EMPLOYMENT TRIBUNALS

Claimant: **Miss L Mannell**

Respondent: **Altrad Employment Services Ltd**

Heard at: **Bristol**

On: **20 and 21 April 2026 (with the Tribunal meeting to deliberate on 22 and 23 April 2026)**

Before: **Employment Judge Livesey**
Mrs D England
Ms S Maidment

Representation
Claimant: In person
Respondent: Mr Pincott, counsel

JUDGMENT

1. The Claimant's complaints of harassment related to sex under s. 26 of the Equality Act are dismissed upon withdrawal.

2. The Claimant's complaints of constructive unfair dismissal and discrimination on the grounds of age and/or disability are dismissed.

REASONS

1. The claim

1.1 By a Claim Form issued on 16 January 2025, the Claimant brought complaints of discrimination on the grounds of age, disability and/or sex and constructive unfair dismissal. The Claim was originally brought against the Respondent and other parties (NG Bailey Ltd, Balfour Beatty Ltd, Cavendish Nuclear Ltd and Babcock International Group) but those claims were rejected in the absence of early conciliation certificates.

2. The evidence

2.1 The Claimant gave evidence and called Mrs Wood, a former Payroll Coordinator, in support. A written statement was also submitted on behalf of Mr Martin, a Lifting Engineer, which was read.

2.2 The Respondent called the following witnesses to give evidence;
- Mr Gardner, Mechanical Superintendent, MEH Alliance;
- Ms Armour, former Head of HR, MEH Alliance;
- Mr Wooding, Senior Commercial Manager, MEH Alliance.

2.3 Mr Lumsden, People Engagement Team Leader, formerly Workforce Manager, MEH Alliance, was unable to attend through illness and his statement was also read.

2.4 The following documents were produced;
- R1; Hearing Bundle;
- R2; Chronology;
- R3; Cast List;
- R4; List of Issues, with the Respondent's comments;
- R5; Mr Pincott's Skeleton Argument (and an addendum, R5.1);
- C1; Skeleton Argument (and an addendum, C1.1);
- C2; Claimant's comments upon the List of Issues.

3. The issues

3.1 The issues were discussed, agreed and recorded by Employment Judge Halliday at the Case Management Preliminary Hearing which she conducted on 21 May 2025. Those issues were revisited by Employment Judge Midgley at the hearing which he conducted on 3 March 2026 and were confirmed. Those issues were;
- Jurisdictional time issues (paragraph 1 of the Case Summary of 21 May 2025);
- Constructive unfair dismissal, based upon nine alleged breaches of the implied term of mutual trust and confidence (2.1.1 to 2.1.9);
- Discrimination arising from disability (anxiety and depression, which the Respondent had conceded); two complaints (paragraph 4.1);
- Indirect age discrimination in relation to the requirements for the Payroll Manager's role (paragraph 5).

3.2 The four complaints of sexual harassment within paragraph 6 were withdrawn by letter dated 13 April and the Judgment above reflected that.

3.3 In a List of Issues drafted by the Respondent in advance of the hearing, it was alleged that some of the complaints which underpinned the complaint of constructive unfair dismissal had not been raised in the Claim Form and that the Claimant therefore needed to have made an application to amend to include them. Those matters *had* been raised in the List of Issues included within Employment Judge Halliday's Case Summary of 21 May 2025. No point had been raised in relation to them at the time by the Respondent nor subsequently, particularly in accordance with paragraph 14 of the Order. It was implicit, therefore, that, if permission to amend had been technically required, it had been granted without objection. That was the point for the Respondent to have drawn its line in the sand if it was going to have done so. It did not. It had to meet the claim set out in the List of Issues going forward.

3.4 Nevertheless, during the hearing, the Claimant clarified that she had *not* resigned as a result of the matters in paragraphs 2.1.1 to 2.1.5 of the List of Issues; they had been included as ‘contextual material’. What led to her resignation, she said, had been her treatment after her return to work in 2024.

3.5 The Judge was concerned that the Respondent had not been part of the Joint Venture in which the Claimant had worked. Having heard Ms Armour’s evidence and having considered the Claimant’s payslips and her P45, the parties agreed that she had been employed by the Respondent as named, but had been seconded to the Joint Venture (see, further, below).

