EMPLOYMENT TRIBUNALS

Claimant:	Marie Townrow		
Respondent:	Bright Stars Nursery Group Limited		
Heard at:	Nottingham Justice Centre	**On:** 13-15 April 2026	
Before:	Employment Judge Ost Ms F French Mr C Tansley		

Representation
Claimant: in person
Respondent: Mr Dalal (Counsel)

RESERVED JUDGMENT

After consideration of the evidence provided and hearing from the parties the unanimous judgment of the Tribunal is as follows:

Direct discrimination on the grounds of sex

1. The complaint of direct sex discrimination is not well-founded and is dismissed.

Discrimination arising from disability

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

Failure to make reasonable adjustments

3. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

REASONS

Introduction

4. The Respondent is a company that operates nurseries for children. The Claimant was employed by the Respondent as an area manager from 9 May 2023. She was

given notice of termination on 24 October 2023 which expired on 1 November 2023.

5. The Claim relates to the Respondent's treatment of the Claimant during her employment within a probation period, and, the termination of her employment at the end of that probation period.

6. The Claimant commenced early conciliation on 11 December 2023 ("Day A") and the early conciliation certificate was issued on 22 January 2024 ("Day B").

7. On 21 February 2024 the Claimant presented a claim asserting discrimination on the grounds of disability and sex, and also alleging "bullying".

8. On 16 April 2024 the Respondent submitted a response form in which it resisted all of those complaints and did not admit the Claimant's asserted disability status.

9. On 6 June 2024 a preliminary hearing took place before Employment Judge Shore which the Claimant did not attend. Following the hearing Employment Judge Shore issued a record of hearing and case management orders. Within these Employment Judge Shore provided to the parties the definitions of types of prohibited conduct including sections 13 (direct discrimination), 15 (discrimination arising from a disability), 19 (indirect discrimination), 20 and 21 (failure to make reasonable adjustments), 26 (harassment) and 27(victimisation).

10. At a preliminary hearing before Employment Judge Brown on 13 September 2024 the complaints being brought by the Claimant were clarified at paragraph 48 of the record of hearing as follows:

> "48. The Claimant is making the following complaints:
>
> 48.1 Direct sex discrimination about the following:
>
> 48.1.1 Feeling undermined by her manager during her employment;
>
> 48.1.2 Dismissal.
>
> 48.2 A failure to make reasonable adjustments in requiring her to carry out duties outside of her job description and in particular manual duties.
>
> 48.3 Unfavourable treatment arising from disability in relation to the requirement to carry out manual duties."

11. The details of the Claimant's complaint and the issues to be determined at the hearing to determine those complaints were recorded by Employment Judge Brown at paragraph 49 of the record of hearing which was issued to the parties on 14 September 2024. The list of issues is attached as a schedule to this judgment.

12. The Respondent was permitted to submit an amended grounds of resistance. Within that amended grounds of resistance, the Respondent conceded that the Claimant was disabled. Therefore disability and that part of the list of issues was no longer required for determination by the Tribunal. (Within the amended grounds of resistance the Respondent also addressed issues related to unfair dismissal for reasons which were not clear.)

13. Both the Claimant and the Respondent attended the final hearing and called evidence from various witnesses.

14. The parties cooperated in the production of a bundle of 175 pages. At the start of the Claimant did not have exactly the same version of the bundle as the Respondent. The Tribunal paused the hearing so that this could be addressed and corrected during a break. The hearing did not proceed until Claimant had the same version of the bundle. The Tribunal considered all of the documentary evidence provided in the bundle.

The hearing

15. This was a hearing in which both parties attended in person. Initially the Claimant had supplied witness statements for two witnesses (Ms Fotheringham and Ms Cook) but she had not made arrangements for two of her witnesses to attend. The Tribunal explained to the Claimant the consequences that non-attendance of witnesses would normally have on the weight attributed to that witness' evidence. The Claimant expressed a wish to explore whether her witnesses could attend online and the Tribunal permitted the Claimant to contact the two witnesses to see if they could attend remotely. When it was confirmed that the witnesses could do so, the Tribunal made arrangements for them to participate by CVP.

16. The Tribunal explored with both parties any needs for reasonable adjustments to enable full participation. The Tribunal noted the Claimant's assertion of fibromyalgia and had considered the Equal Treatment Bench Book in advance. Noting that Mrs Townrow was best placed to understand her particular experience of the condition and the implications for her participation, the Tribunal sought her views. Mrs Townrow said that her fibromyalgia may cause her mental tiredness. She also referred to her lack of knowledge of legal terms and issues and her nervousness. However, she did not identify any adjustments that would like to assist to remove or reduce these issues. The Tribunal explained that it would ensure there were regular breaks and it would remain alert for any signs that Mrs Townrow was struggling with tiredness. However, the Tribunal also asked Mrs Townrow to assist the Tribunal by clearly letting informing the Tribunal if she was tiring at any point. The Tribunal also informed Mrs Townrow that it would seek to explain any legal terminology or procedural issues as the hearing progressed, but if there was anything that she didn't understand then she should alert the Tribunal and it would explain the meaning or the process.

17. Mrs Townrow subsequently appeared alert and engaged during the hearing and did not appear to struggle with tiredness during the hearing. She did not notify the Tribunal that she was tiring during the hearing.

18. The Tribunal noted that within her witness statement the Claimant had referred to 'victimization'. The Tribunal explained that people use this term in every day conversation and often do so to refer to targeted unfair treatment. The Tribunal further explained that in a discrimination law context the term "victimisation" had a specific narrower meaning which was provided by section 27 of the Equality Act 2010 ("section 27 victimisation"). In broad terms 'section 27 victimisation' is where (a) one person subjects a second person to a detriment and (b) the first person does so because either the second person has done a 'protected act' under the Equality Act 2010, or, the first person believes that the second has done or may do a 'protected act' under the Equality Act 2010. The Tribunal explained that the acts which amount to 'protected acts' are only those listed within section 27(2) of the Equality Act 2010.

19. The Claimant clarified that she was not seeking to bring a complaint that the detrimental treatment which she alleged was connected to a protected act under the Equality Act 2010. She had just used the term victimisation in a wider 'every day' sense not in the section 27 sense.

20. The Tribunal also explored with the Claimant her complaint of discrimination arising from a disability. It did so because it appeared that in the Claimant's witness statement that she was seeking to evidence that the Respondent placed a requirement on her to do manual gardening duties *regardless of her disability or anything connected with it*, and this had a greater impact on her due to her fibromyalgia. (This Tribunal noted that this seemed more like a complaint of indirect discrimination). The witness statement did not appear to be evidencing that the Respondent had treated her unfavorably by asking her to do the manual duties *because of something arising in consequence of B's disability*. The Claimant confirmed this was what she was evidencing.

21. The Tribunal informed the Claimant that it had not made any decision but wanted to explain the options open to the unrepresented Claimant and the potential consequences that could arise. On a quick review, the Claimant did not appear to have pleaded indirect discrimination within the meaning of section 19 of the Equality Act 2010 in her claim form. Furthermore, a complaint of indirect discrimination did not appear to have been addressed in the previous preliminary hearing on 13 September 2024, indirect discrimination was not listed as a complaint for determination and it was not addressed within the list of issues as recorded in the case management orders and record of hearing subsequently issued by Employment Judge Brown. It also appeared that the parties had not prepared to deal with a complaint of indirect discrimination at this hearing. The Tribunal explained that even at this stage the Claimant had a right under the Employment Tribunal Procedure Rules 2024 to apply to amend her claim. Equally however the Respondent had a right to oppose that application. The Tribunal forewarned the Claimant that if that application was made and an amendment was granted so that the Claimant could pursue a complaint of indirect discrimination, then it was possible, if not likely, that such a substantial change in the complaints for determination would lead to the current three day hearing being postponed so that the parties could gather relevant evidence and properly prepare to deal with that new complaint.

22. The Respondent confirmed that it would oppose an application for an amendment to the claim to add a complaint of indirect discrimination. The Tribunal also indicated that if an application was granted it would need to explore the relevant issues notably to understand the provision, criterion or practice which was asserted and then gather evidence. The Claimant was given time to consider what she wished to do. She decided that she would not seek an amendment to bring a complaint of indirect discrimination. She would continue pursuing a claim for discrimination arising from a disability.

23. The Tribunal also noted the Respondent's reference to unfair dismissal in its amended grounds of resistance and the references in a skeleton argument/note for hearing provided by Counsel at the beginning of the hearing. On the basis that there was no reference to unfair dismissal within the claim form, the Tribunal checked with the parties whether a complaint of unfair dismissal was being brought. The Claimant confirmed that she had not brought and was not bringing a claim for unfair dismissal. The Respondent indicated it had addressed unfair dismissal out of an abundance of caution. After those clarifications, the Tribunal did not address any complaint of unfair dismissal.

24. The Tribunal explained the intended timetable for the hearing and the process of giving evidence, cross examination, Tribunal's questions and re-examination.

