the complaint does not get off the ground.

47. As regards June 2023, an invitation to attend a disciplinary meeting was issued by Mr Jones on 3 June 2023. This was following an incident on 22 May 2023 when an incorrect vehicle was delivered to a customer. The customer alleged that the Claimant had joked about the matter and encouraged her to seek compensation from the Respondent, that she had failed to demonstrate the vehicle features when the correct vehicle was eventually delivered, and that the vehicle had not been cleaned. The Claimant denied the customer's account and attributed the delivery error to a technical glitch affecting her EVO App. The customer's initial concerns were captured by a member of the Respondent's Customer Services Team – see in this regard page 856. The customer submitted a detailed complaint on 23 May 2023; whilst she identified a catalogue of alleged errors which were unrelated to the Claimant, she was critical of the Claimant. Her complaint concluded,

> "I have dreaded every phone call I get from Cinch thinking what next is wrong. I should have been happy getting my car finally after everything but instead I was crying because I did not even care anymore. I have never been so stressed. I have paid a lot of money and I felt it was a scam when the car never turned up in the first place, all the way to having the wrong car being delivered and the specialist laughing as if it's funny then acting like she has done me a favour by filling up the tank. She did not have time to take it to a car wash because of her own fault. This was meant to be something for me to be excited about. The whole experience was ruined." (page 853)

48. The Claimant misses the point when she says her colleague and the customer were wrong or even possibly lying. On any reasonable view the Respondent, or in this case Mr Asghar, had proper cause to escalate the matter under the disciplinary policy. The Claimant's complaint that the Respondent's actions were unjustified is misconceived.

<u>Issue 7</u>

Allowing colleagues including Olli, Francesco, Mohammed and Louis to make comments to her about her trying to avoid work, that her absence was a deliberate attempt to avoid work, that she was slow and not a team player leading to her suffering isolation from September 2022 to her dismissal

49. As with Issue 4, the Claimant alleges that one or more unidentified individuals encouraged or permitted an adverse environment; specifically, that four colleagues were somehow allowed to make comments to the Claimant to the effect that her absences were an attempt to avoid work and that she was slow and not a team player, with the result that she was isolated over an extended period leading up to her dismissal. The evidence relied upon by the Claimant in support of her complaint is extremely limited. As Ms Harty notes, the available text messages in the bundle do not support the Claimant's claim that her colleague Mohammed called her slow or that colleagues suggested she was not a team player. We were taken to the messages at pages 160, 251 – 258, 288 and 364 of the bundle; they do not add up to much, if anything. If, as the Claimant claims, her phone was recording all her calls without her knowledge, it is surprising that she has not produced transcripts of calls with her colleagues which demonstrate their hostility towards her and efforts to isolate her. No such hostility or criticisms are indicated in the messages sought to be relied upon by her, let alone that this was encouraged, permitted or tolerated at some more senior level. We note that the Claimant did not raise any concerns about being isolated at the time or even document what she felt was happening at the time so that she would have a contemporaneous record to rely upon if needed at a later date. Her complaint is not well founded.

<u>Issue 8</u>

Osman encouraging the claimant's colleagues to create a toxic environment for her between September 2022 and her dismissal

50. We agree with Ms Harty that the allegation is not sufficiently particularised to enable the Respondent to understand the case it is expected to meet nor indeed to enable the Tribunal to make substantive findings of fact that might support the conclusion that Mr Asghar encouraged a toxic environment. The Claimant has the burden of establishing the primary facts sought to be relied upon in support of the allegation but has failed to discharge it. There is no evidence within the bundle and, as Ms Harty says, nothing in the Claimant's testimony or her cross examination of the Respondent's witnesses at tribunal to support the conclusion that Mr Asghar encouraged the creation of a toxic environment for her between September 2022 and her dismissal. As with Issue 7, nothing was seemingly captured on any phone recordings to substantiate the claim and the Claimant did not raise a grievance about Mr Asghar's alleged conduct at the time. The complaint is not well founded.

Issue 9

Osman and Jack making last minute changes to her tasks, especially after her successful appeal in February 2023

51. The complaint is inadequately particularised, but does not succeed in any event given the lack of any evidence which might suggest that changes to tasks, in particular changes made at the last minute, were related in some way to the Claimant's disability. The complaint is pursued on the basis that there was an increase in last minute changes following the Claimant's successful appeal in February 2023 against the Final Absence Warning. Yet, as Ms Harty points out, the Claimant has not described any last minute changes to her tasks after February 2023. She refers to three such changes in May, November and December 2022; however the first two did not involve Mr Asghar or Mr Larkin notwithstanding her complaint that they were responsible for last minute changes. Mr Asghar was involved in the reassignment of tasks on 22 December 2022. We shall come back to the question of why this happened, specifically whether it was related in some way to the Claimant's disability.

Issue 10

Failing to ensure the claimant was not working alone in the hub at night

52. The Claimant has not identified who she says failed to ensure she was not working alone at the Enfield Hub at night or why their alleged failure in the matter was related in some way to her disability. We can understand for example, why someone with an anxiety disorder might argue that such a practice places them at a disadvantage if it exacerbates or triggers their anxiety. However, this is not the Claimant's case. She is essentially complaining of being made to feel uncomfortable by the thought of being alone at the Enfield Hub without relating this to any protected characteristic of hers.

53. Under the terms of her contract the Claimant was required to work additional hours if necessary. Her contracted working hours were from 6am to 6:15pm. In her witness statement, the Claimant refers to two specific incidents, two days apart on 19 and 21 October 2022.

54. On learning on 19 October 2022 that her colleague, Peter was no longer at the Enfield Hub, the Claimant messaged him and her other colleagues within the "Cinch Enfield A Team" group at 7:36pm on 19 October 2022 as follows:

> "Oh, thanks for letting me know Pete. I'm just going to go home. Too scary in that place at night. Lol."

The Claimant did not seek approval to go straight home, which suggests to us that there was no expectation that she should be at the Enfield Hub alone out of hours.

