EMPLOYMENT TRIBUNALS

Claimant:	**Davina Srodzinski**
Respondent:	**Burncoose Nurseries LLP**
Heard at:	**Truro Magistrates Court**
On:	**16, 17 and 18 June 2026**
Before:	**Employment Judge Volkmer**

Representation

Claimant:	in person, supported by CAS Ms Payton (day 1 only)
Respondent:	Mr Ishaq, Litigation consultant

JUDGMENT

1. The Claimant's complaint of a failure to make reasonable adjustments was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The complaint is therefore dismissed.
2. The Claimant's complaint of harassment related to disability in relation to Act 1 was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The complaint is therefore dismissed.
3. The Claimant's complaint of harassment related to disability in relation to Act 2 is not well founded and is dismissed.

REASONS

Name of Respondent

1. At the beginning of the hearing, the Respondent's name was amended by consent to Burncoose Nurseries LLP.

Amendment

2. Page references in this judgment are references to the agreed hearing bundle of 435 pages.

3. Following ACAS conciliation, the Claimant presented a claim on 13 August 2024 (page 12).

4. A previous case management preliminary hearing took place before Employment Judge Livesey on 25 July 2025. Employment Judge Livesey listed a three day hearing to take place from 16 to 18 February 2026.

5. The case management order records that "*The Employment Judge discussed the issues with the parties and the Claimant explained that her general complaints of bullying and harassment were not based upon (or 'related to') the alleged existence of a particular protected characteristic. Further, it was clarified that no allegation of victimisation was brought on the basis of formal or informal grievances which had been raised*." [69] (page 68). The only complaint recorded on the list of issues was a failure to make reasonable adjustments based on the PCP of there being a requirement to work at premises where there were, from time to time, unleashed dogs present. The Claimant relied on cynophobia, prolactinoma, anxiety and poor bladder function as disabilities. The case management order was sent to the parties on 12 August 2025.

6. On 13 August 2025 the Claimant wrote to the Tribunal saying that in relation to paragraph 69 there had been a misunderstanding, the bullying and harassment was related to her disabilities/cynophobia (page 71). There was significant further correspondence with the Tribunal, but this point was not raised again.

7. There was significant correspondence with the Tribunal regarding cooperation between the parties to produce an agreed hearing bundle and at the request of the parties a further case management hearing was listed. This took place on 11 February 2026 before Employment Judge Livesey. Employment Judge Livesey postponed the final hearing, which had been due to take place shortly thereafter. There is no mention of the Claimant raising any concerns regarding the List of Issues in the case management order resulting from the 11 February 2026 hearing, which was sent to the parties on the same date. The Claimant's position was that she was not given the opportunity to properly address the Tribunal on 11 February 2026, whereas Mr Ishaq stated that he had been

present for the hearing and the Claimant had been expressly asked and stated that there were no amendments. I cannot resolve that factual dispute, and nothing is recorded in the case management order.

8. The Claimant made an application on the morning of the first day of the hearing to add a number of allegations of harassment related to disability. We discussed which allegations should be added to the List of Issues and whether they were in the Claimant's claim form. The allegations the Claimant told me she wished to add were complaints of harassment related to disability based on the following factual allegations.

    a. matters included in the Claim form:

        i. Mr Mills telling the Claimant that he wanted to sack the Claimant on a number of occasions in or around 31 January 2020 and on other dates that the Claimant could not recall prior to 2023, as well as 8 March 2023 harassment related;

        ii. in October 2023, not giving the Claimant a role in the office;

        iii. on 11 or 12 March 2024 Mr Mills threatened to put Claimant in a cage;

    b. matters the Claimant stated were not included in the Claim form, but included in the Claimant's witness statement:

        i. on 27 March 2019 Mr Mills told the Claimant that if she could not get out of the car because of the dog, there was no job for her with the Respondent;

        ii. on 23 February 2024 Mr Mills said to the Claimant "*what exactly is your problem*";

        iii. in October 2022, Ms Alford wrote emails about the Claimant to Mr Williams saying, "*bullocks to the chart*", Mr Williams responded saying woman can be as bitchy as men in the work environment;

        iv. on 6 February 2023 Mr Mills blamed the Claimant for Scott (a colleague) not being able to come in because of his dog. The Claimant wished to add a further comment allegedly said by Mr Mills to the Claimant on the same date which is not contained in the Claimant's statement, "*You will be the first person who will be let go.*";

        v. on 6 February 2023 Mr Mills shouted at the Claimant "*do you want to take this into my office*";

vi. on 8 February 2023 Mr Mills leaned over a palate crate shouting at the Claimant calling her wasted labour, and saying that she was a liar in fantasy land;

vii. on 24 February 2023 Mr Mills told the Claimant that she was not to speak to anyone otherwise he would sack her;

viii. on 24 February 2023 Ms Alford clicked her fingers at the Claimant and shouted "*aggression*" then walked off laughing;

ix. the contents of an email from Ms Alford to Mr Sims and Mr Mills dated 1 March 2023 (page 115);

x. on 2 March 2023 Mr Mills sent an email saying "*decide how we are to tackle Davina*" instead of investigating the bullying complaint she had submitted;

xi. Mr Mills disbelieving the Claimant had a bad back on 29 September 2023;

xii. on 12 March 2024 "Farmer Steve" saying to the Claimant "*Woof Woof Woof the dog is there*";

xiii. on 23 February 2024 Mr Sims asking to speak to the Claimant regarding her poor absence record;

xiv. Mr Sims not getting back to the Claimant to provide her with support in relation to her phobia, which she had asked for in their discussion on 23 February 2024; and

xv. on 8 March 2024 Mr Mills telling the Claimant that she would have to work in the packing shed with all the doors shut and if there was no work, in the end cubicle of the bottom shed.