25. The Tribunal heard from the following witnesses for the Claimant:

    25.1. The Claimant, Marie Townrow;

    25.2. Charlene Fotheringham – a former colleague at the Respondent;

    25.3. Kirsty Cook– a former colleague at the Respondent.

26. The Tribunal heard from the following witnesses for the Respondent:

    26.1. Chris Foot – Managing Director of Childcare and Operations for the South Region for the Respondent;

    26.2. Julie Campbell - Managing Director of Operations for Scotland and the North for the Respondent;

    26.3. Stephen Booty – Founder and Executive Chairman of the Respondent.

27. Each witness provided a prepared witness statement. The Tribunal took time to read the statement in advance. Each witness was cross examined by the other party and the Tribunal also asked questions.

28. At the conclusion of the evidence each party was given time to prepare and then the opportunity to make oral submissions, which the Claimant and Mr Dalal both did.

29. The Respondent's submissions were in broad summary as follows:

    - Anything which happened prior to 12 September 2023 was out of time.
    - The issues relating to the gardening tasks occurred as a one off task in July and so complaints based on that event were out of time.
    - Any emails to which the Claimant took exception were in July and so were also out of time.
    - There was no explanation as to why the claim was not issues earlier.
    - The Claimant was not bullied and undermined; she was mentored, supervised and inducted.
    - A hypothetical employee in the same circumstances would have been treated in the same way.
    - Nothing in the unannounced visits was discriminatory; it was a valid business practice to reflect its context.
    - Evidence showed Mr Booty treating female and male employees in the same way in email correspondence.
    - The Claimant told the Respondent about the fibromyalgia but explicitly told then that her fibromyalgia had no effect on her work.

- The Claimant could at any time have used a gardener or someone else to do the manual gardening tasks in question.

- It is legitimate for the Respondent to require its nurseries to have attractive kerb appeal.

- The Respondent is passionate about quality and was entitled to dismiss the Claimant at the end of her probationary period it she didn't meet their requirements.

- There was no direct evidence of any sex or disability discrimination.

- The Claimant had not met the burden and standard of proof to succeed in her claims.

30. The Claimant's submissions were in broad summary as follows:

- She would leave the Tribunal to decide whether her complaints were in time.

- The events in her claim were a continuing course of conduct.

- She was undermined and bullied thorough her employment by the Respondent.

- The tone and content of Mr Booty's email communication was not in line with the Respondent's own code of conduct.

- There was no evidence in the bundle of complaints by parents at the Little Learners Nursery under her supervision.

- The Respondent had referred to other managers who had not given evidence.

- Mr Booty micromanaged the Claimant.

- Mr Foot had said that he couldn't remember text messages he had received from the Claimant but claimed to remember telephone calls.

- Mr Booty took and early view that the Claimant's performance and did not undertake a fair fact finding approach.

- There was no evidence in the bundle that the Claimant had not met the requited standards and she had asked for this numerous times.

- The Claimant had provided to the Appeal Manager, Ms Cambell, a description of the positive things she had done and achieved which painted a very different picture.

- Both of her witnesses gave a glowing report on the Claimant as an Area Manager.

- David Jenkins, Chief Financial Officer received positive feedback on the Claimant during a visit but this wasn't taken into account in the decision to fail her probation.

- Another manager was given different treatment (the Nursery manager at Little Learners whose probation period was extended by Mr Booty)

- The Claimant had declared her fibromyalgia and the Respondent should have taken that more seriously during onboarding.

- The Respondent had failed to take reasonable steps.

- The Claimant had lots of knowledge and experience. She had a Masters degree, she had run her own nursery, and, she carried out work for Ofsted for 4 years.

The Relevant Facts

31. The relevant facts are as follows in the paragraphs below. Where the Tribunal had to resolve a conflict of evidence, it did so on the balance of probabilities and it has indicted how it resolved that conflict at the relevant point.

Background

32. The Respondent is a nursery business. It operates approximately 90 nurseries and employs approximately 3,500 employees. Approximately 98% of employees are female. Like most nurseries, the Respondent's nurseries are inspected by Ofsted. Part of Ofsted's inspection regime is to make unannounced visits and/or visits with little notice.

33. The Respondent used a methodology known as the "route to outstanding" to set out its approach to operating nurseries. In broad terms this described the steps necessary to make a nursery worthy of the highest Ofsted grading of 'outstanding".

34. The Respondent's approach is to focus on improving the quality of its nurseries in various respects to a predetermined level which it believes will then naturally lead to its desired financial performance. This approach includes achieving and maintaining certain levels of occupancy. The Respondent believes that the appearance of a nursery to parents/carers (which the Respondent's witnesses described as "kerb appeal") plays a significant part in their decision on whether or not to place their child in that nursery.

35. Stephen Booty is the founder and Executive Chairman of the Respondent. He was at the material times highly involved in the operation of the business. He quite deliberately made unannounced visits to the Respondent's nurseries because he wanted to experience the nurseries as the parents/carers experience them. He also wanted to know what Ofsted would see if they made unannounced visit. He did not want nursery staff to change the nursery's normal appearance or their normal practice to make the nurseries look better and operate better because they know that the Executive Chairman would be visiting.

36. The Claimant had fibromyalgia at all material times. Her fibromyalgia made it more difficult and more painful for the Claimant to undertake some physical tasks, including (of relevance to this case) manual gardening tasks. Whilst she can

perform some manual gardening tasks it is materially harder and more costly for the Claimant to do so in terms of her comfort and her ability to recover than it is for those who do not have her disability.

37. Prior to her employment by the Respondent, the Claimant had run her own nursery based at a football stadium. She was also contracted by Ofsted to undertake Ofsted inspections.

The start of the Claimant's employment

38. The Claimant was employed as an Area Manager by the Respondent. The offer of employment dated 28 April 2023 stated:

> *"During the first 6 months of your employment as a permanent member of staff, you will be on a probationary period."*

39. An Area Manager for the Respondent would typically be responsible for six or seven nurseries. Only four nurseries were allocated to the Claimant: Leeds Montessori Nursery in in Roundhay Leeds, Little Learners Nursery School in Skegness, The Garden House Nursery in Fulwood, and The Child First Nursery in Moulton. Prior to the Claimant commencing employment, some of these nurseries were underperforming according to the Respondent's assessment, notably the Little Learners Nursery.

The Claimant's health declaration

40. The Respondent asked the Claimant to complete a health declaration form. The Claimant completed the health declaration form with the date 5 May 2023. In this form, amongst other questions and responses, the Claimant responded to the following questions as follows:

> *"Do you, or have you, ever suffered from OR received treatment for any of the following?*
>
> *…*
>
> *2. Back/joint problems [The Claimant ticked 'No']"*

and

> *"Are you taking any medicines, tablets or injections? If yes, please detail:*
>
> *Medication for fibromyalgia"*

and

> *"Have you been off work for health reasons in the last 24 months? If yes, please detail:*
>
> *Fibromyalgia I have had for 10 years, controlled by medication and lifestyle changes. Doesn't affect my work in any way."*

and

"Is there any further information that we should be aware of regarding your health and well-being?

[The Claimant did not write anything]"

41. The Respondent did not respond proactively to the Claimant's declaration that she had fibromyalgia in any way; the form was just put on the Claimant's personnel file.

42. When the Claimant started employment her line manager was Chris Foot as reflected in the offer letter. On 27 June 2023, the Claimant was told by Mr Foot that her line management was being changed to a new Regional Manager, Andrew Clifford, who has been recruited as a Regional MD for the North region. (However later in the probationary period the Claimant's line management changed back to Chris Foot after Mr Clifford left the Respondent's employment.)

The information provided to the Claimant regarding performance

43. The Claimant had access to a dashboard which showed various aspects of performance of the nurseries under her responsibility. She also received monthly profit and loss details for those nurseries. The Respondent also had regular 'Teams' meetings involving senior management and other Area Managers at which they discussed performance of the nurseries and other operational matters in a group setting.

44. The Claimant's line manager did from time to time provide comments or feedback on different issues or situations which arose and they provided occasional guidance on how the Respondent wanted such issues or situations to be dealt with.

45. The Claimant's line manager did not hold meetings or discussions with the Claimant to provide formal feedback on her performance in probationary period, identify areas of her performance that were below expectation, identify areas that needed to improve in order for her to reach the standards or warn her that she may not pass her probationary period. The Respondent disputed this but it did not provide any evidence of any formal discussions about the Claimant's performance or reviewing her probation. If those meetings or discussions had taken place in any meaningful or structured way then the Tribunal believed these would have been documented in some way and presented as evidence. The Tribunal preferred the Claimant's evidence that there was no feedback specifically on her performance and any improvement required to pass her probation, but only one off comments on issues which arose as might always be given by a line manager. Mr Foot's explanation was that he expected the Claimant to identify the deficiencies between her performance and the general standards and targets expected of her by the Respondent by using the 'route to outstanding' document for each nursery and the other management information available to her so as to deduce for herself what she needed to improve and by when. In the Tribunal's view that does not amount to setting improvement plans or targets for the purposes of probationary management.

Interactions between the Claimant's and Mr Booty

46. Mr Booty was several management layers above the Claimant. Mr Booty did not have any substantial face to face or telephone interactions with the Claimant. Mr Booty would receive emails from the Claimant as part of her role and her reporting.