55. As regards 21 October 2022, it is clear from the transcript of the Claimant's recording of her call with Mr Larkin that day that it was in fact her colleague, Irena who might have found herself alone at the Enfield Hub that evening had the Claimant not offered to accompany her back to it. Irena's final delivery that day was a vehicle that had not been cleaned or appropriately charged, which was causing some delay. When the Claimant contacted Mr Larkin to let him know this, he was apologetic, understanding and supportive. He suggested that the vehicle in question should be delivered to the customer even if it was not fully charged. He asked the Claimant to call him when she and Irena were back at the Enfield Hub so that he could be on hand to provide reassurance and so that he would know they were safe. He also committed to look at the rota for the following day given the Claimant and Irena's late finish. If anyone has cause to complain about having to potentially return to the Enfield Hub late in the evening on that occasion when there would be no one else there, it was Irena rather than the Claimant.

56. The complaint is not well founded. The Claimant has not established that the Respondent failed to ensure she was not working alone at the Enfield Hub at night. In any event, she has not suggested that Irena was disabled. If Irena was not disabled, there is no obvious basis to conclude that the Claimant was being treated differently to non-disabled colleagues.

<u>Issues 11 and 12</u>

Changing the work rota from 4 days on and 4 days off to 4 days on and 2 days off in May 2023

Jamie King saying the claimant was mentally unwell when the claimant spoke to him about the work rota change in May 2023

57. Ms Harty points out that the Claimant's rota did not change in 2023 from four days on and four days off, to four days on and two days off. Instead, along with her driver colleagues, she moved onto a rolling 12-week rota

under which she worked an average of 3.5 days per week. However, the Claimant's mischaracterisation of the arrangements is not fatal in terms of her claim since her complaint is plainly about the changed rota arrangements, the impact of which seemingly only finally crystalised in her mind in early May 2023.

58. The Claimant messaged Mr King on 12 May 2023,

> "… I noticed that I have 4 days ON this week and 3 days off.
>
> I mentioned from the onset that I will not be able to do this as I battle with health issues which leaves me no time for recovery if I'm to work more days than I get off to rest.
>
> Tomorrow makes it my fourth day on if I do work and unfortunately I don't think I can do it if I'm only going to have 3 days off.
>
> I have raised this issue with Sir Jonathan Maw yesterday and he said he'll look into it. He's incredibly busy.
>
> Can you please kindly check with him if there's been any resolution as I don't want to bother him any further with this.
>
> For now, I will not be able to work tomorrow and humbly request for tomorrow's work to be added to a week where I have 2 days on or something." (pages 491 – 492)

59. The Claimant subsequently clarified that she would in fact only have two days off, not three days as she had initially stated. Mr King responded to say that he would look into the matter. He spoke with Mr Maw and reverted to the Claimant to say that the following day would be treated as sickness absence. In his email he referred to her not being, "up for working due to mental health". The Claimant's initial email had not specified the nature of the health issues she said she was battling. She responded to Mr King,

> "I see. Well, I don't have mental health issues and neither have I stated this as my reason for wanting the days substituted for a lesser busier week.
>
> My reasons are that doing more days on than off has the potential to make me unwell which in event makes it counter productive.
>
> However, I appreciate your efforts, but like I said, I am not unwell and would not like this counting as a day off sick, anything but that."
>
> (page 495)

60. Mr King immediately apologised, which evidences to us that he had misunderstood the health issue to be a mental as opposed to a physical

one. We are amply satisfied that it was not his intention to create an adverse environment for the Claimant, even if he went on to say that her absence would continue to be treated as sickness absence. As we shall come back to, he could be said to have taken a somewhat inflexible approach in terms of adjusting her rota, since he went on to say,

> "Regardless, whether the other day is quieter, we cannot predict this and at present, we will not be substituting any other day for tomorrow. This is something we enforce across the business." (page 501)

61. The Respondent first consulted staff about a change to their rota arrangements in December 2022. The changes were originally planned to take effect on 16 January 2023. Although the rota would change, there would be no change to employees' average weekly hours of work or to the number of days worked each year. Employees with concerns relating to their personal circumstances were asked to contact their Lead Driver. The Claimant says that she initially raised the matter with her colleague, Mohammed, who she refers to as a "leader" at paragraph 52 of the Claimant's witness statement. However, she has not provided any further detail in her witness statement, including what, if any, further action was agreed upon.

62. To our knowledge, the Claimant was not one of sixteen employees whose personal circumstances were recorded in the spreadsheet at pages 429 and 430 of the bundle and, in the majority of cases, whose needs for adjustment were met by the Respondent. In the course of a relatively lengthy message to Mr Maw on 20 February 2023, regarding an unrelated health scare, the Claimant said:

> "Whilst I'm here, may I also add that I strongly doubt that I'll be able to do 4 days ON and 2 days off. I will always need a minimum of three days off due to, once again my health condition." (page 757)

She told Mr Maw that she had previously discussed this with Mohammed, before going on to say:

> "Also thought to clarify this, I can manage 1 manual car a day. From experience my condition only gets worse when I do more than one. …"

63. During a call with Mr Maw about the rota on 11 May 2023, following her return from an extended period of sickness absence, the Claimant reiterated the concerns she had expressed on 20 February 2023. The transcript of their call suggests that Mr Maw may not have taken on board her previous comments about the rota:

> Dorothy It's just, I just noticed that I have this shift I am doing now is supposed to be a 4 days on and 3 days off and basically….
>
> Jon Maw Ah right.

Dorothy Once I noticed it I sent you an email and I was trying to reach Osman as well. I can't reach him. I can't do that, I just can't. As much as I'd love to, I really can't. I mean by day 3 normally when it was 4 days on, that's when I'm beginning to recover. So I don't know how I am going to do 3 days off and 4 days on.

Jon Maw So how was, was that agreed with, is that a return to work or?

Dorothy I don't know, that's just what my timetable says. I don't have a clue you know how it works or who has planned it that way.