4 The hearing

4.1 At the start of the hearing, the Claimant made an application for specific disclosure in relation to the annual salary of the postholder whose job she did not get (Mr. Halliday). She maintained that it was relevant to issues of remedy. The Respondent asserted that the application was premature as the hearing had been listed to determine matters of liability only. The Claimant accepted that and, whilst the Judge indicated that the application was likely to have been granted, it was not determined.

4.2 There was also an issue regarding the first six lines of paragraph 39 of the Claimant’s witness statement which appeared to contain ‘without prejudice’ material. Once explained to the Claimant, that was not disputed by her and the Tribunal’s indication that it would have been ignored as part of the evidence was agreed by the Respondent.

4.3 On 3 February 2026, the Claimant wrote to be excused from the final day of the hearing as it clashed with her university graduation. That application was not pursued before Employment Judge Midgley at the hearing on 3 March, but it was renewed on 13 April and, on 15 April, the Regional Employment Judge excused both parties’ attendance on that day. This document therefore reflected the Claimant’s wish to have received full Reasons in writing.

5 The facts

5.1 The following factual findings were reached on the balance of probabilities. The Tribunal tried to restrict its findings to matters which were relevant to a determination of the issues. Page references cited below are to pages within the hearing bundle, R1, unless otherwise indicated.

<u>Introduction</u>

5.2 The Claimant was employed from 21 October 2019. Initially, she held the position of Senior Administrator. The Respondent is a provider of human resources and payroll services which sits within a much larger group of businesses which provide services within a multitude of industrial settings.

5.3 In May 2022, the Claimant was assigned to work for an unincorporated joint venture known as the 'MEH JV' or the 'MEH Alliance' ('the MEH' hereafter), which was formed in 2019 in order to integrate and coordinate all of the main technical contractors and other support service workers at the Hinkley Point C nuclear power station, North Somerset. She was assigned as a Payroll Coordinator.

5.4 The MEH Joint Venture was formed between NG Bailey Ltd, Balfour Beattie Kilpatrick Ltd, Altrad Services Ltd, Cavendish Nuclear Ltd and Altrad Babcock Ltd (formerly Doosan Babcock). It provided services to NNB Generation Company (HPC) Ltd, the client.

5.5 When the MEH was initially formed in 2019, it comprised only approximately a hundred staff who were engaged to plan the project before the engineers and trade operatives were appointed. They then worked in Bristol. Trade operatives began to be appointed to Venture from 2021 onwards and the MEH management team then moved to the Somerset site.

5.6 The Claimant's employment had commenced with Doosan Babcock, a member of the MEH. She had been assigned to MEH as set out above and, when Doosan Babcock was acquired by the Respondent on 23 September 2023 under TUPE, she remained within the MEH on the same basis. The arrangement was best understood as one of secondment as the Respondent was not itself a constituent member of MEH. Ms Armour and others were employed on the same basis.

<u>Disability</u>

5.7 The Claimant's disabilities were admitted by the Respondent. She had experienced symptoms from an anxiety disorder since 2010 and depression from 2017, the effects from which clearly waxed and waned.

5.8 Subsequent to her resignation and not relevant to any issue in the case, she was diagnosed with a form of ADHD in November 2024.

<u>Promotion</u>

5.9 Workers at the site were subject to a specific sector agreement, the Engineering Construction Sector Agreement ('ECSA'), which governed rates relating to pay, overtime, shift disturbance, lodge, compassionate leave and other issues. The Agreement covered those receiving weekly pay.

5.10 As trade operatives were recruited and began to be paid, the need to provide time and attendance data to each parent company within MEH was identified. Each company had its own payroll function, but the role of the MEH payroll function was to provide data to each of the five companies to enable payments to have been made correctly and consistently across the Joint Venture. For example, the MEH built the clocking system which operatives used ('Kronos').

5.11 As the scope of the payroll requirements on site increased, more Payroll Coordinators were appointed and a decision was taken to appoint a Payroll Team Leader (see the role profile [75-6]). The Claimant applied for the position and, following an interview process, she was offered the role with effect from 1 April 2023. She had been the only applicant. At the time however, she had been offered another position elsewhere and there was some discussion over the terms of her retention before she accepted [77-91].

5.12 Two further Coordinators were appointed in July and November 2023 and the Claimant then had responsibility for three Coordinators who reported into her. She reported to Mr Lumsden, the Workforce Manager, who himself reported to Ms Armour, the Head of HR. Mr Lumsden was technically employed by NG Bailey Ltd, an MEH member, whereas Ms Armour was employed by the Respondent.