47. On 30 June 2023 Mr Booty responded to a weekly report from the Claimant by email which said

> *"Marie*
>
> *LL – I thought the manager was having her probation extended?*
>
> *Leeds – you say no visit then go on to make notes about activity and actions taken – did you go or not."*

48. Mr Booty made several unannounced visits to the nurseries under the Claimant's responsibility. This was in keeping with his general practice of making unannounced visits to experience the nurseries in their normal state. Sometimes the Claimant was not present when the unannounced visits took place and sometimes she was present. Mr Booty also made unannounced visits to other nurseries.

49. On one unannounced visit to the Little Learners Nursery under the Claimant's responsibility, Mr Booty was particularly unhappy with the appearance of the nursery: in cross examination he described it as "disgraceful". He sent an email on 1 July 2023 at 15:31 to the Claimant and Mr Foot which he also copied to David Jenkins, Chief Financial Officer, which attached 3 photographs showing the front of the nursery with large weeds and rubbish visible. Mr Booty's message said:

> *"All*
>
> *Do you walk into these nurseries with your eyes shut?*
>
> *Can you please ensure that all of our nurseries have a tidy, attractive kerb appeal.*

50. On 4 July 2023 Mr Booty hadn't had a reply so he sent a further email at 14:36 that day to both the Claimant and Mr Foot stating:

> *"Hi both*
>
> *Any response???*
>
> *Stephen*

51. The Claimant responded by email at 16:07 to say as follows:

> *Hi Stephen*
>
> *Totally agree about the kerb appeal. We have had problems getting a gardener to take on the site, due to previous payment issue on our side.*
>
> *However, I have got someone else in and they are completing the work on Friday afternoon this week.*
>
> *Also we are going to be placing some planters outside the pre-school site and staff will be responsible for bring them in at night and weekends.*
>
> *I will ask staff to send me some pictures Friday night to show the improvements. If not, I will be site Tuesday and Wednesday next week. So I will send you some over myself.*
>
> *May thanks*

Marie"

52. Mr Booty responded by email at 16:58 as follows:

"Hi Marie

It doesn't take a gardener to pull up a few weeds up especially at the entrance. The manager should have done this or even yourself.

Stephen"

53. As an Area Manager, the Claimant had the responsibility for ensuring that the manual gardening tasks were undertaken as demonstrated by the email exchange above. The Claimant could do this by hiring a gardener to do the tasks, by instructing the nursery manager to do them, by instructing a member of the nursery's staff to do them or by doing the tasks herself.

54. The Claimant had tried to hire a gardener but had difficulty securing a gardener because the gardeners in the local area would not undertake the work first and then submit an invoice for subsequent payment as the Respondent required. The gardener whom the Claimant initially arranged to attend the nursery on the Friday to perform the manual gardening tasks ultimately did not do so. At the time in question, the Claimant was concerned about the impact which the nursery's ongoing negative appearance may have on her job because of the emails from Mr Booty.

55. The Claimant chose not to instruct the nursery manager or a member of the nursery's staff to do so; she decided to undertake the manual gardening tasks herself and she did so on 5 July 2023. The Claimant found this physically hard, it caused her intense pain over the weekend, and she experienced increased aching and tiredness over the following two weeks. Whilst the Respondent disputed that the Claimant would find the manual gardening tasks any more difficult than other domestic activities that she undertook, Ms Fotheringham and Ms Cook gave evidence on their perception of the impact on the Claimant which they said left her "achy", in pain, and tired into the following week. The Tribunal preferred the Claimant's evidence on this subject as she was the person to experience the effects, and she was also corroborated by Ms Fotheringham and Ms Cook.

56. On 7 July 2023 the Claimant send a weekly report which contained a drawing of her plans for the outside of the Leeds Montessori Nursery. Mr Booty sent an email on 7 July 2023 at 22:24 to the Claimant which read:

"Hi Marie

What is the drawing supposed to illustrate?

Thanks

Stephen"

57. The Claimant explained to Mr Booty that it was rough drawing of how the Leeds Montessori staff were going to change the outdoor space.

58. On 10 July 2023 the Claimant send a report. Mr Booty sent an email on 10 July 2023 at 17:43 to the Claimant which read:

"Marie

Thanks for the report.

Lots of activity

I understood that all of the references are there at LL – it's just that you didn't find/look at all the folders.

Lots of work in Leeds – I'd rather we use as much carrot as possible rather than the stick – or we will be losing more staff.

…

Stephen"

59. The Claimant had discussions with her line manager, Mr Clifford, about the performance of the manager at Little Learners. Following those discussions, Mr Clifford made the decision to dismiss the nursery manager and informed her of this on 23 August 2023.

60. Mr Booty was made aware of the decision that day and he disagreed with it. Mr Booty overturned the decision made by Mr Clifford and reinstated the dismissed nursery manager. Mr Booty then also removed the Little Learners Nursery from the Claimant's responsibility and sent an email on 23 August 2023 at 22:06 to the Claimant in the following terms:

"Marie,

I understand that the manager at LL was given notice today.

I do not believe that the company has acted in a fair and appropriate way in this situation.

With immediate effect I have rescinded this notice and extended the manager's probation in order that we are fair to our employees.

In the circumstances I will also reassign LL to Lisa Weston for the remainder of the probation period.

Please do not visit LL until further notice.

I understand that you may have keys to the confidential cabinets. Please arrange that these are sent back with guaranteed delivery if this is the case.

Stephen"

61. The Claimant responded to express her disappointment that the Little Learners Nursery had been given to a different Area Manager. She also said that she felt that she had made really good progress with both nursery sites, the parents and the staff there. The Claimant rang Mr Clifford the next morning to ask about the issue and Mr Clifford told her that he knew nothing about it and hadn't received an email. The Claimant then forwarded the email chain to Mr Clifford.

62. The staff at nurseries valued the Claimant's contribution. The Claimant spent more time at the nurseries compared to previous Area Managers and they felt like she wanted to help them. They also found her knowledge of the Ofsted curriculum very helpful. Some staff gave this as express feedback to David Jenkins when he visited one of the nurseries.

The assessment of the Claimant's performance and the termination of her employment

63. Towards the end of the probationary period Mr Foot, Mr Booty and Mr Jenkins discussed the Claimant's performance. They formed the view that the Claimant's performance did not meet the Respondent's requirements because:

    63.1. There had been various issues regarding the operation and appearance of nurseries under her responsibility;

    63.2. whilst she was engaged in lots of activity, it was not resulting in sufficient operational improvements in nursery operation, staffing, relationships with parents/carers and occupancy rates to the levels required by the Respondent;

    63.3. the Respondent had concluded that the financial performance of some of the nurseries under the Claimant's responsibility was not going to reach the Respondent's requirements within the financial year.

64. Mr Foot and Mr Booty decided together to dismiss the Claimant on the basis that in their view she had failed to pass her probationary period. The Respondent's witnesses gave conflicting evidence over who was involved in the decision to terminate. Mr Foot's witness statement presented the decision as his alone whereas Mr Booty clearly indicated that he was involved in the decision-making. Mr Foot's evidence appeared to change during cross examination when faced with Mr Booty's evidence. In contrast Mr Booty was consistent that he was involved in the decision-making. Mr Booty's involvement in that decision was also more consistent with Mr Booty's 'hands on' approach to management decisions. The Tribunal found Mr Booty's evidence on this issue was more likely to be reflect the reality. Mr Foot was tasked to visit the Claimant and deliver the news in person. He arranged to do so on 24 October 2023.

65. When the Claimant saw Mr Foot on 24 October 2023, before he delivered the decision she said to him "*You're letting me go aren't you*?".

66. The Claimant appealed against the decision to dismiss her and that appeal was chaired by Julie Campbell, Managing director of Operations for Scotland and the North. The Claimant provided a document setting out her positive contribution as an Area Manager. The appeal meeting took place on 17 November 2023. Within the appeal meeting Ms Cambell said to the Claimant that based on what she could see from the Flash Report and P&L was "fairly grim" and that the "nursery performance was around 10% away from where they should have been". She asked the Claimant if she agreed with this assessment. The Claimant agreed that this description was true. The Claimant didn't dispute Mrs Campbell's evidence of this exchange in the appeal meeting and the record of the appeal meeting reflected Mrs Cambell's account as well.

<u>The Law</u>

<u>Time Limits</u>

67. The time limit for bringing the complaints under the Equality Act 2010 of the type brought by the Claimant is found within section 123(1) of the Equality Act 2010 which provides in so far as is relevant as follows:

> ***"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.

(2) …

(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.

68. The three-month primary period in section 123(1)(a), is extended by the period of early conciliation pursuant to section 140B of the Equality Act 2010 which provides as follows.

"140B Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4)

....

(2) *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.

69. One effect of section 140B is to extend the limitation period by the duration of early conciliation.

70. Under section 123 of the Equality Act 2010 a claim must be presented within three months less one day of the act complained of, subject to the Tribunal's discretion to extend time where it considers it just and equitable to do so: **Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**.

71. In cases involving alleged continuing conduct, time runs from the end of the act or series of acts constituting the continuing act.

72. The Tribunal's discretion under section 123 is broad and evaluative and requires consideration of all relevant circumstances, including delay, knowledge, prejudice, and overall fairness: **British Coal Corporation v Keeble [1997] IRLR 336** and **Abertawe Bro Morgannwg University Health Board v Morgan [2018] EWCA Civ 640**.