64. Putting aside for present purposes that it is an employer's duty to make reasonable adjustments, if the Claimant failed to escalate the matter following her exchange with Mr Maw on 20 February 2022, that is explicable by the fact she was absent from work for two months. Following her return to work towards the end of April, it seems that the Claimant was not rostered to work four days on and two days off until the week commencing 8 May 2023. She and Mr Maw spoke on 11 May 2023. The transcript of the Claimant's recording of their conversation is at pages 486 – 489, in the course of which the Claimant highlighted that the occupational health referral had still not progressed. Mr Maw said he would look into this. They discussed in some detail that the Claimant would struggle with the rota, including that she needed more time to recover following three or four days on duty. We shall come back to this.

Issues 13 and 14

Dismissing the claimant on 17 June 2023;

Rejecting the claimant's appeal against dismissal by letter of 3 August 2023.

65. It is not in dispute that the Claimant was dismissed on 17 June 2023 and that her appeal against her dismissal was not upheld. We shall come back to why this was.

66. In summary, the Claimant has failed to establish the primary facts in support of the complaints which derive from the allegations identified above as Issues 2, 4, 6, 7, 8 and 10.

Did the Claimant do a protected act?

67. We think Ms Harty has raised the bar unduly in terms of whether the Claimant's discussions with Mr Lynott, Mr Maw and Mr King in May and June 2022 amounted to protected acts. The Claimant does not need to establish that she made a complaint regarding her Equality Act 2010 rights. Under s.27(2)(c) it is sufficient that she "did any other thing for the purposes of or in connection with this Act". Even if it is unlikely that she understood that she was in effect asking the Respondent to discharge its s.20 duty to make adjustments, the Claimant plainly invited Mr Lynott to

give consideration to the distances she drove and types of vehicle she was asked to deliver. Furthermore, this was in the context of a return to work interview on 29 June 2022, one of the documented purposes of which was to explore any need for adjustments. If there is any doubt about the matter, when the Claimant and Mr Lynott spoke again on 30 June 2022, Mr Lynott prefaced their conversation by explaining that HR would want to know how the company could support her. He was actively inviting a discussion of her health issues, including any need for adjustments. Her identification of two aspects of the job that she struggled with does not cease to be a protected act because the conversation was initiated and led by Mr Lynott. She was identifying aspects of her job/working environment that put her at a disadvantage because she was disabled. We are satisfied that she was thereby doing something "in connection with" the Equality Act 2010.

68. For essentially the same reasons, we uphold that the Claimant did protected acts in May and June 2022 when she raised the rota arrangements with Mr Maw and Mr King. If anything, she expressed herself more clearly and emphatically in terms of her need for adjustments.

Conclusions in relation to the section 13, 15, 26 and 27 Equality Act 2010 complaints

Issue 1

69. We conclude that the Respondent 'dropped the ball', so to speak, in failing to progress the occupational health referral. The Respondent's witnesses did not know that their calls with the Claimant were being recorded. When one reads the transcript of the Claimant's conversation with Mr Maw on 11 May 2023, he clearly assumed that the referral had been dealt with some months earlier and was entirely unaware that it had in fact stalled. We understand that by May 2023 he may have moved to a different part of the Respondent's business and accordingly was not directly responsible for the Claimant or her team. Whatever the position and regardless of his responsibility or otherwise in the matter, we are satisfied that his documented reaction reflects his genuine surprise on learning that the occupational health referral had not progressed. In our judgement, it confirms that any failure on Mr Maw's part to progress the referral was not because the Claimant was disabled or otherwise related to disability. If Mr Maw, Mr Lynott, Mr King or anyone else had been minded or even subconsciously prone to discriminate against the Claimant or otherwise influenced in some way by her disability in their approach to and handling of the referral, it begs the question why the Respondent suggested and then initially progressed an occupational health referral. The Respondent may be criticised for not gripping the issue, particularly in October 2022 and again in May 2023, but in our judgement its failure to do so was the result of a genuine oversight, partly related to a multi-layered system of management under which no one person seems to have been responsible for managing the Claimant's absences, and which was potentially

exacerbated by people being busy and by Mr Maw's move to another part of the business.

70. There is no reason for us to infer that this oversight was unique to the Claimant, as opposed to an organisational weakness that would have seen a non-disabled person with health issues experience the same treatment in comparable circumstances. We do not therefore uphold the Claimant's direct discrimination complaint. Her section 15 EqA 2010 complaint does not succeed for essentially the same reason. The Respondent's failure to progress the referral may have been in context of recurring sickness absence, much of it disability-related, but it was not because of those absences. The absences did not cause the Respondent to overlook the matter, rather it resulted from organisational inefficiency and a lack of individual ownership of the issue. Similarly, the oversight did not relate to the Claimant's disability for the purposes of her s.26 EqA 2010 harassment complaint. It is not sufficient in our judgement that it took place in the context of disability, or that but for the fact she was disabled a referral might not have been required. The perceived need for an occupational health referral arose out of the fact the Claimant was disabled, but the failure to progress the referral, namely the unwanted conduct complained of, related to the Respondent's oversight, including as a result of organisational inefficiency. We do not uphold the Claimant's victimisation complaint for the same reason. Mr Maw understood that the Claimant was requesting an adjustment to the rota arrangements and, we infer was also aware of the Claimant's June 2022 discussions with Mr Lynott when he messaged her to say that she would need to complete the occupational health referral forms to, "help us make better decisions about how you are able to conduct your role." His correspondence with the Claimant about the matter came directly on the back of her discussions with Mr Lynott rather than their own earlier discussions. As we have noted already, Mr Maw initially progressed the referral. In our judgement, he would not have done so had he been minded to retaliate against the Claimant for having raised the need for adjustments, or even subconsciously viewed this as an inconvenience. No hostility or resistance to the referral is indicated in any of Mr Maw's communications with the Claimant. He endeavoured to resolve the matter in October 2022 when the Claimant highlighted a lack of progress and his genuine surprise in May 2023 and commitment to follow the matter up, speaks to a non-victimising mindset. We do not uphold any of the Claimant's complaints in respect of this matter.