9. The Claimant's submissions were that she was a litigant in person. She had limited assistance from CAB with someone who was in a rush and could only help her for two hours. She did not know everything had to be included in the original claim or how to make an amendment. She did write to the Tribunal after the first case management hearing. In relation to the February 2026 preliminary hearing, she was not allowed to speak and felt she had been silenced.

10. The Respondent objected to the amendments. The Claimant had had the opportunity to discuss this matter in the February 2026 preliminary hearing and had not done so. Any amendment would require the witness statements to be varied and would therefore put the Respondent in an unfair position. The Respondent also raised that the relevant allegations were out of time.

The Law: Amendments

11. Under the general case management powers set out in Rule 30 of the Employment Tribunal Rules of Procedure 2024, Tribunals have a broad discretion to allow amendments to pleadings at any stage of the proceedings, either on the Tribunal's own initiative or on application by a party.

12. In *Cocking v Sandhurst (Stationers) Ltd and anor* *[1974] ICR 650 NIRC* Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in *Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT*, which approach was also endorsed by the Court of Appeal in *Ali v Office of National Statistics [2005] IRLR 201 CA*.

13. The EAT held in *Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT* that in determining whether to grant an application to amend, the Employment Tribunal should have regard to all of the circumstances of the case. In particular it must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. In *Selkent* His Honour Judge Mummery (as he then was) set some examples of factors which should be considered by the Tribunal: the nature of the amendment, the applicability of time limits and the timing and manner of the application.

14. It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success: *Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06*. However, Tribunals should proceed with caution.

15. In *Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07* Lord Justice Underhill made clear that the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment but was a factor to be taken into account in the balancing exercise.

16. In *Abercrombie v Aga Rangemaster Ltd [2014] ICR 209* Lord Justice Underhill emphasised that Selkent was not intended as prescribing a tick box exercise. It is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance of hardship and injustice. He added the following guidance: "*the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted*".

17. In *Vaughan v Modality Partnership 2021 ICR 535, EAT*, His Honour Judge Tayler gave detailed guidance on applications to amend tribunal pleadings. It

confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. Factors in *Cocking* and *Selkent* are not a definitive checklist. The consideration of the real practical consequences of allowing or refusing an amendment should underlie the entire balancing exercise undertaken by the Tribunal.

18. In relation to time limits it was recognised that there were conflicting authorities on the doctrine of relation back. In *Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN*, HHJ Hand QC held that the doctrine of relation back does not apply to Employment Tribunal proceedings. The guidance given by Mummery J in *Selkent* and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both *Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207* and *Abercrombie* emphasised that the discretion to permit amendment was not constrained necessarily by limitation.

19. In *Reuters Ltd v Cole UKEAT/0258/17/BA* at para 31 HHJ Soole said: *"In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach.*"

20. This was further considered in *Vaughan*. There has been some confusion as to whether a tribunal may grant an amendment in the form of a new claim without applying the law of time limits to the new claim at the time of application. HHJ Tayler reminds us that a tribunal may do so and suggests that the *Selkent* categories are regularly misunderstood. Whether the claim may be out of time is just one matter that the EJ has regard to in exercising discretion on whether to allow the amendment. It is not necessarily conclusive.

Discussion and conclusions

21. In considering the balance of injustice and hardship in allowing or refusing the application, I took into account the following factors in this case:
    a. the overriding objective;
    b. in relation to the allegations in the ET1, whilst these were raised in the claim form, they were not identified in the List of Issues;
    c. in relation to the "cage" comment, this had been referred to in the ET1. On a fair reading of the ET1, no amendment was required to add this. It had also been addressed factually by Mr Mills in his witness statement;
    d. in relation to the allegation regarding not being permitted to work in the office, this had been pleaded in the ET1 but on a fair reading was clearly identified as being a complaint of failure to make reasonable

adjustments, this would require relabelling to be included. It was already included in the List of Issues as a suggested reasonable adjustment and therefore had been dealt with in the Respondent's evidence;

e. whilst the reference to being told constantly that she would be sacked by Mr Mills, this was not described with enough information (i.e. the alleged dates) to be sensibly responded to, and could be fairly understood to be background information. Further, these allegations were out of time even at the time of presentation of the Claim. No good reason was given why those complaints had not been brought within the time limit. These had not been addressed in the Respondent's evidence;
f. the matters which were not in the ET1 were raised for the first time as factual allegations in the Claimant's witness statement. Whilst a few of these were referred to in the Respondent's witness evidence, the majority were not. They were entirely new factual allegations which were not considered during disclosure and were not understood by the Respondent to form part of the substantive claim;
g. the Claimant was a litigant in person, with limited assistance from CAB, and had not realised that she was required to include all of the factual allegations in the ET1;
h. the Claimant had been signed off sick from work from March 2024 to the present, but had managed to submit her ET1 during that time;
i. the Claimant did write to the Tribunal regarding the List of Issues, but had then not raised it again, despite the Tribunal file containing a significant volume of correspondence from her;
j. this matter it is not recorded as having been raised by the Claimant in the February 2026 preliminary hearing;
k. there were real practical consequences for the Respondent in that the addition of these additional allegations would require further investigation and potentially further documents as well as an expansion of the witness evidence in most cases;
l. Ms Alford and "Farmer Steve" were alleged to have committed acts of discrimination but were not called as witnesses by the Respondent;
m. the dates of allegations range from March 2019 to March 2024. There could be an argument that there may be an act continuing over a period as the allegations primarily relate to Mr Mills and Ms Alford. However, since the application to amend was made in June 2026, the allegations were around two years out of time and no good reason had been given as to why the amendment should be permitted notwithstanding the time point;
n. in relation to the new factual allegations as well as the allegation Mr Mills saying he wanted to sack the Claimant, the making of these amendments would likely require postponement, to allow for further disclosure, further witness evidence and a longer hearing.