Direct discrimination

73. The test for direct discrimination in so far as is relevant is found in section 13 of the Equality Act 2010:

> "***13 Direct discrimination***
>
> (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*."

74. Therefore, direct discrimination takes place where a person treats the claimant 'less favourably' than that person treats or would treat others and does so because of a protected characteristic. Under section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

75. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as they were. (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285**)

76. Decisions by employers are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, then discrimination is made out. (**Nagarajan v London Regional Transport [1999] IRLR 572, HL**)

77. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed [2009] IRLR 884** the EAT recognised two different approaches from two (then) House of Lords authorities - (i) in **James v Eastleigh Borough Council [1990] IRLR 288** and (ii) in **Nagarajan v London Regional Transport [1999] IRLR 572**. In some cases, such as James, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as Nagarajan, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15**.

78. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where

necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of **Anya v University of Oxford [2001] IRLR 377**.

79. Thus, the reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it. In "reason why" cases the matter is dispositive upon determination of the alleged discriminator's state of mind. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by the application of a criterion which is inherently or indissociably discriminatory (**R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15**).

80. In **Glasgow City Council v Zafar [1998] IRLR 36**, also a (then) House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. They must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

81. In **Shamoon v Chief Constable of the RUC 2003 IRLR 285**, a (then) House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

82. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The Tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred as per **Shamoon (above)**).

<u>Discrimination Arising from a Disability</u>

83. The test for discrimination arising from disability in so far as is relevant is found in section 15 of the Equality Act 2010:

> ***"15 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.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

84. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**, Mr Justice Langstaff, the then President of the EAT, explained that there is a need to identify two separate causative steps for a claim under section 15. The two separate causative steps required are that:

- the disability had the consequence of 'something', and

- the claimant was treated unfavourably because of that 'something'.

85. In **Secretary of State for Justice and Anor v Dunn EAT 0234/16** then President of the EAT, Mrs Justice Simler, identified the following four elements that must be made out in order for a claimant to succeed in a complaint of discrimination arising from a disability under section 15:

- there must be unfavourable treatment
- there must be something that arises in consequence of the claimant's disability
- the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and
- the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

86. The Tribunal must adopt a staged approach to a section 15 claim. In **Pnaiser v NHS England 2016 IRLR 170**, Mrs Justice Simler considered the authorities, including **Weerasinghe (above)**, and summarised the approach to be taken under section 15.

- The tribunal must identify whether there was unfavourable treatment and by whom.
- It must determine the cause of or reason for the treatment, focusing on the conscious or unconscious thought processes of the alleged discriminator (but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant).
- There may be more than one reason or cause for the treatment and, as in a direct discrimination case, the 'something' need not be the main or sole reason for the treatment but it must have at least a significant (more than trivial) influence so as to amount to an effective reason for or cause of it.
- The tribunal must determine whether the reason or cause (or a reason or cause) is something arising in consequence of the claimant's disability. That is an objective question and does not depend on the thought processes of the alleged discriminator. The expression 'arising in consequence of' could describe a range of causal links, for example it could include more than one link.
- If an effective reason or cause is 'something arising in consequence of' the claimant's disability, the tribunal will decide whether the respondent can show that the treatment is a proportionate means of achieving a legitimate aim. At this stage, the test is an objective one for the tribunal.

87. In applying section 15, the requisite causal connection need not be sole, direct or immediate, but there must be a proper evidential basis for concluding that the "something" arose in consequence of the disability: **Pnaiser v NHS England [2016] EWCA Civ 1103; City of York Council v Grosset [2018] EWCA Civ 1105**.

88. Whether the "something" arose in consequence of disability is a question of fact. The employer's knowledge is addressed separately by section 15(2) and is not part of that causal inquiry. The expression "arising in consequence of" is capable of extending beyond the disability itself to its effects, including symptoms, absence

and conduct, where the evidential chain is established: **City of York Council v Grosset [2018] EWCA Civ 1105; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265**.

89. Mrs Justice Simler returned to the question of the causative link required under section 15. In **Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT,** where she stated that: 'On causation, the approach to section 15… is now well established... In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

90. Some causal link between the unfavourable treatment suffered by a claimant and the 'something arising in consequence of a disability' must be shown. In **Robinson v Department of Work and Pensions 2020 IRLR 884, CA**, the Court of Appeal concluded that only one outcome could flow where there was no link between the unfavourable treatment suffered by the claimant and the 'something arising in consequence of a disability'. Lord Justice Bean pointed out that discrimination arising from disability under section 15 requires a tribunal to ascertain whether the 'unfavourable treatment' was *because* of the protected characteristic (here, disability).

91. In **iForce Ltd v Wood UKEAT/0167/18** the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

92. "Unfavourable treatment" in section 15 is a broad concept. It does not require a comparator. The question is whether the claimant was subjected to treatment which was adverse or disadvantageous in the relevant sense: **Williams v Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65**.

93. In **T-Systems Ltd v Lewis EAT 0042/15** the EAT held that unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then places the disabled person at a disadvantage.

94. Parliament opted to use the expression 'treats unfavourably' in section 15 in preference to 'disadvantage' or 'detriment'. The significance of this distinction was considered in **Trustees of Swansea University Pension and Assurance Scheme and Anor v Williams 2019 ICR 230, SC.** On appeal, the then President of the EAT, Mr Justice Langstaff, noted that the term 'unfavourable' was deliberately chosen by Parliament for the test in section 15. It was used in preference to 'detriment' because it has the sense of placing a hurdle in front of, creating a particular difficulty for, or disadvantaging, a person. The Court of Appeal agreed with the EAT's decision, as did the Supreme Court.

95. If the elements of section 15 are established, the respondent avoids liability only if it shows that the treatment was a proportionate means of achieving a legitimate aim. The burden of establishing justification rests on the respondent. The Tribunal must therefore identify the aim relied upon, determine whether it is legitimate, and assess whether the treatment was proportionate having regard to the

discriminatory impact: **Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15**; **Grosset (above)**.

96. When determining whether the measure complained of was reasonably necessary, however, the ET is required to keep in mind that this does not mean there can only be one course open to the employer; reasonable necessity allows that there may be more than one option which would constitute a proportionate means of achieving the legitimate aim in question, **Health and Safety Executive v Cadman [2005] ICR 1546 CA at paragraph 31**.

97. A critical evaluation of the evidence is required, entailing a weighing of the needs of the employer against the discriminatory impact on the employee. The Tribunal must carry out its own assessment on this matter, as opposed to simply asking what might fall within the band of reasonable responses of the reasonable employer **(Gray v University of Portsmouth EAT 0242/20)**.

<u>Reasonable adjustments</u>

98. The test for failure to make reasonable adjustments in so far as is relevant is found in sections 20 and 21 of the Equality Act 2010:

"*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.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(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.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

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.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

99. **Redcar and Cleveland Primary Care Trust v Lonsdale EAT [2013] EqLR 791**: The duty involves 'treating disabled people more favourably than those who are not disabled'.

100. The Statutory Code of Practice on Employment, EHRC describes the duty to make reasonable adjustments as 'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'.

101. The authorities emphasise the need for a structured statutory analysis. In **Environment Agency v Rowan [2008] ICR 218 (EAT)** and **Royal Bank of Scotland v Ashton [2011] ICR 632 (EAT)**, the EAT stressed that a tribunal must identify with precision: i) the provision, criterion or practice ("PCP") relied upon; ii) the nature and extent of the substantial disadvantage caused by it; and iii) the adjustment said to have been reasonable. The Tribunal must avoid approaching the matter as a broad inquiry into whether the employer acted reasonably overall.

102. The concept of a PCP is to be construed broadly. In **Carreras v United First Partners Research UKEAT/0266/15**, the EAT observed that the protective purpose of the legislation supports a broad rather than overly technical approach. Likewise, in **Nottingham City Transport Ltd v Harvey [2013] EqLR 4**, the EAT recognised that the threshold for identifying a "practice" is relatively low, requiring some element of repetition rather than a wholly isolated occurrence.

103. As the Court of Appeal explained in **Ishola v Transport for London [2020] EWCA Civ 112**, Parliament chose the language of “provision, criterion or practice” rather than “act” or “decision”, and not every one-off managerial act, omission or administrative failing can properly be characterised as a PCP. The concept ordinarily connotes a state of affairs indicating how similar cases are generally treated or would be treated if repeated.

104. As to substantial disadvantage, section 212(1) of the Equality Act 2010 defines “substantial” as meaning more than minor or trivial. In **Sheikholeslami v University of Edinburgh [2018] IRLR 190**, Simler P explained that the comparison exercise is directed to whether the PCP disadvantages the disabled person more than persons who are not disabled. Simler P said "It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.” The Tribunal must therefore assess objectively whether the PCP places the claimant at a disadvantage which is more than minor or trivial compared with those who are not disabled.

105. We also note the observations of Laws LJ in **Newham Sixth Form College v Saunders [2014] EWCA Civ 734** that the nature and extent of the disadvantage, the employer’s knowledge of it, and the reasonableness of any proposed adjustment are closely related questions. However, as emphasised in **Rowan (above)**, the Tribunal must identify clearly the nature and extent of the disadvantage before it can properly assess whether any adjustment would have been reasonable. The Tribunal must identify the fit between the proposed adjustment and the extent of the disadvantage.