<u>Issue 3</u>

71. We do not uphold the complaint under s.13 EqA 2010 as Mr Asghar would have expressed the same frustration had he been dealing with ongoing intermittent absences in relation to a non-disabled employee.

72. In expressing frustration to Mr Bhakoo regarding the Claimant's absence and the need to manage it, Mr Asghar's conduct plainly related to her disability and also amounted to unfavourable treatment because of

something arising from the Claimant's disability, given, as we shall come back to, the 1 and 2 September 2022 absence was disability related. Whilst we can appreciate why such an expression of frustration, even if only reported second-hand to the Claimant, might be unwanted and capable of creating an adverse working environment, and further that the Respondent would likely struggle to justify Mr Asghar's frustration under s.15(1)(b) of the 2010 Act, the Claimant's complaints about the matter have been brought out of time. Mr Asghar's alleged comments were made in early September 2022, but the Claimant's claim in respect of them was only presented to the employment tribunals on 24 October 2023, over ten months after the latest date by which the claim should have been notified to Acas under early conciliation. In our judgement, the conduct complained of stands alone and does not form part of any continuing act of discrimination. Even if Mr Asghar might have been more curious to find out if there was an underlying health condition that was contributing to the Claimant's absence, his frustration at having to manage the Claimant's absence is not sufficiently linked to the Respondent's failure to implement adjustments in respect of the types of vehicles she was tasked with delivering, for us to conclude that they were part of a continuing act of discrimination. As the EAT observed in <u>Allen v Worcestershire Health and Care NHS Trust</u> [2024] EAT 40, it is not sufficient that the acts in question are simply related in their factual context (in that case, a restructure), or that later events would not have occurred without the earlier events. The Respondent's failure to comply with its s.20 EqA 2010 duty to make adjustments was essentially an organisational shortcoming, albeit the primary responsibility for which rested with Mr Lynott, Mr Maw, Mr King and the Respondent's HR team. Even if others in Mr Asghar's position might have explored the reasons for the Claimant's absence in greater detail when they met on 4 September 2022, the Respondent's ongoing failure to consider identified adjustments to the Claimant's duties was not a continuation of any isolated discriminatory comments of his. His expression of frustration was a one-off act unrelated to those matters.

73. The Claimant has not explained why it might be just and equitable to extend time in respect of this complaint. We consider that there has been material forensic prejudice to the Respondent in having to address the complaint, relating as it does to comments allegedly made by Mr Asghar three and a half years ago about which he has no recollection. We decline to extend time for the Claimant to pursue her claim about the matter.

74. The s.27 EqA 2010 complaint in respect of Issue 3 does not succeed. We accept Mr Asghar's evidence that he was unaware that the Claimant had any health issues until on or around 4 September 2022 when he conducted the return to work interview with her following her sickness absence on 1 and 2 September. It follows that he was unaware of Mr Lynott's earlier discussions with the Claimant in June that year (indeed, on 30 June 2022 Mr Lynott had assured the Claimant "this doesn't leave the room" – page 241) or the interactions with Mr Maw and Mr King. In the circumstances, whatever Mr Asghar's frustrations in the matter, they did not arise because he understood the Claimant to have done protected acts

by discussing her need for reasonable adjustments with Mr Lynott, Mr Maw and Mr King some months earlier.

Issue 5

75. The return to work meetings were in accordance with the Respondent's documented Sickness Absence Policy. As we have already said, they were not excessive. In any event, we would not uphold any section 13 or section 27 complaints in respect of the meetings. We are in no doubt that any other employee would have been treated the same way in the same or comparable circumstances. As regards the Claimant's victimisation complaint, there is no evidence that Mr Pietrafesa, Mr Asghar or Mr Larkin were aware that the Claimant had done protected acts when she spoke to Mr Lynott, Mr Maw and Mr King in May and June 2022. Whilst we now have the benefit of the transcripts of the Claimant's recordings of the June 2022 conversations, it has not been suggested that the transcripts were available to Mr Pietrafesa, Mr Asghar or Mr Larkin when they held return to work discussions/meetings with the Claimant through 2022 or when Mr Larkin imposed the Final Absence Warning in early 2023. Nor is there any evidence that any of them had been briefed on the May and June 2022 interactions such that a specific aspect, namely the Claimant's identification of a potential need for adjustments, influenced how they dealt with her over the course of several months, culminating in Mr Larkin proceeding in her absence on 26 January 2023 in circumstances where two meeting invitations had been issued. In any event, the absence review process was mandated under the Respondent's documented policy in relation to managing sickness absence. The invitation to the second formal absence review meeting on 26 January 2023 was in accordance with the Respondent's Policy, as was the issue of the Final Absence Warning in circumstances where the Claimant had failed to attend the relevant meeting to discuss her further absences. Her non-attendance resulted from a miscommunication or misunderstanding rather than because she was disabled or because of something arising from her disability.

76. The Claimant does not rely upon the Sickness Absence Policy as a PCP and accordingly we are not required to consider whether the Policy placed the Claimant at a substantial disadvantage such that the Respondent was under a duty to make adjustments to the Policy in her case. However, the Policy does fall to be considered under s.15 EqA 2010. We have set out already why we do not consider the return to work interviews to have been to the Claimant's detriment. However, in our judgement, the Respondent's actions in issuing a Final Absence Warning to the Claimant on 26 January 2023 was to her detriment. In our further judgement, the warning was because of disability-related sickness absences, specifically: the absences between 13 and 16 June 2022 because of body aches and pains; between 22 and 24 June 2022 because of extreme fatigue, chest pain and palindromic rheumatism; on 1 and 2 September 2022 because of pains in the body; and on 9 and 10 January 2023 because of an arthritis flare up. Regardless of how the absences were described at the time by the

Claimant and/or recorded by the Respondent, we find in each case that the reported symptoms were symptoms of palindromic rheumatism.