22. I took all of the factors set out above into consideration and considered the balance of injustice or hardship to the parties if the amendment is allowed or refused.
    a. I determined that the cage comment was included in the ET1 and had been addressed factually in Mr Mills witness evidence. I could not see any prejudice caused to the Respondent if this allegation was added to the List of Issues now.

b. In relation to the allegation that the Claimant was not given a role in the office, this was relabelling a matter which was already included in the List of Issues because it was included as a suggested reasonable adjustment. On that basis, the Respondent had come to the hearing prepared to address the point and would not be prejudiced by the relabelling.
c. In relation to the other allegations, I considered that these matters were significantly out of time, with little prospect of time being extended. Little prejudice could be suffered by the Claimant if she was not permitted to pursue allegations which were likely to be found to be out of time in any event. Further, they could not be dealt with fairly in the present hearing because the Respondent had not prepared for the hearing on the basis that these were part of the claim. I considered fairness would require a postponement, additional disclosure and/or additional witness evidence. Taking all of this into account, I considered that the balance of injustice and hardship weighed in favour of refusing the amendment in respect of the remainder of the allegations.

The Issues

23. The following List of Issues was discussed in the first case management hearing and set out in the Case Management Order of Employment Judge Livesey (sent to the parties on 12 August 2025). This has been amended to add time limits, which I explained to the parties at the beginning of the first day was an issue which was still at large. As a result of the amendment application made on the first morning, the harassment allegations were also added.

1. Time limits

1.1. The Claimant commenced the Early Conciliation process with ACAS on 3 June 2024. The Early Conciliation Certificate was issued on 11 July 2024. The Claim was presented on 13 August 2024.

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

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

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

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

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

1.2.5. Why were the complaints not made to the Tribunal in time?

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

2. *Disability*

    2.1. *Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide the following.*

        2.1.1. *Whether the Claimant had a physical or mental impairment. The Claimant relies upon:*

            2.1.1.1. *cynophobia;*

            2.1.1.2. *prolactinoma;*

            2.1.1.3. *anxiety;*

            2.1.1.4. *poor bladder function.*

        2.1.2. *Did the impairment(s) have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?*

        2.1.3. *If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment(s)?*

        2.1.4. *Would the impairment(s) have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?*

        2.1.5. *Were the effects of the impairment(s) long-term? The Tribunal will decide:*

            2.1.5.1. *did they last at least 12 months, or were they likely to last at least 12 months?*

            2.1.5.2. *if not, were they likely to recur?*

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

    3.1. *Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?*

    3.2. *A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: the requirement to work at premises where there were, from time to time, unleashed dogs present.*

    3.3. *Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that her fear of dogs caused her extreme anxiety and panic attacks when they were present.*

    3.4. *Did the Respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? From what date?*

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

~~3.5.1. ensure that dogs were not present at the premises~~ [withdrawn during submissions];

3.5.2. tether and/or otherwise confine any dogs whilst on the premises to a specific area/areas;

3.5.3. redeploy her into an office based role which would keep her away from dogs on site.

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

3.7. Did the Respondent fail to take those steps?

4. Harassment related to disability (Equality Act 2010 s. 26)

4.1. Did the Respondent do the following things:

*4.1.1. in or around October 2023 refuse to give the Claimant a role in the office (**Act 1)**; and*

*4.1.2. on 11 or 12 March 2024 Mr Mills threatened to put Claimant in a cage **(Act 2)**?*

4.2. If so, was that unwanted conduct?

4.3. Did it relate to the Claimant's protected characteristic, namely disability?

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

4.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The Facts

24. The Claimant has been diagnosed with the following conditions: prolactinoma (in 2003), phobic anxiety disorder (in 2006), and longstanding urinary symptoms (since 2019). This finding is based on a letter from the Claimant's GP dated 20 June 2025 (page 365).

25. Although the diagnosis was in 2006, the Claimant has suffered the symptoms of cynophobia/phobic anxiety disorder all of her life. The Claimant explained that this phobia is selective, depending on the breed of dog, the behaviour of the dog (whether it is calm or agitated) and the behaviour of the owner in controlling the dog and giving the Claimant confidence that the dog is under control. Based on her written and oral evidence, cynophobia had the following effects at the relevant time. The Claimant would take longer routes or different

routes/travel methods to avoid lanes or the driveway of the Respondent, would not enter a shop if there was a dog in there, and would not leave her home if there was a dog outside of it barking. If the Claimant took a bus, she would have to get off the bus if there were certain dogs on the bus. The anxiety was an aspect of the Claimant's cynophobia, although the Claimant referred to this affecting day-to-day activities, none were specifically identified in her impact statement (page 48).

26. Based on the Claimant's impact statement, the prolactinoma affects the Claimant's sleep (page 48), although other symptoms are referenced no other day to day activities are referenced. The has affected her since 2003 (page 48).

27. The Claimant's bladder condition affects her ability to sleep and means that she needs to visit the toilet more frequently. This has affected her since childhood (page 47).

28. The Respondent is a garden centre and plant nursery which sells plants to retail customers both onsite and online. The Claimant has an interest in plants and has completed an RHS Level 2 course at Duchy College.

29. The Claimant visited the Respondent on 20 March 2019 and asked whether there were any jobs going. Andrew Mills, the Nursery Manager told her that there were only roles in packing.

30. The Claimant started work on 27 March 2019 as a Nursery Packhouse Operative. Her first day was intended to be a trial day. I make this finding based on Mr Mills' evidence that this is this is the general practice so that he can observe the prospective employee and they can also determine whether they would like to work at the Respondent. The Claimant disputed this account. I note that a petty cash slip (page 106) supports Mr Mills account, and a payslip (page 422) supports the Claimant's version. I preferred Mr Mills evidence on this based on his explanation of the Respondent's general practice of doing this.