106. It would be wrong to consider that the duty to make reasonable adjustments arises only upon a formal request by the employee, because under sections 20 and 21 of the Equality Act 2010, read with paragraph 20 of Schedule 8, the duty depends upon the employer’s actual or constructive knowledge of the disability and the substantial disadvantage caused by the PCP, and upon whether there were reasonable steps which should have been taken to avoid that disadvantage. In **Southampton City College v Randall [2006] IRLR 18 (EAT)**, the EAT did not treat a prior formal request as a prerequisite to the duty arising; the question remained whether, on the facts known or reasonably to be known to the employer, reasonable adjustments ought to have been made.

107. There is no freestanding duty to consult about adjustments, nor does a failure to consult itself constitute a breach of the statutory duty. In **Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06**, the EAT held that the statutory question is whether the employer failed to take reasonable steps, not whether it adequately discussed those steps with the employee.

108. **Royal Bank of Scotland v Ashton [2011] ICR 632**: When considering reasonable adjustments, the focus must not be on the way in which the respondent acted, or their thought processes. The focus should be an objective analysis of the practical result of the adjustments which could be taken.

109. **Archibald v Fife Council [2004] UKHL32**: the duty to make reasonable adjustments necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are

110. The reasonableness of any proposed adjustment is an objective question for the Tribunal as per **Smith v Churchill's Stairlifts plc [2006] IRLR 41 (CA)**. Relevant considerations may include the extent to which the adjustment would alleviate the disadvantage, its practicability, cost, disruption, and the resources available to the employer. An adjustment need not guarantee removal of the disadvantage; a prospect of alleviation may suffice: **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**. However, there is no duty to implement an adjustment where there is no realistic prospect that it would avoid or materially reduce the disadvantage identified.

111. Finally, even where the respondent had knowledge of the claimant's disability, the duty to make reasonable adjustments does not arise unless it knew, or could reasonably have been expected to know, of the particular substantial disadvantage relied on as per **Glasson v The Insolvency Service [2024] EAT 5**.

112. The EHRC Code of Practice on Employment (2011) provides at paragraph 6.28: factors which may be taken into account when deciding if a step is reasonable:

i. "whether taking any particular steps would be effective in preventing the substantial disadvantage;

ii. the practicability of the step;

iii. the financial and other costs of making the adjustment and the extent of any disruption caused;

iv. the extent of the employer's financial or other resources;

v. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

vi. the type and size of the employer."

113. When assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer as per **Hensman v Ministry of Defense EAT [2014] EqLR 670**.

114. **City of York Council v Grosset [2018] EWCA Civ 1105**: the test of justification is an objective one to be applied by the tribunal; therefore, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, it is the ET which must make its own assessment.

115. **Birtenshaw v Oldfield [2019] IRLR 946**: in assessing proportionality the Tribunal should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

116. **Ali v Torrosian (t/a Bedford Hill Family Practice) UKEAT/0029/18**: the authorities on the objective balancing exercise show that to be a proportionate

means of achieving a legitimate aim the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim.

117. **Department for Work and Pensions v Boyers EAT 0282/19**: The proportionality assessment requires the tribunal to carry out an objective balancing exercise, between the needs of the employer, and the negative effect of the dismissal on the claimant.

118. It is for the claimant to establish that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It will then be for the respondent to show that it did not fail to comply with the duty. (**Project Management Institute v Latif UKEAT/0028/07**.)

Burden of proof in complaints under the Equality Act 2010

119. Sections 136(2) and (3) provide for a shifting burden of proof:

> *"(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) This does not apply if A shows that A did not contravene the provision."*

120. In section 136(6), a reference to “the court” includes a reference to an Employment Tribunal.

121. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

122. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (**Nagarajan v London Regional Transport [1999] 4 All ER 65**). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.

123. At Stage 1 proof is of a prima facie case and requires relevant facts from which the Tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (See **Madarassy v Nomura International Plc [2007] ICR 867 (CA)**). “In so far as this [information]

was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal" (**Efobi v Royal Mail Group [2019] EWCA Civ. 19**).

124. Assessment of Stage 1 is based upon all the evidence adduced by both the claimant and the respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (see Madarassy). All relevant facts should be considered but not the respondent's explanation, or the absence of any such explanation (**Laing v Manchester City Council [2006] ICR 1519, EAT** and **Efobi (above)**). The respondent's explanation for its conduct provides the reason why he has done what could be considered a discriminatory act. "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts" (see **Madarassy (above)**). "In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts" (as per **Igen (above)**).

125. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (as per **Laing (above)**). The treatment must be "in no sense whatsoever" because of the protected characteristic (**Barton v Investec 2003 IRC 1205 EAT**). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 prima facie case (**Network Rail Infrastructure Limited v Griffiths Henry 2006 IRLR 865**).

126. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (as per **Laing (above)**).

127. In **Madarassy**, a case brought under the then Sex Discrimination Act 1975, the Court of Appeal found that the words "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it, meaning that the claimant had to "set up a prima facie case". That done, the burden of proof shifted to the respondent (employer) who had to show that they did not commit (or is not to be treated as having committed) the unlawful act. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on balance of probabilities, the respondent had committed an unlawful act of discrimination.

128. The Court of Appeal referred to the burden of proof, stating:

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts 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.'*

129. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (**The Solicitors Regulation Authority v Mitchell UKEAT/0497/12**.

130. The Supreme Court, in **Hewage v Grampian Health Board [2012] ICR 1054 (SC)**, held that Tribunals should be careful not to approach the Igen guidelines in too mechanistic a fashion. The Court of Appeal has confirmed that approach under the Equality Act 2010 in its Judgment in **Ayodele v Citylink [2018] IRLR 114 (CA)**. The Supreme Court stated at paragraph 32 of their decision: “The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance.

131. Furthermore, as Underhill J pointed out in **Martin v Devonshires Solicitors [2011] ICR 352**, at para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”

<u>The analysis – application of facts to law to determine the issues</u>

<u>Time limits</u>

132. Given the date that the claim form was presented (21 February 2024) and the dates of early conciliation (Day A: 11 December 2023, and, Day B: 22 January 2024) any complaint about something which happened before 12 September 2023 may not have been presented in time.

133. In respect of each of the complaints of direct sex discrimination, discrimination arising from a disability and failure to make reasonable adjustments, conduct extending over a period is to be treated as done at the end of the period in accordance with section 123(3).

134. The Tribunal considered that all of the allegations were closely related and intwined. The Tribunal unanimously determined that each of the complaints relating to conduct of Mr Foot and Mr Booty towards the Claimant towards the Claimant in relation to her probationary period and whether she passed it or not. This related conduct included (a) intervention and direction given by Mr Booty and Mr Foot to the Claimant on fulfilling her tasks during the probation period, (b) the same managers’ dissatisfaction with the Claimant’s performance (which included dissatisfaction with the presentation of the Little Learners Nursery) (c) the nature and tone of the same managers’ communication with the Claimant whilst providing intervention, direction or expressing dissatisfaction, (d) the impact which that intervention and communication had upon the Claimant’s decision to perform the manual gardening tasks at the Little Learners Nursery, through to (e) the same managers’ decision to dismiss the Claimant on 24 October 2023 which took into account those elements of dissatisfaction (including her approach to the presentation of the Little Learners Nursery).

135. The Tribunal unanimously concluded that this amounted to continuing conduct extending over a period of time ending on 24 October 2023. Therefore, in accordance with section 123(3), all elements of that continuing conduct were treated as done at the end of that period i.e. on 24 October 2024 which is after 12 September 2023. Accordingly, each of the complaints were submitted in time.

<u>Direct Discrimination on the grounds of sex</u>

136. The Claimant did not identify a male comparator which is perhaps to be expected given the witnesses description that the Respondent's workforce was 98 to 99% female and there was no male performing the Claimant's role.

137. The Tribunal performed the mental exercise of constructing a hypothetical male comparator.

138. The Tribunal concluded that the Comparator would have been treated in the same way as the Claimant.

Did the Respondent undermine and bully the Claimant during her employment?

139. The Tribunal found that the Respondent did not undermine and bully the Claimant in the following ways:

139.1. By the tone and content of emails: The Respondent's Code of Conduct found within its handbook stated "*You are therefore required to conduct yourself honestly, fairly and professionally. Be kind patient and caring towards children and parents, but particularly towards each other."* Regrettably, despite his denial, Mr Booty's communication did not reflect the professionalsim, kindness, patience and care required within the Code of Conduct. The emails sent by Mr Booty to the Claimant and to others which were before the Tribunal were brusque and sometimes lacked common courtesies (such as a salutation) to the point of being rude on occasions. Mr Booty's emails were also sometimes sent late at night with little regard for the impact that the receipt of an email from the Executive Chairman might have on a recipient several managerial levels below him. Despite a further denial from Mr Booty, the Tribunal found that he did micromanage an employee several management layers below him by directly instructing her how to do her role e.g. removing weeds. In doing so he also undermined the male managers in the management layers between himself and the Claimant. However, the Tribunal found that Mr Booty did this because he was dissatisfied with the Claimant's performance as an Area Manager and he did not believe that the management layers had dealt with this. Whilst Mr Booty's management style might be unpopular, demotivating, and/or counterproductive it does not in itself amount to 'bullying' in the Tribunal's view. Mr Booty's directions to the Claimant on how she should carry out her management duties and the results she should be achieving could indeed be perceived as 'undermining'. However, as a more senor manager he is entitled to provide direction and correction to more junior managers whose decision he considered to be wrong. Carried out well, such direction and correction can be an invaluable learning opportunity (even it is naturally also upsetting to be directed to act differently or to be corrected). Unfortunately, Mr Booty's harsh management style and brusque communication magnified the inherent negative experience of the intervention for the Claimant so that it felt to her (as it would to many others) as being unfairly undermined and bullied.