5.13 Despite their recruitment, the Payroll Team continued to be busy. The Claimant worked a significant amount of overtime ([98,108 and 121]) and Ms Armour offered her support where appropriate [93-4]. There were particular challenges faced by the Team towards the end of 2023 and into early 2024; issues with holiday pay following a system change, the application of incorrect pay rates [131-4] and some payslips which were delayed ([90], [100], [102], [105], [112-9] and [126-9]). There was also a disagreement with the HR team with regard to the handling of the payroll of some superintendents within Altrad Babcock. Because they were paid monthly, the Claimant considered that they were not part of her Payroll Team's remit. HR considered otherwise [135-140].

5.14 The Claimant accepted in evidence that there had been payroll problems at the time. She attributed it to the fact that the Team was chronically understaffed and that the Payroll Team did not have access to the constituent members' back office systems. As the Team Leader, she found herself facing some of the blame and she understood why that had been the case.

5.15 There was little doubt that the pressure on the Claimant and others had been significant. Mrs Wood described it as 'extreme'. Ms Armour accepted that the Claimant had then been 'covering a number of gapped roles' and had been 'giving her weekends and evenings to support us' [121]. Mr Lumsden and Ms Armour could see how hoard she was working and were appreciative and supportive ([93-4], [98] and [108] also).

5.16 Management had asked for many more staff to have appointed than were initially allocated and it appeared that the MEH was always trying catch up to cater for the increasing number of operatives that had been appointed. All recruitment had had to be approved by the client, NNB Generation Company (HPC) Ltd, and many requests for extra staff were only ever partially met.

5.17 The Claimant took some time away from work for a month in January and February 2024. She initially described herself as having been 'burnt out' [135] but, in her evidence, she described the events of the end of January as having caused her a 'mental breakdown' (paragraph 11 of her witness statement). A fit note followed on the 25th for one week initially [143].

<u>Payroll Team Manager's position; creation and advertisement</u>

5.18 As the demands upon the Payroll Team further increased, it was determined that the role of Payroll Team Manager ought to have been created. Mr Lumsden said that the original intention had been to have created the role in late 2024 or early 2025 but events overtook them and the need for an earlier appointment came sooner than expected.

5.19 Mr Lumsden and Ms Armour decided to create the role in January 2024 (see Ms Armour's email of the 24th [141]). Approval then had to be sought, which was obtained on 14 February 2024, when funding was provided.

5.20 The Claimant's case was that she was promised the role (paragraph 13 of her witness statement);

> "*I was promised on multiple occasions and through both express conversations and clear implication, that if I continued to perform the Payroll Manager functions, built the team and the infrastructure< I would be recognized and rewarded with progression to the Payroll Manager role.*"

She relied upon two emails as evidence of that promise; Ms Armours' of 30 November 2023 [110-1] and Mr Lumsden's of 5 February 2024 [150-1].

5.21 The first of those did not say what the Claimant had alleged. To the contrary, it appeared to reflect misgivings that were held about her ability to operate at a higher level. Mr Lumsden had always held doubts ("*I had some doubts about her progressing to Manager*, *as I think a number of us did*" [110]) but considered that she had been working better by November. Ms Armour agreed, but stated that she had then only been '*starting* to live up' to the role that she had been appointed into in April 2023. She did not consider that she was then ready for a further promotion [110];

> "*I agree she has stepped up. And she's now starting to live up to the Team Leader promotion we gave her. For me she still needs to deliver on the procedures etc. and dealing with the tricky stuff…*
> *Let's see how she develops the team and the role across 2023 and this time next year when we are looking at our structure for 2025 there may be a case for further promotion at that time.*"

5.22 The latter email [150-1] merely highlighted the intention to create the Payroll Manager's position and the Claimant's ability to have applied for it.