31. When the Claimant arrived, she saw an unleashed dog in the car park. The Claimant informed Mr Mills that she had a fear of dogs and because of the dog in the car park, she felt unable to get out of the taxi she had arrived in. Mr Mills said that it was up to her whether she wanted to get out of the taxi and meet him in the packing shed to start working or if she preferred to return home again (the inference being that there was no role for her). This is the account set out in Mr Mills witness statement. I consider that this is consistent with the version in the email at page 150 and the Claimant's account.

32. On the first day, 27 March 2019, there was a discussion during which the Claimant informed Mr Mills that she had a phobia of dogs. The Claimant's submission and oral evidence was that she referred specifically to cynophobia, however her written statement states that she had said "*phobia of dogs*" (paragraph 2 of the Claimant's witness statement). Mr Mills' evidence was that she did not use the word phobia at all but referred to a fear of dogs. I prefer the Claimant's written evidence and find that she told Mr Mills that she had a phobia of dogs. It is consistent with the facts as they occurred on the first day that she would have made this disclosure, and the way in which she has described it on

other occasions. Further, cynophobia would not be a commonly understood term, whereas phobia of dogs would be a phrase that would be more likely to be used in general conversation. Mr Mills responded saying that there were a number of dogs onsite and that it was a dog friendly environment. He did not make enquiries about how the phobia affected the Claimant or how long she had had it.

33. I had to determine whether the discussion set out in paragraph 32 above took place on 20 March 2019 (according to the Claimant) or the 27 March 2019 (according to Mr Mills). I consider nothing turns on the date; however, I prefer Mr Mills's evidence on this. He gave a detailed explanation of recalling the other individuals present and the location of the discussion. I consider that this account is also more consistent with the events as they occurred on the first day in relation to the Claimant being unable to get out of the taxi.

34. The Claimant's role at the beginning of her employment was working in the packing shed. There was a dog, a Staffordshire Terrier, which belonged to a colleague which was regularly in the same area. The Claimant's evidence was that she repeatedly raised that this was an issue for her. Based on the Claimant's evidence, this had a significant impact on her from the start of her employment. She would wake up crying, have stomach pain and feel nauseous.

35. After a period of time working in the packing shed, the Claimant was moved to working in the retail side of the business. This involved the Claimant working in the nursery, including discussing plants and giving customers advice in relation to this. Mr Mills evidence was that the Claimant performed well during this time and was given a higher pay-rise and bonus than other employees to reflect her performance. Based on Mr Mills' evidence, dogs were also present in this area.

36. The Claimant would try to work near the toilets so that she could lock herself in the toilet if there was a dog which she wanted to avoid. This is based on the Claimant's evidence and the text message to a colleague, Ms Alford, (page 399) dated 15 March 2021 in which she states that she has done so.

37. The Claimant had a particular phobia of two specific dogs: Reuben, a dog belonging to Scott, a colleague; and Spike a Rhodesian Ridgeback belonging to the brother of the owner of the Respondent, Mr Williams. Burncoose Estate is an estate with 30 acres which sits behind Burncoose Nursery (the Respondent). Mr Williams and his wife lived in London but would come and stay at the estate from time to time. They would bring Spike with them.

38. I find, based on the Claimant's evidence that Spike who was allowed to access Burncoose Estate, entered the Respondent's property from time to time without a lead on. This is consistent with her text message in March 2021, which states "*Spike is loose*" (page 399), and another message in December 2023 in which she states "*I'm really stressed about spike running around loose*" to her manager, who did not contradict that he was loose (page 138). Mr Sims' evidence on this was not consistent, on the one hand saying that it was not within the Respondent's jurisdiction to tell Mr Williams that Spike could not exercise in the Estate gardens, and that Spike getting in would be navigating gateways, then later denying that Spike would be present at the property at all.

Mr Mills' evidence was internally consistent in saying that Spike would be on the estate with his owners off the lead, but only present on the Respondent's premises on a lead. However, I consider it is notable that Mr Mills took steps (see below) to alleviate the effect of Spike being present, which is not consistent with his evidence that Spike was not loose. I also note that throughout the Claimant's grievance and grievance appeal, there was never a denial by the Respondent that Spike was loose on the Respondent's property.

39. Reuben was banned from the Respondent's property in 2022 after the Claimant and other colleagues raised a concern about him, because he had attacked other dogs.

40. In October 2023, the Respondent advertised a role in the Respondent's office. The Claimant wished to work there to avoid contact with dogs. With the encouragement of Mr Sims and Mr Mills, she submitted her CV and did a trial day. However, she was not given the role.

41. In early 2024, the Claimant again raised her concerns about Spike with the Respondent. This included a meeting with Mr Sims on 23 February 2024 in which she told Mr Sims about her concerns regarding Spike being on the property without being on a lead and that she felt unsupported in relation to this. She also disclosed her prolactinoma to Mr Sims (page 144) and told him that it caused her constant tiredness.

42. In response to this, Mr Mills moved the Claimant to working in the packing shed again. This required him to move other employees to different roles. He was concerned that if the work in the packing shed were to run out, he did not wish the Claimant not to be working. He therefore informed her that if the work ran out, she would go to one of the potting cubicles. He told her that he would construct a gate for her to prevent Spike from being able to access it. The cubicle is pictured in the bundle at page 383.