139.2. By making unannounced visits: The Tribunal found that the reason for the unannounced visits to nurseries by senior management was to experience the nurseries as both parents and Ofsted would experience them. This was entirely logical and legitimate. Once again, such unannounced visits can be naturally unnerving but again they could also be a learning opportunity. Unfortunately, once again Mr Booty's harsh management style overall similarly magnified the negative experience for the Claimant and diminished the learning opportunity to the extent that she felt that "intimidated".

139.3. By overturning decisions and removing Little Learners Nursery from the Claimant's responsibility without explanation: Mr Booty's intervention in the dismissal of the Little Learners Nursery manager in which the Claimant was involved and removal of the nursery from the Claimant's responsibility was not bullying as it was a legitimate response to operational issues and complaints. It could indeed be perceived as 'undermining' but it was a legitimate step which a more senior manager could take if problems were escalating relating to the Claimant and Mr Clifford. When the Claimant contacted her then line-manager, Mr Clifford, about Mr Booty's decision to overturn the decision to dismiss a nursery manager, Mr Clifford told her that he knew nothing about it.

Did the Respondent fail to provide the Claimant with supervisions during her probation?

140. The Tribunal found that the Respondent did fail to provide meaningful supervision to the Claimant during her probation. It was accepted by Mr Foot that there were no formal meetings labelled as one to one supervision whilst he line-managed the Claimant. The Respondent provided no evidence of anything which would be commonly understood to be 'supervision' or personal feedback on her probation. There were only general teams meeting with other managers present at which there was generic interaction and discussions about nursery performance.

Did the Respondent fail to set any improvement plans or targets for the Claimant during her probation?

141. The Tribunal found that the Respondent did fail to set any improvement plans or targets during employment.

Did the Respondent dismiss the Claimant?

142. It was agreed between the parties that the Claimant was dismissed.

Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

143. The Claimant did not identify a male comparator in the same circumstances. Therefore, the Tribunal used a hypothetical male comparator whose circumstances and performance were the same as the Claimant's circumstance: An Area Manager of the same nurseries, performing as the Claimant's nurseries were performing, with the same occupancy levels, same parent feedback, same financial performance, same staffing issues and the same 'kerb appeal' issues. The Tribunal considered how that hypothetical comparator would have been treated.

144. The Tribunal found that the Respondent generally and Mr Booty in particular would have treated a hypothetical male Area Manager who was in the same material circumstances as the Claimant (i.e. with no material difference in their circumstances) in exactly the same way as set out below:

144.1. The Tribunal determined that Mr Booty would have emailed males in exactly the same way. It did so because the evidence before the Tribunal showed that he did treat male employes in that way. Most pointedly the email which he sent to the Claimant on 1 July 2023 was sent to both the Claimant (female) Chris Foot (male) and cc'd to David Jenkins (male) and it was explicitly addressed to "All". We find that email is symptomatic of Mr Booty's harsh management style and brusque communication style to both male and female employees. Mr Foot gave evidence that this was Mr Booty's style. Mr Booty said that he is known for 'calling a spade a spade'. Whatever the positives or negatives of Mr Booty's communication style, this did also indicate that his style was widely known. There was no evidence before the Tribunal that Mr Booty communicated to males and females in different styles. The Tribunal was satisfied that Mr Booty was consistent in his communication style between the sexes.

144.2. The Tribunal determined that Mr Booty (and others) would have made unannounced visits to nurseries under a male Area Manager. This was because it was deliberate policy to make unannounced visits to reflect how Ofsted visits would take place and to view nurseries as parents would view them. There was evidence that the policy of unannounced visits to nurseries took place before the Claimant's employment, during her employment and after her employment. As per **Shamoon (above)** the 'reason why' the Claimant was treated as she was, was due to the Respondent's intention to see the nurseries as Ofsted or parents would experience them.

144.3. The Tribunal determined that the Respondent would also have failed to provide supervision to the hypothetical male Area Manager whose performance and the performance of the nurseries for which they were responsible was the same. The Tribunal found that the Respondent's supervision process was generally poor and lacked 'one to one' time or formal supervision meetings for all Area Managers. The Respondent's system appeared to be reliant on informal discussions and participation in general Teams meetings for any form of supervisory feedback. There was no evidence to support that the Respondent's supervision process would be any better or different for the hypothetical male Area Manager. When the Claimant contacted her then line-manager, Mr Clifford, about Mr Booty's decision to overturn the decision to dismiss a nursery manager, Mr Clifford told her that he was also unaware of what was happening.

144.4. The Tribunal determined that the Respondent would also have failed to provide to set any improvement plans or targets during employment to the hypothetical male Area Manager whose performance and the performance of the nurseries for which they were responsible was the same. Again, the Respondent's minimalist approach appeared to be the Respondent's normal approach which seemed to apply equally to males and females from the evidence before us. Again, there was no evidence to support that the Respondent's improvement process and communication would be any better or different for the hypothetical male Area Manager.

144.5. The Tribunal determined that the Respondent would also have dismissed the hypothetical male Area Manager whose performance and the performance of the nurseries for which they were responsible was the same as the end of the probationary period as it dismissed the Claimant. It was noticeable that Mr Clifford, the Claimant's line manager for a while, also left the Respondent's employment after his decision to dismiss a nursery manager was overturned. The reasons which the Respondent put forward for the decision to dismiss the Claimant did not include sex as a factor and they were consistent with the evidence. Whilst the Respondent's decision to dismiss may be considered harsh given the struggles which appeared to have existed in some of the nurseries and the effusive praise for the Claimant from several nursery workers, the Tribunal it is not deciding whether it agreed with the Respondent's assessment of the Claimant's performance and the decision to dismiss her at the end of the probationary period. The Tribunal is determining whether the hypothetical male Area Manager in the same circumstances would have been treated in same way. The Tribunal was satisfied that the hypothetical male Area Manager in the same circumstances would have been treated in same way.

Was any less favourable treatment because of the Claimant's sex?

145. Whilst this element of analysis would be rendered unnecessary because of the conclusion above, for completeness the Tribunal records that it did not believe that the Respondent's treatment of the Claimant as set out above (whether less favourable or not) was because of the Claimant's sex.

146. The Claimant referred to another manager who failed the probation period but was given different treatment (the Nursery manager at Little Learners whose probation period was extended by Mr Booty). However, that didn't assist the Claimant in relation to the complaint of sex discrimination as the manager was also female. (This element would not have assisted the Claimant in respect of her disability complaint either, because the nursery manager had health related issues which Mr Booty took into account when deciding to extend her probationary period rather than fail her.)

147. As per **Madarassy (above)**, the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on balance of probabilities, the Respondent had committed an unlawful act of discrimination. The Claimant was asked by the Tribunal on several occasions what evidence she had to suggest or indicate that her sex played any part in the Respondent's decision to dismiss her, or, what it was that made her think that her sex had played any part. The Claimant was able to point to several elements of conduct that she did not like; saying that "it was the unprofessional tone" of the emails, "the control" by Mr Booty, and, "it was just the way decisions were made, like not bothering to call me". However, she did not suggest anything which indicated that her sex was a factor. In accordance with **Zafar (above)** the fact of unreasonable treatment and a difference in sex was still not enough to shift the burden of proof.

148. When considering stage 1 of the shifting burden of proof the Tribunal did not take into account the Respondent's explanation for the treatment in question, as per the guidance in **Igen**, **Laing** and **Efobi (all above).** However, there was no evidence of discrimination adduced by either the Claimant or the Respondent of discrimination within the act itself (as per **James (above)**) and no evidence of a

discriminatory thought processes (as per **Nagarajan (above)**). The evidence indicated that the Claimant's sex did not have a significant influence or any influence (as per **Nagarajan** and **the Governing Body of the Jewish Free School (above)**) on:

148.1. the emails above sent to the Claimant by My Booty;

148.2. the unannounced visits to nurseries by My Booty;

148.3. the Respondent's failure to provide supervision to the Claimant during probation;

148.4. the Respondent's failure to provide to set any improvement plans or targets for the Claimant during employment; or

148.5. the Respondent's decision to dismiss the Claimant at the end of the probationary period.

149. In particular regarding the decision to dismiss, the Respondent's perspective of what represented success for an Area Manager was highly nuanced in its reference to the Respondent view of quality and the 'route to outstanding' which then would lead to greater occupancy and better financial performance in each nursery. This perspective may be harsh in not giving more weight to the many very positive aspects of the Claimant's performance which were much admired by her reports and which the Claimant set out in a list of the positive things she had done and achieved and provided to Ms Cambell at the appeal. However there was no basis for concluding that the Respondent's narrow focus on the issues of concern regarding the Claimant (and its disregard for the other positive aspects of her performance) was connected to the Claimant's sex.