5.23 The Respondent denied that she was ever *promised* the role. There may well have been an expectation and hope that she would have gained the necessary level of experience to have applied for the role had it been created in late 2024 or early 2025 (for example, [110]), but Mr Lumsden stated that there was never a promise made to her that the role was hers (paragraph 6 of his witness statement). Ms Armour echoed and endorsed that evidence (paragraph 23) and when the role was created, Ms Armour's candid views were shared with Mr Lumsden about where she thought the Claimant reached in terms of her development then [141];

> "*Based on recent events, I think we need a manager now. We need to get someone planning ahead, managing procedures, getting the Kronos reporting sorted out and managing the team to take the headache for you. And if we're both honest, we've held off because we had hoped to wait for Lou to get there but I don't think that will be for quite some time. And I'm not basing that just on today, she needs to develop and learn the management side before she's ready for that.*"

5.24 Having considered all of the evidence, we were not satisfied that paragraph 13 of the Claimant's statement was correct. The oral evidence and surrounding correspondence did not support the assertion that the role had been promised or guaranteed for her. It was noteworthy that she did not cross-examine Ms Armour to that effect and that her own correspondence had only referred to 'carrots' having been 'dangled' in front of her to that effect [177].

5.25 Ms Armour had put together the role profile [148-9] in January in collaboration with HR within Cavendish Nuclear, which included the following in the box 'Additional Qualifications/experience';

"*Minimum 5 years Payroll Manager experience*"

5.26 Mr Lumsden and Ms Armour felt that that requirement was important because the role was a complex one, involving different trades within the construction industry, working with trade unions and managing complex and/or collective grievances. The postholder would also have been managing a payroll team who were dealing with different payroll systems operated by the constituent MEH members, with complex financial year end activities and the handling of annual pay increases. The postholder would also have required experience of undertaking performance reviews and appraisals. It was considered necessary to have had somebody with a reasonable amount of experience behind them in a manager's role. Ms Armour expressed her views at a subsequent grievance interview as follows [306];

> "*In the past I have shy* [sic] *away from this* [the minimum experience requirement]. *In this instance it seemed the best way to identify someone who had managed the need multiple times. It is about having experience of building a team, going through a process of updating yearly allowances, managing significant varied payroll issues. We were looking for extensive relevant experience, if they had done 3 years but managed a large payroll, we would have considered them…*"

5.27 In cross-examination, Ms Armour accepted that many other advertisements of that sort had not contained such an experience requirement; those produced by the Claimant [380-441], but she nevertheless believed that they ought to have obtained a candidate of that level of experience for the role.

5.28 The advert for the role went out in March 2024, both internally and externally.

5.29 During cross examination, the Claimant had to accept that it had not been her age which had determined whether she had the necessary experience for the role, but her career path and qualifications ([62] and [166]). Had she gone down an apprenticeship route, she could have gained the necessary qualifications for the role and her age had not prevented her from having had the necessary experience had she chosen a different path.

5.30 That evidence was to have been balanced against paragraph 20 of Mr Wooding's evidence, which he stood by in cross-examination;

> "*I recognised that the effect of this criterion would make it more difficult for younger people to apply as they would not have had the time to gain the experience…*"

Payroll Team Manager's position; recruitment

5.31 Cavendish Nuclear Ltd led the recruitment process and it appeared that the successful candidate was going to have been their employee (see [367]). The Claimant, who was then 29 years old, applied for the role on 6 March but she was not shortlisted. She had clearly known of the experience criterion by then. Three candidates were identified as having been suitable for interview, although the number was reduced to 2 on 16 April, one male and one female.

5.32 On or around 24 April, Ms Armour informed the Claimant that she had not been selected for interview. She was told that she did not have sufficient and successful track record of working with unions or the wider experience of managing a payroll function. On that day, the Claimant started the grievance process [177].

5.33 In cross-examination, the Claimant accepted that Ms Armour's decision not to have interviewed her was taken because of her views of her experience, but she also denied that age and/or disability had had nothing to do with it.

5.34 On 1 May, Mr Halliday was offered the position, which he accepted. He started work in July. He had 20 years' experience as a Senior Office Manager for Laing O'Rourke in the field of construction and, since January 2015, had worked at Hinkley Point C with them. The Claimant was at pains to point out that he had not previously held a managerial position which had 'Payroll' in the title, but his c.v. reflected extensive payroll involvement and leadership [171]. He was appointed on that basis and has continued in that role successfully ever since.

5.35 In her witness statement, the Claimant had contended that Mr Halliday had been known to Ms Armour and that it had been unusual for such roles to have been advertised externally. Ms Armour stated that she had not previously known him and she was not cross-examined on that point. It was also denied that such roles would have been restricted to external applicants as a matter of practice (see paragraph 22 of Mr Wooding's witness statement). Senior roles of that sort were generally advertised externally. Again, this was not a point that was pursued during the hearing.