43. The Claimant alleges that Mr Mills told her he was going to "*cage [her] in*" on 11 or 12 March 2024, in relation to the potting cubicle. Mr Mills strongly denied making this comment. The Claimant points to the fact that on other occasions the Respondent has referred to there being an "enclosure" which is in practice the same thing as a cage. I note that both the Claimant's account has changed, in her grievance, she stated she had been told she would be "boxed in" (page 151), which she also referred to in her witness statement, but I consider that if the caged in comment had been made this would have been referred to in the grievance email. In the grievance meeting, she raised the "*cage in*" comment. During the grievance process Mr Mills denied making this comment (page 296). On this matter, I preferred Mr Mills' evidence. He was very clear and consistent in his written and oral evidence that he could clearly remember and had not said this.

44. Following this, the Claimant raised a grievance on 7 April 2024 (page 151) regarding the arrangements, saying that being trapped in a small area like the potting cubicle would be stressful, exacerbate her fear and that she would not be able to go to the toilet.

45. During the grievance meeting on 23 April 2024, the Claimant referred to her

cynophobia and disclosed further details about the prolactinoma, saying it affected her sleep (page 224). She also raised that she had health problems and needed to go to the toilet frequently (page 234).

46. The Respondent sent a grievance outcome letter to the Claimant on 3 May 2024. It did not uphold the Claimant's complaints about the management of her fear of dogs saying that the Respondent had done "*all within its jurisdiction*", provided the Claimant with a protected environment in which she could work (page 312) and did not uphold her allegation of harassment. The Claimant was notified of her right to appeal.

47. The Claimant appealed the decision on 8 May 2024. A meeting was held with Charles Williams regarding the appeal on 28 May 2024. The Respondent notified the Claimant on 14 June 2024 that her appeal had not been upheld (page 352).

The Law - Failure to make reasonable adjustments

48. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA.

"*20 Duty to make adjustments*
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature 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.
(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
…
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
…

21 Failure to comply with duty
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

49. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in _*Environment Agency v Rowan [2008] IRLR 20 EAT*_ at paragraph 27. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer (or the physical feature if applicable); (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant. _*Rowan*_ was specifically approved by the Court of Appeal in _*Newham Sixth Form College v Sanders [2014] EWCA Civ 734*_. The matter to be identified at (i) would now also include the relevant auxiliary aid as a third alternative.

50. As set out in _*Newham Sixth Form College*_, "*these three aspects of the case -- nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments -- necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage"* [14].

51. HHJ Richardson stated at paragraph 37 of _*General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN*_: "*The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take*".

52. The duty to make adjustments only arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The test of reasonableness is an objective test, which is for the Tribunal to determine based on its own assessment of what was reasonable (_*Smith v Churchills Stairlifts plc 2006 ICR 524, CA*_).

Knowledge

53. Paragraph 20(1) of Schedule 8 to the EqA provides that: "*A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement*".

54. In relation physical feature a failure to make reasonable adjustments, it is a defence if the employer did not have actual knowledge and could not be reasonably be expected to know (also commonly referred to as not having

constructive knowledge) of (i) the disability; <u>and</u> (ii) the disadvantage created by the PCP, physical feature or lack of an auxiliary aid.

55. The principles relating to knowledge of disability in the context of section 15 EqA were summarised by HHJ Eady QC, as she then was, in *<u>A Ltd v Z [2020] ICR 199 (EAT)</u>* as follows. The same principles can be applied to reasonable adjustments. The parts of the summary set out which relate to constructive knowledge of disability are also applicable to constructive knowledge of disadvantage in relation to a failure to make reasonable adjustments complaint.

"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see <u>York City Council v Grosset</u> [2018] ICR 1492 CA at paragraph 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see <u>Donelien v Liberata UK Ltd</u> UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see <u>Pnaiser v NHS England & Anor</u> [2016] IRLR 170 EAT at paragraph 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see <u>Donelien v Liberata UK Ltd</u> [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see <u>Herry v Dudley Metropolitan Council [2017] ICR 610</u>, per His Honour Judge Richardson, citing <u>J v DLA Piper UK LLP</u> [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in <u>Donelien</u> EAT at paragraph 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

> *"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

Harassment related to disability

56. Section 26 EqA provides as follows.

"*26 Harassment*
(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.

(5) The relevant protected characteristics are—
age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation"

57. Unwanted conduct means conduct which is 'unwelcome' or 'uninvited' (Equality and Human Rights Commission (EHRC)'s Code of Practice on Employment (2011) (the "EHRC Employment Code") paragraph 7.8). Unwanted conduct means conduct that is unwanted *by the employee* (*Thomas Sanderson Blinds Ltd v English EAT 0316/10*).

Related to the protected characteristic

58. The unwanted conduct must be "related to" the protected characteristic, here the Claimant's disability. In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor 2020 IRLR 495, EAT*, His Honour Judge Auerbach made the following comments.

"*20…Secondly, the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is the connector used in the definition of direction discrimination found in section 13(1) of the 2010 Act. Put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits.*

21. Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative. These propositions, we think, derive from a pure consideration of the language of the statute, and have been articulated in previous authorities, including Hartley, O'Brien, and Nailard.

….

24. *However, as the passages in Nailard that we have cited make clear, the broad nature of the "related to" concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*

25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

59. In *Carozzi v University of Hertfordshire [2024] EAT* 169 HHJ Tayler addressed the concept of "related to" as follows.