77. In our judgement, issuing a Final Absence Warning and thereafter a Second Absence Warning in its place, was not a proportionate response to the Claimant's further absences in November 2022 and January 2023 even though we accept that the aims identified by the Respondent are legitimate ones. A more proportionate, less discriminatory, approach would have been to disregard the original disability related absences as well as the January absences, given that there had been no more than eleven days of disability related absence in total over a rolling twelve-month period. Discounting those absences, we calculate that the Claimant had been absent from work for just three days in total, or five days if the family related absences in November 2022 are counted for these purposes. Either way, this was below the threshold to trigger a formal absence review meeting, let alone a Second or Final Absence Warning. In our judgement, it is irrelevant that the Final Absence Warning was overturned by Mr Maw on appeal and a Second Absence Warning substituted in its place, since we do not consider the lower level warning to have been a proportionate response in the circumstances we have just described. In our judgement, it was reasonable for the Claimant (or strictly, a reasonable worker in her situation) to take the view, in all the circumstances, that the warnings were to her detriment.

78. As to whether the Respondent knew, or ought reasonably have known, that the Claimant was disabled, we are concerned here with Mr Larkin's and Mr Maw's knowledge, since it was their decision to issue the Claimant respectively with a Final and Second Absence Warning. Given the Claimant and Mr Maw's discussion of the Claimant's health issues, Mr Maw's understanding that an occupational health referral was warranted and the potential identified need for adjustments in respect of the rota, in our judgement when he heard the Claimant's appeal against the imposition of the Final Absence Warning, Mr Maw knew or ought reasonably to have known that the Claimant was disabled. As regards Mr Larkin, he did not give evidence at Tribunal. It is the Respondent's burden to establish the requisite lack of knowledge; it has failed to discharge its burden in the matter in relation to Mr Larkin. In any event, even had we been persuaded that Mr Larkin or Mr Maw did not know the Claimant was disabled, we would have said that they ought reasonably to have known that she was disabled. In our judgement, Mr Lynott was on notice by no later than 30 June 2022 that the Claimant was disabled, namely that she had a physical health condition which had a more than minor or trivial impact on her ability to undertake normal day to day activities, specifically driving longer distances and driving manual vehicles. It was information that he ought reasonably to have imparted to Mr Larkin, and indeed to Mr Maw, to enable them to manage and support the Claimant appropriately.

79. In the circumstances, we partly uphold the Claimant's s.15 EqA 2010 complaint in respect of Issue 5.

80. Alternatively, in our judgement, the warnings amounted to harassment in contravention of s.26 EqA 2010. The warnings were undoubtedly unwanted conduct. The warnings evidently related to the Claimant's disability as they concerned disability related sickness absences. The warnings may have been issued pursuant to the Respondent's documented Policy but in our judgement, it was reasonable for the Claimant to take the view that they created an adverse working environment for her, in circumstances where no or insufficient allowance was being made for her disability. We therefore uphold her further complaint in that regard.

81. Although the warnings were issued on 26 January 2023 and 18 February 2023, we consider that the Claimant's complaints about them have been brought in time on the basis that they amount to discriminatory conduct extending over a period of time. We are satisfied that Mr Larkin's and thereafter Mr Maw's decision to issue absence warnings are properly to be viewed together with the Respondent's failure to make adjustments to the allocation of manual vehicle deliveries and to its rota arrangements, which we find likely aggravated her condition and contributed to the absences which resulted in the warnings being issued. In the circumstances, her complaints in respect of the warnings have been brought in time, namely they were notified to Acas within three months of the end of the period in question. We refer in this regard to paragraph 103 below.

82. Alternatively, even if the warnings are to be viewed together as discrete acts, so that the time to notify a claim to Acas and thereafter present a claim expired on 17 May 2023, we would have said that it would be just and equitable to extend time in respect of the complaints. The Respondent is not faced with the forensic prejudice that prejudices its ability to defend itself against the claims arising in relation to Issue 3, as Mr Larkin and Mr Maw's reasons for issuing the warnings which they did are well documented. The Respondent's ability to defend itself against the claims has not been impaired by the passage of time, rather by its well documented failure to give any much thought to what adjustments might be accommodated.

83. We do not uphold the Claimant's victimisation complaint in respect of Issue 5. Although Mr Lynott's knowledge is to be imputed to Mr Larkin for the purposes of section 15 EqA 2010, actual knowledge is required under section 27 if any complaint is to succeed. We conclude that Mr Larkin was unaware that the Claimant had done protected acts in May and June 2022 when she discussed her potential need for reasonable adjustments with Mr Lynott, Mr Maw and Mr King, in which case her protected acts do not explain Mr Larkin's decision on 26 January 2023 to issue a Final Absence Warning. On the contrary, Mr Larkin's decision in that regard reflected the application of the Sickness Absence Policy in circumstances where the Claimant had failed to attend the meeting. For the same reasons we do not consider Mr Maw to have victimised the Claimant when he failed to progress her occupational health referral, we determine that he did not victimise her when he substituted the Final Absence Warning for a Second

Absence Warning. In coming to that decision, he was applying the Sickness Absence Policy as he understood it. We are satisfied that the 2022 discussions played no part in his thinking or eventual decision.

Issue 6

84. We have not upheld the Claimant's complaint that the disciplinary proceedings were unjustified. In any event, we are satisfied that any employee, regardless of their protected characteristics, would have been treated in the same way in the same or comparable circumstances. As Ms Harty notes, the Claimant said during cross examination that the confusion in relation to the vehicle that was to be delivered on 22 May 2023 did not have anything to do with her disability, that is to say that her actions did not arise as a result of her disability. That is fatal in terms of her section 15 EqA 2010 complaint as well as her section 26 EqA 2010 complaint which also depends for its success on the unwanted conduct complained of, namely the initiation of a disciplinary process, being related to the relevant protected characteristic. The invitation to attend a disciplinary meeting in June 2023 related to the delivery of an incorrect vehicle, including the Claimant's allegedly inappropriate response to the situation, neither of which related to her disability or resulted from something that arose from her disability. Nor is there any basis to infer that it was in response to the May and June 2022 discussions about potential adjustments. The various complaints are not well founded.