5.36 Feedback was provided to the Claimant on 9 May [183-4]. She then commenced a further period of sick leave on the same day. She did not return to work until 18 June. Her fit note stated that her reason for absence was 'depression'.

5.37 On a more fundamental basis, the Claimant alleged that her breakdown in January 2024 had prevented her appointment into the role. She asserted that, on the very evening of her breakdown, Ms Armour had stated that they ought to 'hold off' appointing into the role because they had hoped that she would have 'got there' [141].

5.38 We did not consider that there was anything suspicious about the email or the timing. Given the context of the previous emails [110-1], we considered that the conversation was simply about the Claimant's experience. The email predated her fit note [143] as too did the email to Mr Fishlock of the same date in which she expressed her desire to 'recruit an experienced

Payroll Manager who will sit above Louise'. Ms Armour had not spoken to the Claimant on the day of her claimed 'breakdown' before the email at [141] was sent. That, we considered, was simply part of the conversation which had been going on for several weeks before and Ms Armour further said this [145];

"*We'd hoped to wait 6 months to give Louise a chance to develop into that role but we need it now*."

5.39 That was echoed in Ms Armour's evidence to the Tribunal when she said that "*we had hoped that we would have had time to develop a role that you could have developed into, but the payroll and IR issues which occurred meant that we needed to get there sooner.*"

5.40 It was clear that their views had been shared by others at the same time (see Mr Jackson's email of 26 March [174]). It was equally clear that the Respondent still wanted to retain her in her role as a Team Leader [173].

5.41 The Claimant accepted in cross-examination that the contemporaneous evidence showed that the key decision maker, Ms Armour, did not consider that she had been ready to have stepped up to the role of Payroll Manager at the time.

<u>Illness absence, grievance and resignation</u>

5.42 On 24 April, the Claimant indicated an intention to issue a grievance on the grounds of disability and/or age discrimination [177]. She said that that had been the informal stage of the process. She spoke to Mr Lumsden about it, but that obviously did not provide her with the resolution that she had been seeking.

5.43 At that stage, the Claimant had been prepared to have considered other roles with the Respondent, but away from the MEH (see her email in May [183]).

5.44 On 18 June, the Claimant submitted her formal grievance. She reiterated her belief that the decision not to have interviewed her for the position of Payroll Manager had been discriminatory [197-8].

5.45 Mr Wooding, Senior Commercial Manager, was ultimately selected to deal with the grievance, but there was some initial delay in identifying a member of the senior management team who had not previously been involved.

5.46 Mr Wooding invited the Claimant to an interview on 19 July which took place on 2 August [247]. He had HR support from Ms McLackland and the Claimant was supported by her union representative. During the meeting, she stated that she felt that her absence in January and February 2024 due to severe anxiety had been the reason why she had not been offered the position of Payroll Manager. She also complained about the requirement for 5 years' experience for the role. When asked what resolution she was seeking, she stated that she wanted to be 'paid out'. She subsequently submitted some further documents and a timeline of events [263-274].

5.47 According to the Respondent, it was agreed between the parties that no further steps would have been taken to investigate the grievance for a period while they were in discussions about alternative means of resolving their dispute, but it was recommenced on 30 August [275]. The Claimant not accept that there had been an express agreement but did accept that there had been settlement discussions.

5.48 The Claimant resigned on 9 September, giving four weeks' notice to take effect on 4 October 2024 [278]. She stated that she felt that she had been 'pushed out of the business'. She asked to be placed on garden leave and claimed that her mental health would have been 'severely impacted' if she had returned to site, which was reasonably understood to have been Hinkley Point C [314].

5.49 The Respondent required her to work out her notice, however, but agreed that she could work from a satellite office to avoid her having to attend site (the 'SDC' in Bridgwater) [287-8]. She had previously worked there following a period of sickness absence at her request [251] and on the back of an Occupational Health recommendation [195-6] and Ms Sudds, a member of HR who she got on well with, was based there. It also suited the type of work which the Respondent wanted her to undertake; the training of Coordinators on Kronos and the completion of certain payroll process documents. The Claimant did not challenge that [289].