"*I consider that the term "related to" is designed to have a relatively broad meaning. The harassment provisions are designed to be pragmatic, balancing the interests of employees against those of their employer and colleagues who may be accused of harassment. That balance is not achieved by applying a limited meaning to the words "conduct related to a protected characteristic". The limitations are that the conduct must be unwanted and it must have the purpose or effect of violating dignity. Where the conduct has that effect, but not that purpose, the Employment Tribunal will go on to consider the perception of B, the other circumstances and whether it is reasonable for the conduct to have that effect. Employers and employees can be expected to take greater care in how they speak and behave at work than they might in their social life. While it is in no-one's interest that colleagues should constantly be walking on egg-shells, it is also important that proper protection is provided against violation of dignity at work.*

…

24. I consider that the Employment Tribunal erred in law in its approach to the concept of treatment related to a protected characteristic. On a fair reading of the judgment, the Employment Tribunal required that there must be a mental element so that, essentially, the treatment is because of the protected characteristic. At paragraph 18 the Employment Tribunal stated in terms that a mental element is required in a claim of harassment as much as in a claim of direct discrimination. The Employment Tribunal made a similar point at paragraph 107. The Employment Tribunal erred in law in that analysis. There is no requirement for a mental element equivalent to that in a claim of direct discrimination for conduct to be related to a protected characteristic. Treatment may be related to a protected characteristic where it is "because of" the protected characteristic, but that is not the only way conduct can be related to a protected characteristic, and there may be circumstances in which harassment occurs where the protected characteristic did not motivate the harasser.

25. Take, for example, a person who unknowingly uses a word that is offensive to people who have a relevant protected characteristic because it is historically linked to oppression of people who have the protected characteristic. The fact that the person, when using the word, did not know that it had such a meaning or connotation, would not prevent the word used being related to the protected characteristic. That does not necessarily mean the person who used the word would be liable for harassment, because it would still be necessary to consider whether the conduct violated the complainant's dignity. If the use of the word had that effect but not that purpose, the Employment Tribunal would go on to consider the factors in sub-paragraph (4) of section 26 EQA. That said, there could be circumstances in which, even though a word was used without knowledge of the offensive connotations, having considered the factors in sub-paragraph (4), the perception of the recipient, other circumstances and whether it is reasonable for the conduct to have that effect, the use of the word would nonetheless amount to harassment under section 26 EQA."

Proscribed Purpose or Effect

60. Section 26(1) EqA requires that the unwanted conduct in question has the purpose or effect of: violating the Claimant's dignity; <u>or</u> creating an intimidating,

hostile, degrading, humiliating or offensive environment for them. The Claimant only has to show one of these two strands, i.e. that the conduct had either the proscribed purpose or the proscribed effect.

61. The Court of Appeal gave guidance on determining whether the conduct has had the proscribed effect in _Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham_ _[2018] EWCA Civ 564_ as follows.

"*In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider* both *(by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question)* and *(by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so*." [88]

62. Not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. This is the case even if it may have caused the recipient to be upset. _Grant v HM Land Registry [2011] EWCA Civ 769_ "*Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*."

63. Other circumstances of the case must also be taken into account under section 26(4) of the EqA. These will inevitably vary from case to case and may assist the Tribunal to determine the Claimant's perception and the reasonableness of it. The EHRC Employment Code at paragraph 7.18 sets out that such circumstances can include the claimant's health, including mental health; mental capacity; cultural norms; and previous experience of harassment. It can also include the environment in which the conduct takes place.

64. Section 212(1) of the EqA states the following in relation to the definition of a detriment: "*"detriment" does not, subject to subsection (5), include conduct which amounts to harassment*". Therefore, the correct sequence for addressing the Claimant's complaints is to take harassment first, for if the acts amounted to harassment, they would not be detriments under section 212(1) EqA.

Burden of proof in relation to EqA complaints

65. The provisions relating to the burden of proof are to be found in section 136 of the EqA:

"*136 Burden of proof*

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

66. *Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC*: the claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the Tribunal could infer an unlawful act of discrimination.

67. *Igen v Wong [2005] EWCA Civ 142* remains the leading authority in relation to the application of the burden of proof set out in section 136 EqA in relation to discrimination cases. It is not sufficient for the claimant simply to prove facts from which the tribunal could conclude that the Respondent "*could have*" committed an unlawful act of discrimination. It is clear that the claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent *did* commit an unlawful act of discrimination it can.

68. It is not sufficient to shift the burden of proof (in relation to a direct discrimination complaint) for a claimant to show only a difference in status and a difference in treatment. These are bare facts which only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. (*Madarassy v Nomura International Plc [2007] EWCA Civ 33*).

69. *Madarassy* further sets out that "could conclude" "*must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later) the tribunal would need to consider all the evidence relevant to the discrimination complaint*".

70. In *Artem Limited v Edwins [2024] EAT 136* this was also emphasised by HHJ Tayler, who stated that in relation to considering whether there was sufficient evidence to shift the burden of proof "*an Employment Tribunal should not ignore evidence that suggests discrimination. However, I should also add that it is important that Employment Tribunals do not ignore evidence that suggests there has not been discrimination. What must be ignored at the first stage is any exculpatory explanation for the treatment*."

71. Per *Igen*, in which the Court of Appeal approving the revised *"Barton Guidance"* if the burden of proof has moved to the respondent:

"*10) It is then for the respondent to prove that it did not commit, or as the case* *may be, is not to be treated as having committed, that act.*

11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [the protected characteristic]...

12)That requires a tribunal to assess not merely whether the Respondent has proven an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question." [76]

72. In relation to a complaint of a failure to make reasonable adjustments, establishing that there is a provision, criterion or practice ("PCP") and demonstrating that this caused substantial disadvantage to the claimant, "*[t]hese are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant*." [45] Project Management Institute v Latif 2007 IRLR 579, EAT. However, proving these is not sufficient to shift the burden of proof to the Respondent. Unless there is evidence before the Tribunal of an adjustment which at least on its face appears reasonable and which would mitigate or eliminate the disadvantage, the burden does not shift to the respondent (paragraphs 49 and 53, *Latif*).

73. If the burden does shift to the respondent, it must then show why it was not reasonable to make the relevant adjustment and/or the question of whether the proposed adjustment would have removed the disadvantage.