Issue 9

85. The only remaining question is whether Mr Asghar's actions on 22 December 2022 amounted to discrimination. The Respondent is a logistics business in which case it seems to us that last minute changes to deliveries and delivery schedules are inevitable. The Claimant's alleges that last minute changes intensified following her February 2023 appeal. However, she has failed to put forward any evidence in that regard. There has to be something more than simply a last minute change and a disability or a protected act to support an adverse inference. The limited messages on 22 December 2022 contained within the bundle certainly do not constitute 'something more'. The section 13 and section 27 EqA 2010 complaints are not well founded, likewise the Claimant's section 26 EqA 2010 harassment complaint, since the conduct complained of did not relate to her disability. The Claimant's section 15 EqA 2010 complaint also fails as the treatment complained of was not because of something arising from the Claimant's disability but because there was a delivery that needed to be covered. We do not uphold the complaints.

Issue 11

86. The change in rota was not unique to the Claimant. It cannot realistically be suggested that the Respondent implemented a new rota for its drivers because the Claimant had spoken to Mr Lynott, Mr Maw and Mr King in May and June 2022 about her potential need for adjustments and thereby had done protected acts. Instead, as the Respondent explained when it

began consulting staff on the new rota arrangements in December 2022, it was looking to implement revised rota arrangements because having traded for two years, the business had identified a pattern regarding the busiest delivery days in the week, which was not met by the existing rota.

87. In so far as the new rota arrangements disadvantaged the Claimant because she says she needed more than two days off after three or more days on duty, in our judgement she was not treated unfavourably by the Respondent *because* of something arising from her disability. The rota arrangements were not implemented in response to her difficulties but for the reasons we have just identified. The Claimant's section 15 EqA 2010 complaint cannot succeed given the lack of causal connection between the decision to implement a new rota and something arising in consequence of the Claimant's disability.

88. If Mohammed failed to record or report any conversation with the Claimant regarding her ability to work four days on and two days off as part of the new 12-week rolling rota arrangements, there is no specific separate complaint about his failure to do so. We do not consider the Claimant to have been treated less favourably in the matter than others were treated or would have been treated. In any event, even if it could be said that the Claimant was treated less favourably than one or more of the 16 employees whose personal circumstances are documented in the spreadsheet we have referred to, the Claimant has failed to advance even basic facts to support the inference that this was because she was disabled rather than, for example, because of some misunderstanding, lack of experience or oversight on Mohammed's part. The Claimant has not addressed the matter in her witness statement. Whilst that may reflect her lack of legal experience, nevertheless she has the burden of establishing the primary facts to support her complaint. The spreadsheet confirms that disability was a factor in the case of three employees, at least two of whom were granted flexible working. A third employee is noted as having failed to attend a meeting to discuss their need for adjustment. In which case, the only evidence available to us is that flexible working was agreed where disability was identified as a relevant personal consideration. In so far as the Claimant may have discussed her circumstances with Mohammed, there is no evidence before us that further action was agreed or obviously warranted, or that any failure on Mohammed's part to progress the issue was related to the Claimant's disability. In the circumstances, we do not uphold the Claimant's complaints on this issue.

<u>Issue 12</u>

89. We accept that when Mr King referred to the Claimant's mental health this was a genuine misunderstanding or slip on his part. The Claimant seemed to accept his explanation at the time. We do not infer that he would not have made the comment had the Claimant not had a physical disability, and do not therefore uphold her direct discrimination complaint. If there was no intention to create an adverse environment for the

Claimant, as she seems to have accepted at the time (particularly since she expressed her appreciation for Mr King's efforts), we consider that it would be encouraging hypersensitivity on her part to uphold her s.26 EqA 2010 harassment complaint. In our judgement, it is not reasonable and was not reasonable for her to consider that an adverse environment was created by a misunderstanding or slip which did not seek to minimise her health issues or to characterise them as the product of a mental health impairment, not least in circumstances where Mr King suggested a temporary practical solution whilst the issue was considered in more detail by the business. Likewise, Mr King's comments were not because of something arising in consequence of her disability. As we say, it is not the case that he perceived the Claimant's health issues to be a manifestation of a mental health condition. We do not uphold the Claimant's victimisation complaint either. For the reasons we have explained in relation to the other issues above, there is no basis for us to infer that Mr King's comments were influenced by their conversations in May 2022 or the Claimant's discussion of reasonable adjustments with Mr Lynott and Mr Maw. It makes little sense that Mr King would have said the business would be back in touch the following week if he was inclined, consciously or otherwise, to victimise the Claimant for having sought adjustments the previous year.

Issues 13 and 14

90. We do not uphold the Claimant's complaints in relation to her dismissal, including the dismissal of her appeal. It is not necessary to repeat what we have said in relation to Issue 6. The Claimant had insufficient service to bring an unfair dismissal claim. Much of her evidence in relation to her dismissal and the appeal, and a great deal of her cross examination of the Respondent's witnesses, was focused on alleged procedural unfairness. However, we are concerned fundamentally with the reason(s) why the Respondent dismissed her from its employment, rather than the adequacy of any investigation and whether dismissal was a reasonable sanction in the circumstances. In our judgement, whether or not the decision to dismiss could be said to have been a little harsh, dismissal was certainly not outside the band of reasonable responses or sufficiently inexplicable as to support either an inference that the Claimant was treated less favourably than a non-disabled person would have been treated in the same or comparable circumstances, or that the decision to dismiss her was materially influenced by her protected acts in 2022. The fundamental requirement of her job was to deliver vehicles (the correct vehicles) to customers. She failed to do so, and Mr Jones, and thereafter Mr House, was not satisfied with the explanation she gave for this. The way in which she handled the situation with the customer, leading to a complaint, and her demonstrable (and, to this day, continued) lack of insight as to the implications for the company, were understandably viewed by Mr Jones as aggravating features, or at least undermined his ability to be confident it would not happen again. It was not the first time that a delivery issue had arisen involving the Claimant. As we say, this is not one of those cases where it would be appropriate to infer discrimination from a respondent's

failure to explain its handling of a claimant's dismissal. There is no obvious basis to impugn the disciplinary process, let alone conclude that any shortcomings give rise to an adverse inference.