5.50 Having worked at the SDC, however, she stated that she found it 'isolating' and indicated an intention to return to site ([317] and [321]). She attended on 23 September. After that visit, the Respondent asked her to work from home for the remainder of her notice period as it was alleged that she had been disruptive at Hinkley during her visit (a 'spat' was recorded to have taken place between her and Mr Halliday; [299], [307] and [311-2]).

5.51 Mrs Wood had resigned in June, some months earlier, and had not been required to work her notice period. Ms Armour could not explain the difference in treatment. It had all been dictated by the needs of the client at the time.

5.52 Mr Wooding and Ms McLackland nevertheless continued the grievance investigation. Several witnesses were interviewed (Ms Armour [303-7], Mr West [308-12], Ms Sudds [324-6] and Mr Roberts [342-4]) although the process was slowed by Mr Wooding and others' leave [279], availability and sickness. Upon completion, the Claimant was provided with an outcome on 1 November [362-8] and the Report [351-8]; it was concluded that Ms Armour had been justified in setting a time frame for experience for the Payroll Team Manager's role and that the Claimant had not been able to demonstrate that she could have met the demands of it.

5.53 In October, the Claimant had contacted HR and had indicated that she had lost faith in the grievance process and "*don't feel there's much use in continuing*". That message either did not reach Mr Wooding or, if it did, did not change his course in determining it.

5.54 It was Mr Wooding's first ever grievance investigation. He had received no training on how to conduct it. In his evidence, he seemed vague, had little recall of events and we had the distinct impression that stones had been left unturned. He was not an impressive witness.

Remaining allegations

5.55 There were a number of separate allegations which had initially been raised as discrete breaches of the term of mutual trust and confidence but which had been restated to have been contextual evidence only (paragraph 2.1 of the List of Issues). Other than those considered within the chronology of the issues above, they were not considered in detail as nothing specific rested on them. That said, we noted that most of the adverse comments about which the Claimant had complained had been reported to her by others and the people responsible had not been the Respondent's employees, save for Mr Gardner, whose evidence she did not challenge or cross examine.

5.56 Further, it was noteworthy that, in relation to Mr West's alleged email of 24 January 2024 (paragraph 2.1.6 of the List of Issues), no such email was ever found. After her evidence had concluded, the Claimant accepted that there had been no such email at all. It had been a report of something which he had allegedly said that I got back to her. Accordingly, this allegation was simply not made out and/or proved.

5.57 The Claimant also accepted that she could not have resigned because of the Respondent's sending her to the SDC *during* her notice period (paragraph 2.1.7) as she had already resigned. The same applied to the handling of her grievance, since the delays which she complained about had occurred after her resignation (paragraph 2.1.9).

Evidence relating to the issue of limitation

5.58 There was precious little evidence about the issue of limitation and the prejudice which either party might have suffered had the claims which were out of time on their face either being, or not been, considered.

5.59 Whilst the Claimant's witness statement contains no evidence on the point, she accepted in cross-examination that she had been a union member. She had been represented at the 2 August grievance meeting. She had threatened recourse to Employment Tribunal litigation in June 2024 [216], but did not issue her claim until January 2025. She further accepted that, as a graduate in law, she had the wherewithal to have researched the law and that she could have done so.

5.60 The Respondent's statements contained no equivalent evidence either.

6. Relevant legal principles

Constructive unfair dismissal

6.1 First, the question of fundamental breach. The implied term of trust and confidence was not breached merely if an employer behaved unreasonably, although such conduct can have pointed to such a breach evidentially. However, it was breached if an employer participated in conduct which was calculated or likely to have caused serious damage to, or destroyed, that relationship (what had been referred to as the 'unvarnished *Malik* test' from the case of *BCCI-v-Malik* [1998] I AC 20).

6.2 Breaches must have been serious. Parties were expected to withstand 'lesser blows' (*Croft-v-Consignia* [2002] IRLR 851). One of the approaches to that test by the Court of Appeal in the case of *Tullett Prebon-v-BGC* [2011] EWCA Civ 131 was to ask whether, looked at in the light of all of the circumstances objectively, the party's intention was to refuse further performance of the contract (paragraph 27, per Kay LJ), although intention was not an essential ingredient; an objective analysis of the likely effect was required (*Leeds Dental Team Ltd-v-Rose* [2014] IRLR 8).