Was the Respondent's treatment a detriment?

150. Whilst this element of analysis is also rendered unnecessary because of the earlier conclusion, again for completeness, the Tribunal records that it would have found that the following aspects of the Respondent's treatment of the Claimant would have amounted to a detriment:

150.1. sending the emails with the alleged tone and content to the Claimant which the Claimant perceived as "blunt, unfriendly, scary and at times unprofessional" and on occasions doing so late at night;

150.2. making unannounced visits which the Claimant found "intimidating and uncomfortable";

150.3. failing to provide supervision which "disadvantaged" the Claimant regarding her ability to pass the probationary period;

150.4. failing to provide to set any improvement plans or targets during employment which left the Claimant unaware of the Respondent's view of her performance overall and what she need to improve in order to succeed in the probationary period which also "disadvantaged" the Claimant regarding her ability to pass the probationary period; and

150.5. dismissing the Claimant.

151. The complaint of direct discrimination on the ground of sex fails and is dismissed.

152. Whilst the Tribunal found that the complaints of discrimination arising from a disability, and, failure to make reasonable adjustments were submitted out of time and the Tribunal did not have jurisdiction to determine those complaints, the Tribunal records the determinations it would have made in respect of the elements of the relevant tests applicable to those complaints.

<u>Discrimination arising from a disability</u>

<u>Did the Respondent treat the Claimant unfavourably by causing her joint pain and fatigue due to requiring her to carry out manual duties and in particular gardening duties?</u>

153. As per **Lewis (above)** the unfavourable treatment is what the alleged discriminator does or says, or, omits to do or say. The Claimant alleges that what the Respondent did in this case was to require the Claimant to carry out manual gardening duties. For clarity, the joint pain and fatigue was not the unfavourable treatment itself; the joint pain and fatigue was the reason why the treatment was unfavourable to the Claimant in the sense that this what made the treatment adverse or disadvantageous as per **Williams (above)**.

154. The Tribunal found that the Respondent did not require the Claimant to carry out manual duties in particular garden duties. The requirement placed on the Claimant by the Respondent was actually to "*ensure that all our nurseries have a tidy, attractive kerb appeal*". When the Claimant responded saying she was having difficulties getting a gardener and she was expecting someone on Friday, Mr Booty elaborated that if there was a problem getting a gardener then the "*Manager should have done this or even yourself*". This was consistent with Mr Booty's evidence that Areas Managers were expected to 'muck in'.

155. Therefore, the Tribunal found that there was not a requirement that Area Managers including the Claimant must carry out the manual gardening tasks themselves so that the nurseries have a tidy, attractive kerb appeal as alleged by the Claimant. Instead, there was a requirement that Area Managers be responsible for ensuring that the manual gardening tasks are done by somebody so that the nurseries have a tidy, attractive, kerb appeal. The evidence was consistent that Area Managers had flexibility as to who physically undertook those tasks: it could be a gardener, it could be the nursery manager, it could be one of the nursery staff, or it could be the Area Manager. That was consistent with the Claimant's statements that she had organised gardener to come on the Friday and her expressed reasoning for not directing the manager or a member of nursery staff to do those tasks. It was when that gardener didn't turn up that the Claimant decided to do it herself. She chose to do it herself because she was fearful of what the nursery looked like and the impact this might have on her role, not because Mr Booty or anyone told her that she was required to do it personally. The Claimant said that she didn't direct the manager or one of the nursery staff to do the gardening tasks because they were needed for the child/adult ratios (but she didn't consider that she could have replaced the manager or nursery staff to maintain the ratios, whilst that person performed the gardening tasks).

156. The unfavourable treatment here was the requirement that Claimant (like other Area Managers) was responsible for making sure that the manual gardening tasks are done *by somebody* so that the nurseries have a tidy, attractive, kerb appeal. Therefore, this complaint must fail. For the sake of completeness, the Tribunal continues to record its other findings on the remainder of the applicable elements of the test.

Did the following things arise in consequence of the claimant's disability: An inability to carry out manual duties such as gardening at work.

157. The Claimant described that undertaking the manual gardening tasks caused her "a weekend of intense pain" and she and other witnesses had described how this work had left her with prolonged tiredness for two weeks. The Tribunal was satisfied that the Claimant was less able to carry out manual duties such as gardening work of the type described by the Claimant as a result of her disability of Fibromyalgia. The Tribunal's objective determination was that the Claimant's inability to carry out manual duties such as gardening work did arise in consequence of the Claimant's disability.

Was the unfavourable treatment because of any of those things? Did the Respondent cause her joint pain and fatigue by requiring her to carry out gardening duties in particular?

158. The Tribunal followed the guidance in **Pnaiser (above)** by determining what caused the unfavourable treatment focusing on the thought processes of the alleged discriminator.

159. The Tribunal allowed for a wide chain of causation as per **Grosset** and **Griffiths (both above)** including a series of multiple links as per **Wood (above)**.

160. However, the Tribunal determined that unfavourable treatment (i.e. the requirement that the Claimant be responsible for ensuring that somebody did the manual gardening tasks) did not occur *because* of her inability to carry out the gardening work. In this case the Tribunal found that the reason for the unfavourable treatment was purely the responsibilities attached to the role of Area Manager. The role and the responsibilities were not things which arose from the Claimant's disability. The unfavourable treatment took place *regardless* of the Claimant's ability to carry out the gardening work not because of something arising from her disability. To put it more simply, the requirement for gardening work caused the pain and tiredness; the pain and tiredness did not cause the requirement for gardening work.

161. There was no evidence that something arising in consequence of her disability (the hardship in performing the manual gardening tasks) caused the Respondent to apply the requirement to the Claimant as an Area Manager to ensure that somebody did the manual gardening tasks so that her nurseries had a tidy, attractive kerb appeal. Therefore, as per the guidance in **Robinson (above)** this complaint must fail for the lack of any causative link between 'the unfavourable treatment' and 'the something arising from the disability' and it must be dismissed for this reason also.

162. For the sake of completeness, the Tribunal continues to record its other findings on the remainder of the applicable elements of the test.

Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were: [To be confirmed in amended response.] The Tribunal will decide in particular (i) was the treatment an appropriate and reasonably necessary way to achieve those aims; (ii) could something less discriminatory have been done instead; (iii) how should the needs of the claimant and the respondent be balanced?

163. In the case management orders issued on 14 September 2024, the Respondent was directed to clarify the legitimate aim that it relied upon within its amended

grounds of resistance. However, the Respondent did not plead any legitimate aim within its amended grounds of resistance. Therefore, this element of the Respondent's defense would have failed.

164. The Tribunal would have found that there was no proportionate means of achieving legitimate aim.

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

165. The Tribunal found that the Respondent had constructive knowledge of the Claimant's disability from 5th May 2023 when the Claimant reported her Fibromyalgia in the health declaration form. At that point the Respondent should reasonably have made further enquiries with the Claimant herself and with occupational health support to obtain details about her experience of Fibromyalgia and this would have revealed that the Claimant had a mental or physical impairment which had substantial and long term impact on her ability to carry out normal day to day activities so as to hold 'disabled' status.

166. The Respondent appeared to argue that it was unaware of the particular disadvantage caused by the disability. However, in a section 15 complaint of 'discrimination arising from disability' there is no requirement that the alleged discriminator knew that the 'something' which led to the unfavourable treatment was related to the disability as per **Sheikholeslami (above)**.

167. The Respondent also appeared to argue that it was unaware of the severity of the disability or scale of disadvantage. Similarly, however, knowledge of the severity of the disability or scale of disadvantage are not a requirement in the section 15 legal test, which only requires knowledge of the existence of the disability.

168. The Respondent did know she had a disability from the date when the Claimant completed her health declaration form, 5th May 2023.

169. For the various reasons set out above, this complaint fails and it must be dismissed.

Failure to make reasonable adjustments

Did the Respondent know or could it reasonably be expected to know that the Claimant had the disability? From what date?

170. The Tribunal found that the Respondent did know that the Claimant had the disability of Fibromyalgia as from 5th May 2023 when she disclosed this in her completed health declaration form.

A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs: Requiring the Claimant to carry out gardening duties if there was no one else available to carry out gardening duties?

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that her disability caused her to suffer joint pain and fatigue if she carried out heavy manual duties such as gardening?

171. As per **Rowan** and **Ashton (above)**, the Tribunal noted the precise PCP asserted by the Claimant namely, the Respondent required the Claimant to carry out gardening duties if there was no one else available to carry out gardening duties. The Tribunal found that this asserted PCP was evidenced by an email from Mr Booty to the Claimant on 4th July at 4:58 which includes the manager should have done this "or even yourself". Clearly that envisages that one of the options for undertaking the gardening work is the AM (the Claimant herself). This indicated that if all other options were unavailable then Mr Booty on behalf of the Respondent did require Area Managers do that themselves. This was consistent with Mr Booty's oral evidence that there is an expectation that managers will "muck in".