91. We accept, in any event, that Mr Jones was unaware that the Claimant was disabled when he reached his decision to dismiss her and so it cannot have informed his decision. The Claimant's section 15 and section 20 complaints cannot succeed since the conduct which resulted in the Claimant's dismissal, including her perceived failure to accept responsibility for her actions, did not arise from her disability and nor did her dismissal relate to her disability, instead it related to the incorrect delivery of a vehicle and her unacceptable response to the situation. We do not uphold her s.27EqA 2010 complaint given the lack of evidence that Mr Jones knew the Claimant had done protected acts.

92. We do not uphold the various complaints rising from Mr House's decision on the appeal for essentially all the same reasons. As regards the Claimant's s.13 EqA 2010 complaint, on appeal she raised the matter of two colleagues who she claimed had delivered incorrect vehicles but had not been dismissed. We agree with Ms Harty that they are not appropriate comparators. In both cases the employee had followed company procedure by proactively contacting the Operations Team, thereby helping to ensure that customer complaints did not result, (see in this regard pages 904 and 905). The Respondent's approach in those cases does not support an inference that a non-disabled employee and / or an employee who did not do a protected act, would have been treated differently in the matter. It was reasonable for Mr House to distinguish between what had happened in the three cases. We are amply satisfied that there is a non-discriminatory explanation for any difference in treatment.

<u>The s.20/21 EqA 2010 complaints</u>

93. Although the Respondent failed to progress the occupational health referral in October 2022 after the Claimant had alerted Mr Maw to the fact that a new request would need to be generated, there is no evidence that the Respondent's failure to grip the issue reflected some wider practice of not progressing occupational health referrals and assessments. On the contrary, the initial reasonably timely proposal of an occupational health referral points to an organisation that refers staff for assessment where the circumstances indicate that such a referral may be warranted. In the circumstances we do not uphold that the Respondent applied the first PCP contended for by the Claimant.

94. It is not in dispute that the Respondent required its drivers to drive manual vehicles and, accordingly, that it applied the second PCP.

95. We accept that the Respondent's practice or expectation was that its drivers would drive potentially long distances when delivering vehicles, that is to say distances in excess of 60 miles, and as such that it operated the third PCP. The 60-mile figure is the Claimant's, and she confirmed at Tribunal that this is the distance she relies upon for the PCP. The

question then is whether the PCP was applied in practice to the Claimant and, if so, whether she was placed at a substantial disadvantage in relation to her non-disabled colleagues. The Respondent has undertaken an analysis of the Claimant's average delivery mileage in 2022 and 2023 (page 8 of the supplementary bundle). We accept its analysis in the matter, the underlying data for 2023 having been included at page 154 of the bundle. The analysis confirms that the Claimant's average delivery mileage in both 2022 and 2023 was 22 miles, almost 50% lower that the average Enfield Hub delivery mileage of 40 miles. The percentage of her deliveries under 60 miles was 99%. Having regard to the number of outbound deliveries she undertook in 2022 and 2023, recorded at page 8 of the supplementary bundle, she was required to travel a distance in excess of 60 miles on perhaps just two occasions over the course of 18 months or so. She has not included any evidence about these trips in her witness statement. In the absence of any further evidence from her, we are unable to say that the Claimant was placed at a substantial disadvantage in the matter.

96. By contrast, we are satisfied that the Claimant was put at a disadvantage as a result of the second PCP. The Respondent's analysis confirms that automatic vehicles made up 48% of the vehicles delivered by the Claimant in 2022 and 2023, meaning that the Claimant was routinely delivering more than one manual vehicle per day. We accept the Claimant's evidence that she was prone to experience pain, inflammation, swollen joints and discomfort after she drove manual vehicles, particularly if she drove more than one manual vehicle per day, and that the pain, etc resulting from any flare up could last for some time. She explained this to My Lynott in June 2022. In our judgement, the effects were more than minor or trivial, as the messages at pages 254 to 260 further confirm.

97. Turning to the fourth PCP, whilst those staff who had previously worked four days on and four days off, were not required to continuously work a four day on and two day off shift, as part of the revised rolling rota arrangements, they were required to work four days on and two days off at least once in the course of their rota. In the circumstances, and with that caveat, we accept that the Respondent applied the fourth PCP. With respect to Ms Harty, we think she has taken an overly literal or pedantic approach to the PCP wording, in circumstances where it is sufficiently clear that the Claimant's complaint relates to a particular aspect of the rota.

98. We accept that the Claimant was put at a disadvantage as a result of the fourth PCP, in that she required extended periods of rest following back to back shifts in order to manage the symptoms of her condition and limit the risk of further flare ups. We find that the Claimant was more likely to experience pain, etc if she only had two days off after three or four days on duty, and that she was put at a disadvantage compared to non-disabled colleagues who were much less likely to experience pain, etc and/or to have difficulty recovering from the effects of driving manual vehicles when they had just two days off work between longer shifts.

99. The Respondent's s.20 EqA 2010 duty having been triggered in respect of the second and fourth PCPs, in our judgement the Respondent ought to have made reasonable efforts to limit the number of manual vehicle deliveries allocated to the Claimant each day to no more than one vehicle. It should also have adjusted the Claimant's rota either to ensure she had at least three days off after three or more back-to-back shifts or to ensure that she did not work more than three back-to-back shifts. In our judgement, the adjustments would have helped alleviate the painful and discomforting symptoms of the Claimant's disability, reduced the risk of flare ups and helped the Claimant to maintain an improved level of work attendance, by reducing the number and/or length of her sickness absences. For this reason and given also Mr Maw's involvement throughout, in our judgement the Respondent's failure to make these adjustments was conduct extending over a period for time limitation purposes. We shall come back to this.