6.3 It was also important to remember that there was a second consideration; there needed to have been no reasonable or proper cause for the conduct for it to have been regarded as a fundamental breach of the implied term.

6.4 The danger of equating a breach of the implied term with the issue of reasonableness or the 'range or reasonable responses' test was highlighted in the case of *Bournemouth University-v-Buckland* [2010] ICR 908, CA, which also put to bed the notion that a breach might have been remedied or 'cured' by an employer. That said, it was important to distinguish between cases in which a breach occurred and remedial action was then attempted, from those in which action was taken by an employer to avert the risk of a breach (*Assamoi-v-Spirit Pub Company* UKEAT/0050/11).

6.5 The breach (or breaches) relied upon did not need to have been the only cause of the employee's resignation in order for a claim to have succeeded; *Wright-v-North Ayrshire Council [2013] UKEAT/0017/13/2706.* It was sufficient for them to have been *an* effective cause of the resignation.

6.6 A claimant cannot have relied upon a breach of contract which he or she had been taken to have affirmed. Affirmation could have been express or implied by both action (for example, the pursuit of an internal appeal, as in *Folkestone Nursing Home-v-Patel* [2019] ICR 273) or by inaction and delay, although simple delay was rarely enough. It was important to examine what was happening during any such delay (*Leaney-v-Loughborough University* [2023] EAT 155).

> "*Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation. But the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurred during that period.*"(*Dr Leaney-v-Loughborough University* [2023] EAT 155 at paragraph 20).

6.7 In *Chindove-v-Morrisons* UKEAT/0201/13/BA, Langstaff J said this (paragraph 26);

> "*He [the claimant] may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time….. It all depends upon the context and not upon any strict time test*."

6.8 The use of a contractual grievance procedure will not usually be likely to be treated as an unequivocal affirmation (*Sandra Brooks-v-Leisure Employment Services Ltd* [2023] EAT 137). An employee with long service might reasonably need longer to make up his mind, according to the decision in *Leaney* (above), but the question will always be fact sensitive.

<u>Discrimination arising from disability</u>

6.9 When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability, which was an objective question and, secondly, unfavourable treatment which was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-Weerasinghe* UKEAT/0397/14). That second question was subjective, in the sense that it required us to examine the employer's mind in order to establish whether the treatment had been by reason of its attitude or reaction to the '*something*' (*Dunn-v-Secretary of State for Justice* [2019] IRLR 298, CA). Although an employer must have had knowledge (actual or imputed) of the disability, there was no requirement for it to have been aware that the relevant '*something*' had arisen from the disability (*City of York-v-Grosset* 2018] IRLR 746, CA).

6.10 Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might have been several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause, in the sense of 'more than trivial' (*Pnaiser-v-NHS England* [2016] IRLR 170 and *Bodis-v-Lindfield Christian Care Home Ltd* [2024] EAT 65), but the statutory wording ('in consequence') imported a looser test than 'caused by' (*Sheikholeslami-v-University of Edinburgh* UKEATS/0014/17 and *Scott-v-Kenton Schools Academy Trust* UKEAT/0031/19/DA).

6.11 In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

6.12 No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (*Williams-v-Trustees of Swansea University Pension and Assurance Scheme* [2019] ICR 230, SC).

6.13 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

6.14 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic, although unexplained, unreasonable conduct could be sufficient to shift the burden in some cases (as in *Law Society-v-Bahl* [2003] IRLR 640]).

6.15 Under s. 15, a Respondent could not claim ignorance in respect of the causal link between the 'something arising' and the disability and benefit from the defence (*City of York Council-v-Grosset* [2018] EWCA Civ 1105). The defence related to the Claimant's possession of the disability, not other elements of the test.

<u>Indirect age discrimination</u>

6.16 In relation to the claim of indirect discrimination, we considered and applied the test in s. 19 of the Act;

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

6.17 We approached the case by applying the test recommended to us in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, as set out above. The burden to show application of the PCP, the disadvantage caused by it to the group, and like disadvantage to the Claimant all rested upon her. It was only if she satisfied those three burdens that it was for the Respondent to have justified the PCP (*Dziedziak-v-Future Electronics* UKEAT/0270/11 at [42]).

6.18 We first considered whether there was a PCP, then the questions of disadvantage under s. 19 (2)(b) and (c). That required us to ask two questions; first, whether people with the Claimant's characteristics were exposed to a particular disadvantage as a result of the PCP and, secondly, whether the Claimant herself had been exposed to that disadvantage.