Time Limits

74. Section 123 EqA provides that:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

75. Section 140B EqA permits an extension of time where ACAS early conciliation is undertaken:

"In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

76. If the claim is brought outside of the three month time limit, the Tribunal must make a determination in relation to section 123(1)(b) EqA: whether the claim has been brought within "*such other period as the employment tribunal thinks just and equitable*".

When does time start to run in relation to reasonable adjustments?

77. Under s123(4) EqA, in the absence of evidence to the contrary, the employer is to be taken as deciding not to do something either when it does an act inconsistent with doing it, or if there is no inconsistent act, on the expiry of the period in which it might reasonably have been expected to do it.

78. In in *Fernandes v Department for Work and Pensions EAT [2023] 114*, the EAT summarised the position established in the leading cases of *Matuszowicz v Kingston Upon Hull City Council [2009] IRLR 288* and *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640* as follows at paragraph 16.

"*The principles set out in the existing authorities amount to the following propositions:*

a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP *(presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.*

b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.

c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.

d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee."

79. In the same case, HHJ Tayler upheld the Respondent's submissions (in paragraph 31 of the judgment) that where policies remained the same and were applied in the same way these were not to be treated as new decisions so as to affect limitation.

Should the Tribunal use its discretion to extend time?

80. The Court of Appeal in <u>*Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*</u> summarised the position at paragraphs 18 and 19:

"[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

81. Legatt LJ went on to say [25] "*As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.*".

Disability: Conclusions

82. The case turns on the pleaded disability of cynophobia. I cannot see that the other conditions are relevant to the pleaded PCP and/or disadvantage.

83. I find based on the Claimant's GP letter that the Claimant had a mental impairment of phobic anxiety disorder/cynophobia (page 365).

84. This has affected the Claimant for approximately 50 years. This is a period of more than 12 months, and so it is long-term.

85. Throughout the relevant time, the Claimant would take longer routes or different routes/travel methods to avoid lanes or the driveway of the Respondent, would not enter a shop if there was a dog in there, and would not leave her home if there was a dog outside of it barking. If the Claimant took a bus, she would have to get off the bus if there were certain dogs on the bus. Based on these facts which relate to day-to-day activities like traveling, using public transport and leaving the house, I find that there was an effect on day-to-day activities at the relevant time. The effect was more than minor or trivial: the Claimant would get off a bus or not leave her house on these occasions.

86. I find that the Claimant was disabled at the relevant time as defined in section 6 EqA by reason of phobic anxiety disorder (cynophobia).

Harassment (Act 2)

87. This is the only complaint which is in time.

88. The complaint of harassment related to disability relate to an alleged comment about "*caging* [the Claimant] *in*" which Mr Mills was alleged to have said on 11 or 12 March 2024. The primary time limit would therefore expire on 11 or 12 June 2024. ACAS conciliation began on 3 June 2024, within the primary time limit and the certificate was issued on 11 July 2024. The claim was issued on 13 August 2024, which is within the time limit, as extended by the period of conciliation.

89. However, this allegation has not been upheld on the facts.

90. Therefore, this allegation is not well-founded and is dismissed.

Time Limits: Conclusions

91. The allegation regarding the role in the office (Act 1) being an act of harassment occurred in October 2023. Therefore, the three month time limit would expire at the end of January 2024. The ACAS conciliation began after the primary three month time limit, therefore no extension of time is given for ACAS conciliation. The claim was presented on 13 August 2024. However, this was added as an allegation of harassment on 16 June 2026. Therefore, this allegation is around two and a half years out of time.

Reasonable adjustments

92. The first consideration in relation to the Claimant's reasonable adjustments complaint is whether or not it is in time. It became clear during the evidence that the Claimant's case was that the Respondent should have made the adjustments of having dogs on leads from the first day of her employment on 27 March 2019 and should have given her an alternative role in the office when she applied for it (in October 2023).

93. As set out in *Fernandes v DWP* (see above), the duty to make an adjustment arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.

94. I consider that the Respondent had constructive knowledge of the Claimant's cynophobia from the first day of her employment on 27 March 2019. The Claimant had disclosed that she felt unable to get out of the car because of the presence of a dog and that she had a phobia of dogs. Given she had disclosed the condition and that the effect on her was serious enough that she felt unable to get out of the car, I find that this was enough to put the Respondent on notice that it needed to make further enquiries of the Claimant. She should have been asked for further information in order to understand its effect on her day-to-day activities and how long this had affected her. I therefore find that the Respondent could reasonably have been expected to know that the Claimant was disabled on 27 March 2019.

95. I find that the Respondent did have a practice of allowing dogs to be unleashed on its premises. There was a sign saying that dogs had to be on the lead, and Mr Mills' evidence was that customers would be approached and asked to put dogs on the lead. However, the Claimant's evidence was that this policy that dogs should be on the lead was not enforced in practice. I prefer the Claimant's evidence on this. It is consistent with approach taken in relation to Spike, who I have found as a fact would be on the property loose. At no time during the Claimant raising this by text message with her manager or in her formal grievance, did the Respondent take the position that it did in fact enforce a policy that dogs were to be on the lead. In my finding, there was a practice of allowing dogs to be off the lead. As such, the Claimant has established her pleaded PCP that she was required to work on premises where there were, from time to time, unleashed dogs present.

96. I find, based on the Claimant's evidence that she was put to a disadvantage from 27 March 2019. On the first day of work she had great difficulty in getting out of the car and stated numerous times on that day that she was not OK because the dogs on the site being off the lead caused her extreme anxiety. This affected her sleep, made her feel nauseous and have stomach pain.

97. Based on the Claimant's oral evidence, she actively informed the Respondent that she was "*not OK*" on a number of occasions on the first day because of the presence of dogs and continued to raise this matter. This along with saying to Mr Mills that she could not get out of the car meant that the Respondent was

aware of the anxiety caused to the Claimant because of unleashed dogs. I find that the Respondent had (at least constructive) knowledge of both the disability and the disadvantage as of 27 March 2019.