172. The Tribunal was satisfied that a requirement that the Claimant should carry out gardening duties if no-one else was available is within the broad concept of a PCP as per **Carreras (above)** and, in particular, it would amount to a practice as per **Harvey (above)** in the sense that it is how similar situations would be treated as per **Ishola (above).**

173. The Tribunal was satisfied that the PCP to carry out manual gardening duties did cause substantial disadvantage to the Claimant due to her fibromyalgia. The Tribunal found that the Claimant could physically do the tasks in question, and she did so, but it was harder for her to do so that it would be for others without that disability and having done so it was substantially more costly to her well-being and comfort (she described "a weekend of intense pain") and inhibited her ability to function normally afterwards (she and others described prolonged "aches" and "tiredness" into the next week). This is a disadvantage which is more than minor or trivial as per **section 212(1) of the Equality Act 2010** compared with those who are not disabled as per **Sheikholeslami (above).**

Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

174. In a sections 20 & 21 'reasonable adjustments' complaint, paragraph 20(1) of Schedule 8 to Equality Act 2010 makes it clear that an employer must have knowledge of both (a) the disability and (b) the disadvantage in order for the adjustment duty to be triggered. The Tribunal found that the Respondent did not know and should not reasonably have been expected to know that the Claimant was likely to be placed at that disadvantage by the manual gardening tasks. Whilst the Claimant had declared that she had fibromyalgia, fibromyalgia has a range of impacts on individuals. The Claimant had said in health form that her fibromyalgia "*doesn't affect [her] work in anyway*". The Claimant gave evidence that this was based on her expectation of the work at that time she made the comment. That may well be true, but the Respondent was entitled to take that statement at face value. The fact that the Claimant was unaware of those tasks so that the statement was flawed does not mean that the Respondent should somehow have known that the Claimant was flawed and, contrary to the Claimant's statement, she was likely to be placed at the disadvantage by those tasks. The Claimant accepted that she did not inform anybody in management at the Respondent that manual gardening duties would cause her difficulties.

175. In addition to the Claimant's statement that her fibromyalgia "*doesn't affect [her] work in anyway*", the Tribunal noted that the Claimant did not have any absence which might itself have indicated a problem related to manual tasks similar to gardening. The Claimant also appeared to have managed to have done other manual tasks typical of an area manager related to her role without raising any issues. During cross examination it was put the Claimant that even if she hadn't

done so before, it would have been natural for her to respond to Mr Booty's suggestion that she could 'pull up a few weeds' by explaining that this would actually be a problem for her or would be more difficult for her because of her fibromyalgia. The Claimant accepted that she did not say that pulling up a few weeds would be more difficult for her. For clarity, this does not mean that the Claimant needed to have formally requested a reasonable adjustment (which would offend the guidance in **Randall (above)**) the issue is only that she did not make the Respondent aware of the disadvantage at a point when she could naturally have done so which partly contributes the Respondent's lack of knowledge of the disadvantage.

176. When the booked gardener indicated that they would not be able to perform the manual gardening tasks, the Claimant decided to do them herself despite the hardship it would cause her. Her choice to do so is to her credit and displays an admirable attitude and commitment to her duties. However that does not change the fact that the Respondent did not know about the disadvantage associated with the manual gardening tasks and had no basis for knowing about that impact of those tasks on her fibromyalgia when she hadn't told the Respondent's managers about it. As per **Glasson (above)** the duty on the Respondent to make reasonable adjustments did not arise because it was unaware and could not reasonably have been aware of the particular disadvantage caused to the Claimant. The Respondent was not required to anticipate a disadvantage to the Claimant which was not, on the facts, reasonably apparent.

What steps could have been taken to avoid the disadvantage? The Claimant suggests: A risk assessment. and, by not requiring her to carry out manual gardening duties and source someone else to carry out these duties

177. Regarding a risk assessment: A risk assessment could have been undertaken but this would not, in itself, have avoided the disadvantage; it would only have better informed the Respondent. Therefore, this proposed reasonable adjustment fails.

178. Regarding not requiring her to carry out manual gardening duties and source someone else to carry out these duties: Unfortunately, the 'step' asserted by the Claimant of 'sourcing someone else' is logically impossible to reconcile with the asserted PCP which pre-supposes that 'no-one else is able to do the manual gardening tasks'. Cutting through this hypothetical impossible scenario, in order to address the reality behind the complaint, it was apparent that the Respondent was prepared for someone else other than the Claimant to have undertaken the manual gardening task. That was the nature of the requirement which the Respondent placed on the Claimant. So the Respondent was willing from the outset for someone else to do the tasks. If the PCP as pleaded only arises when 'no-one else is available to do the task' then the proposed reasonable step of allowing someone else to carry out the task wouldn't have avoided the substantial disadvantage because the asserted PCP requires that no-one else is actually available. Therefore, this proposed reasonable adjustment must also fail.

179. Given that the Tribunal held that neither of the adjustments asserted by the Claimant would have avoided the substantial disadvantage, then the complaint of failure to make reasonable adjustments fails and must be dismissed.

180. Again, for the sake of completeness, the Tribunal briefly records its other findings on the remainder of the test.

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

181. In an everyday sense, it would have been reasonable for the Respondent to have undertaken a risk assessment at the outset of employment and it would have been reasonable for the Respondent to have allowed someone else to have undertaken the manual gardening task (as evidenced by the fact that the Respondent was willing for this to happen). However, the legal test has a different meaning: it asks would it be reasonable for the Respondent *to be legally obliged to take that step as a means to avoid the substantial disadvantage*. Given that the Tribunal has determined above that neither of the adjustments asserted by the Claimant would have avoided the substantial disadvantage, then in accordance with **EHRC Code of Practice on Employment (2011)** at paragraph 6.28, the Tribunal would have held that it would not be reasonable to oblige the Respondent to take those steps for the purposes of a section 20 & 21 complaint because they would not have been effective in avoiding the substantial disadvantage.

Did the Respondent fail to take those steps?

182. The Tribunal found that the Respondent did fail to undertake a risk assessment.

183. Unfortunately, as explained above the asserted PCP (which requires as its premise that no one else is available to undertake the manual gardening tasks) is impossible to reconcile with the asserted reasonable step (of allowing someone else to undertake the manual gardening tasks). When the Tribunal again stepped away from this impossible logic loop to focus on the reality, the Tribunal noted that it had found that the Respondent did allow others to undertake the manual gardening tasks. The situation here was that the Claimant chose to carry out those tasks herself rather than direct others to do so. Therefore, the Respondent cannot have failed to take the step of allowing others to undertake the manual gardening tasks.

184. For the various reasons set out above, this complaint also fails and it must be dismissed.

Approved by:

Employment Judge Ost

12 July 2026

JUDGMENT SENT TO THE PARTIES ON

......14 July 2026.....................................

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FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

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

SCHEDULE

The List of Issues from Employment Judge Brown was as follows:

“49 The issues the Tribunal will decide in broad terms are set out below but the parties are to agree a final list of issues as set above. The issues I identified are as follows:-

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 12 September 2023 may not have been brought in time.

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

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

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

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

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

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

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

2. 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:

2.1.1 Did they have a physical or mental impairment: Fibromyalgia 2.1.2 Did it have a substantial adverse effect on their 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?

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

2.1.5 Were the effects of the impairment 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. Direct sex discrimination (Equality Act 2010 section 13)

3.1 The claimant is female and they compare their treatment with male employees.

3.2 Did the respondent do the following things:

3.2.1 Undermine and bully her during her employment?

3.2.2 Fail to provide her with supervisions during her probation?

3.2.3 Fail to set any improvement plans or targets during her probation?

3.2.4 Dismiss her?

3.3 Was that less favourable treatment?

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

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

3.4 If so, was it because of sex?

3.5 Did the respondent's treatment amount to a detriment?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by:

4.1.1 Cause her joint pain and fatigue due to requiring her to carry out manual duties and in particular gardening duties?

4.2 Did the following things arise in consequence of the claimant's disability:

4.2.1 An inability to carry out manual duties such as gardening at work.

4.3 Was the unfavourable treatment because of any of those things? Did the respondent cause her joint pain and fatigue by requiring her to carry out gardening duties in particular??

4.4 Was the treatment a proportionate means of achieving a legitimate aim?

The respondent says that its aims were:

4.4.1 To be confirmed in amended response.

4.5 The Tribunal will decide in particular:

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 could something less discriminatory have been done instead;

4.5.3 how should the needs of the claimant and the respondent be balanced?

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

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

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

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

5.2.1 Requiring the Claimant to carry out gardening duties if there was no one else available to carry out gardening duties?

5.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that her disability caused her to suffer joint pain and fatigue if she carried out heavy manual duties such as gardening?

5.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

5.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

5.5.1 Conduct a risk assessment at the outset of her employment.

5.5.2 Not require her to carry out gardening duties and source someone else to carry out these duties.

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

5.7 Did the respondent fail to take those steps?

6. **Remedy for discrimination or victimisation**

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the claimant?

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

6.4 If not, for what period of loss should the claimant be compensated?

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

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

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

6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.9 Did the respondent or the claimant unreasonably fail to comply with it?

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

6.11 By what proportion, up to 25%?

6.12 Should interest be awarded? How much?

7. Remedy

7.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

7.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

7.3 Would it be just and equitable to award four weeks' pay?