100. The analysis at page 8 of the supplementary bundle confirms that about one third of the vehicles sold by the Respondent are automatic vehicles. We have not been provided with data for the Enfield Hub. The Respondent has failed to explain, or certainly with any conviction, why a greater number of automatic vehicle deliveries could not have been allocated to the Claimant, even if it may not have been possible to strictly limit the number of manual vehicle deliveries to one per day. The Respondent's approach is indicated at page 240 of the bundle; in the course of their discussion of the Claimant's health issues on 30 June 2022, Mr Lynott said:

> "Yeah. I think I don't know whether I said before right but obviously for me to sort of just give you exclusively automatics, A I don't think there'll be that many in the first place."

The Claimant was not suggesting she should only be asked to deliver automatic vehicles. It evidences to us how little Mr Lynott had engaged with the issue.

101. In our judgement, it is immaterial that the Claimant's immediate response was:

> "I don't even want you to do that. I don't want to seem like I'm getting some sort of preferential treatment at all."

Mr Lynott was her manager and he was essentially ruling out any adjustment in respect of the vehicles she was allocated for delivery. If her response was somewhat passive, we are not sure how else she was meant to respond in the circumstances. Her complaint does not fail because others in her situation might have asserted their rights more forcefully. Ultimately, it is an employer's duty to make adjustments rather than an employee's duty to secure its compliance. As we say, by his comments it is clear that Mr Lynott was barely engaging with the issue.

102. As regards the rota arrangements, it is equally apparent that the Respondent failed to give meaningful consideration to making adjustments for the Claimant in this regard. That is surprising given its willingness to consider adjustments for staff when the new rota was proposed. The Respondent's approach is rather summed up by Mr King's comment on 12 May 2023:

> " … we will not be substituting any other day for tomorrow. This is something we enforce across the business." (page 501)

Like Mr Lynott, he did not really engage with the issue.

103. We are content to give the Respondent the benefit of doubt, in terms of the need to act upon the Claimant's situation, after the Claimant had spoken to Mohammed about her rota and raised an appeal regarding the imposition of a Final Absence Warning. Nevertheless, by 11 and 12 May 2023 at the latest, the Respondent, through Mr Maw and King, was plainly on notice that the new rota arrangements, were putting the Claimant at a substantial disadvantage. In our judgement, having regard to s.123(4)(b) EqA 2010, the Respondent ought reasonably to have implemented an adjusted rota for the Claimant and re-visited her need for adjustments to her vehicle allocations by no later than 8 or 9 June 2023, namely within four weeks of her interactions with Mr Maw and Mr King. The Claimant notified her claim to Acas on 18 August 2023, namely well within the three-month time limit for notifying claims after the cause of action arose. Thereafter the Claimant presented her claim to the employment tribunals on 24 October 2023, within less than a month of the date that the early conciliation certificate was issued. Her complaints about these matters are therefore in time.

104. If the Respondent's breach of s.20 EqA 2010 in respect of the second PCP could be said to be out of time because it is not to be regarded together with the breach in respect of the fourth PCP as conduct extending over a period, we would in any event have extended the Claimant's time for bringing the claim on the basis that it would be just and equitable to do so.

<u>**Wages and Holiday Pay**</u>

105. We do not uphold the Claimant's unlawful deductions complaints for the reasons set out in Ms Harty's submissions. As we say, the Claimant has become somewhat confused about her wages and holiday pay, and she has remained confused about the matter notwithstanding Ms Grove's admirable efforts to set them out in a readily accessible way in her witness statement and in her evidence at Tribunal. We cannot usefully add to what Ms Grove has said on the matter. We accept her detailed explanation of the Respondent's pay arrangements, in particular that sick pay is paid one month in arrears, with the result that any overpayment of wages in the month in which sickness absence first occurs, is recouped from employees in the following month when they are paid their sick pay for the previous month. Ms Grove's account is supported not only by the

Claimant's payslips but by the detailed explanation provided to the Claimant on 8 June 2023, after she queried her pay. Ms Grove's evidence in the matter could not be clearer, whereas the Claimant has offered no obvious explanation for why she might be owed £6,086.47. As Ms Harty notes, when questioned on the matter at Tribunal, the Claimant was unable to provide any further substantiating detail, stating that, "I don't understand any of it." Ms Gilbert could not assist further in the matter.

106. There is some suggestion by the Claimant that Mr Maw agreed that she would be paid her normal salary when she was absent for approximately two months in February/March/April 2023 following a health scare. However, the transcript of their conversation on 25 February 2023 merely evidences that Mr Maw said he would try his best to secure some form of enhanced sick pay for the Claimant (page 482). It seems to us that when the Claimant was paid her normal salary for the first period of sickness absence (in accordance with the sick pay in arrears arrangements) she assumed that Mr Maw had secured the company's agreement to maintain her on full pay. If so, it was unwise for her to assume anything. As she questioned Ms Grove at Tribunal, we were left with the firm impression that she had closed her mind to anything Ms Grove and the Respondent had to say about her pay.

107. Insofar as the Claimant has been able to articulate her claim, namely in relation to holiday pay, she is plainly mistaken in the matter; she believes she is entitled to payment in lieu of her full annual holiday entitlement on the termination of her employment. In fact, she is only entitled to a pro-rata amount of her annual holiday entitlement, that is to say a proportion of her total annual holiday entitlement to reflect the proportion of the relevant holiday year worked by her up to the date of termination of employment. She was employed for 5.5 months of the 2023 holiday year. As the Claimant had taken in excess of her pro-rata entitlement, namely 16 days' leave, against the 11.25 days which had accrued pro-rata up to 17 June 2023, a deduction was made from her final wages in respect of the 4.75 days she was overpaid. We accept Ms Grove's evidence that after adjusting for certain calculation errors, the Claimant still owes the Respondent £35.88 in respect of the holiday she took in excess of her pro-rata entitlement, albeit the Respondent has chosen not to pursue her for this further balance.

108. The Claimant has not established that she is owed wages or holiday pay.

Approved by:

Employment Judge Tynan

Date: 17 June 2026

Sent to the parties on: 17 June 2026

For the Tribunal Office.

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