98. The Claimant's evidence was that Mr Mills had told her before she started working at the Respondent that dogs were leashed. However, she became aware of an unleashed dog on her first day of employment on 27 March 2019. She raised this with Mr Mills who I have found had constructive knowledge of her disability and the disadvantage. His response was that she could either come into the packing shed to work or go home. He went on to tell her that the Respondent's premises were a dog friendly environment. Later that day, it would have been clear to her that he was not taking any action when she said that she was "not OK" and he did not give her any assurances that anything would be changed.

99. I consider that Mr Mill's conduct on 27 March 2019 was inconsistent with an intention to comply with the duty to make adjustments. As such, I consider that time started to run on 27 March 2019. Even if I am wrong on that, the Claimant's evidence was that she was required to work in the presence of dogs and nothing being done about it despite her having repeatedly raised it with the Respondent. If it was not clear on the first day, I consider that in a period of around two weeks it would be reasonably clear to the Claimant that the Respondent was not intending to make any adjustments to that policy.

100. I do not consider that the later events in 2023 or 2024 relating to Spike specifically (or otherwise) create any new cause of action. The same PCP was in place and was being applied in the same way, albeit there was a specific dog who was the issue, and I consider that there is no evidence of any intervening change to start time running again. The same disadvantage was being caused for the Claimant.

101. I consider the duty to make adjustments relates to the relevant PCP. A duty to make adjustments arises when there is substantial disadvantage to a disabled employee because of a PCP and the knowledge requirement is met. I have found that this was on 27 March 2019. Time starts running when an employer does an act which is inconsistent with its duty to make adjustments. I consider that the introduction of a new suggested adjustment (like the office role in October 2023) will not give rise to a new cause of action with a new and different limitation date.

102. I have not factually upheld the Claimant's allegation regarding the "caging" comment, which was the only act which is potentially in time. The refusal to give the Claimant an office role is dealt with below but is an act which is also out of time. As such, neither of these allegations assist the Claimant with time limits in relation to an argument that there was a continuing course of conduct.

103. This means that the three month time period for making complaint of a failure to make reasonable adjustments ended on 26 June 2019. The ACAS conciliation having commenced on 3 June 2024. Since this is outside of the primary limitation period, no extension to the time limit is given for ACAS

conciliation. The claim was presented on 13 August 2024. This is therefore more than five years out of time.

Is it just and equitable to extend time?

104. In order to decide whether it is just and equitable to extend time I must take all of the relevant factors into account.

105. Merits can be taken into account when making a decision as to whether to extend time. In taking merits into account in relation to the balancing exercise, I take the following into account.

105.1. I consider that the allegation in relation to ensuring dogs are on a lead is well-founded. It is clear that the Respondent did not take the reasonable step of enforcing dogs being on leads. I do not accept that they could not control this in relation to Spike – they did not even take the step of asking his owner to keep him on a lead;

105.2. I consider that the suggested adjustment relating to the office role would have failed on its merits. This is because it was not reasonable for the Respondent to have offered the Claimant the office role. It was an entirely different role to the role the Claimant was employed in. Both parties' evidence was that the Claimant was not good at using computers which was a requirement for the office role. I find, based on Mr Sims evidence, that this was that was the reason she was not given it.

105.3. I consider that the allegation regarding the office role as an act of harassment is not well-founded. It is not related to disability. The "reason why" for not giving the Claimant the role is that she could not work with computers. There is no other connection with disability which has been alleged (that is distinct from the reasonable adjustments point, which is dealt with separately).

106. The other factors to be taken into account are:

106.1. the overriding objective;

106.2. the length of the delay (five years in relation to the reasonable adjustments complaint and two and a half years in relation to the allegation regarding not obtaining the office role);

106.3. the reason for the delay. The Claimant is a litigant in person but her evidence was that she was in contact with ACAS throughout her whole employment. She said there was nothing preventing her from bringing a claim but she was afraid of retaliation. The Claimant referred in oral evidence to waiting for the grievance process to be concluded, but the grievance was not submitted until April 2024. The Claimant pointed in submissions to having been off work sick since March 2024 until the present. The Claimant was able present the claim whilst off sick and the Respondent pointed out that she was able to submit her grievance and grievance appeal during that period. In any case each of these reasons only deals with part of the time period in question;

106.4. a determination that the reasonable adjustments complaint is out of time will debar the Claimant from pursuing it again and she is a current employee of the Respondent (albeit that she has not actively worked since March 2024);

106.5. the Respondent has been able to call Mr Mills to give evidence in relation to the matter but other employees, such as Ms Alford are no longer employed by the Respondent.

107. No other factors were raised by either party as being relevant to the exercise of this discretion.

108. Taking all the circumstances into account, it is a significant factor that the Claimant would be prevented from bringing claim both now and in the future in relation to the relevant PCP in circumstances where she has good merits. This weighs in favour of granting an extension. The harassment allegation does not have good merits, and little prejudice can be suffered by being prevented from bringing this complaint. I consider that that the length of the delay is very significant in relation to both complaints being five years for the reasonable adjustments complaint and two and half years for the harassment complaint. There was nothing preventing the Claimant from bringing the complaints earlier, it was only from March 2024 that she was unwell, and she was in any case able to bring the claim when she was unwell. The debarring point is outweighed by the length of the delay in my judgment. In all of the circumstances, I find that it is not just and equitable to extend time in relation to either complaint.

109. The complaints of a failure to make reasonable adjustments and the complaint of harassment in relation to the office role are out of time and are dismissed for want of jurisdiction.

Approved by
Employment Judge Volkmer
26 June 2026

JUDGMENT & REASONS SENT TO THE PARTIES ON
07 July 2026

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

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

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/