6.19 It was permissible for us to have taken judicial notice of matters which may have led to a conclusion in relation to the group disadvantage. In *Dobson-v-North Cumbria Integrated Care NHS Foundation Trust* [2021] IRLR 729, the EAT provided a non-exhaustive list of four ways in which particular disadvantage could have been established (at [56]):

(i) "There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine;

(ii) Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;

(iii) The disadvantage may be inherent in the PCP in question; and/or

(iv) The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken".

6.20 As regards (ii), the EAT explained at [55] that, whether or not group disadvantage could have been discerned from evidence of individual disadvantage *'will depend not only on the quality and reliability of the evidence in question, but also on whether any meaningful conclusions about the group picture may be drawn from it'*.

6.21 The word 'disadvantage', as it was used in s. 19, set a relatively low threshold. We bore in mind, in particular, the Equality and Human Rights Commission's Code of Practice from 2011 (paragraph 4.9).

6.22 For an indirect discrimination claim to have been made out, there needed to have been a causal link between the PCP and the disadvantage suffered by the group and the individual bringing the claim: *Essop and Others-v-Home Office; Naeem-v-Secretary of State for Justice* [2017] IRLR 558, at [25]. The PCP need not put have put every member of the group sharing the protected characteristic at the disadvantage: *Essop* at [27].

Justification

6.23 If the Claimant had been able to demonstrate the essential elements of the test within s. 19 (1) and (2)(a)-(c) (or s. 15 (1)(a)), the Respondent had a defence if it could have shown that the treatment was "*a proportionate means of achieving a legitimate aim*". Any approach to justification under the sections required, therefore;

(i) The identification of an aim by the Respondent;

(ii) An analysis by the Tribunal as to whether it was 'legitimate';

(iii) The Respondent demonstrating that the PCP was a means of achieving it;

(iv) Consideration as to whether the Respondent's means were proportionate.

(see *Minis Childcare-v-Hilton-Webb* [2024] EAT 108).

6.24 Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of the Respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). The test was not as loose, however, as the range of reasonable responses test (*Scott-v-Kenton Academy Schools* UKEAT/0031/19/DA, paragraph 58).

6.25 It was important to remember that justification had to be considered against the PCP's impact upon the business generally, not just the individual employee (*City of Oxford Bus Services Ltd-v-Harvey* UKEAT/0171/18/JOJ) and that the section required a Tribunal to make its own '*critical evaluation*' of the evidence against the statutory test. The following key principles were set out by Lady Hale in *Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601 [22-24]:

(i) To have been proportionate, a measure had to have been both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so;

(ii) If the measure went further than was (reasonably) necessary to achieve the aim it will have been disproportionate;

(iii) An assessment of justification included a comparison of the impact of the act upon a claimant as against the importance of the aim to the employer.

6.26 The main principles of the objective justification test were usefully summarised by HHJ Eady QC (as she then was) in *City of Oxford Bus Services Ltd t/a Oxford Bus Company v Harvey* [2018] (UKEAT/0171/18) which we also considered (at paragraph [22]).

6.27 It had to be remembered that the tests under ss. 15 and 19 were not the same (*Stott-v-Ralli* [2022] IRLR 148). The issue of group disadvantage had to be considered when the defence was considered under s.19 but, following *Pipe-v-Coventry University* [2024] EWCA Civ 191, it was difficult to conceive of a difference when the disadvantageous PCP was the same as act of discrimination arising from disability.

<u>Limitation</u>

6.28 Under section 123 of the Equality Act 2010, a complaint of discrimination may not have been brought after the end of the period of three months starting with the date of the act to which the complaint related (s. 123 (1)(a)). For the purposes of interpreting the section, conduct extending over a period was to have been treated as done at the end of the period (s. 123

(3)(a)) and this provision covered the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

6.29 When dealing with a series of discriminatory acts, in *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)), although the issue was not necessarily conclusive (paragraph 50 (7) of *E-v-X, L and Z* UKEAT/0079/20). It was important to bear in mind that the conduct needed to have been discriminatory over the relevant period. Acts linked by having occurred against the same 'factual setting' would not necessarily have met the test (*Allen-v-Worcestershire Health and Care NHS Trust* [2024] EAT 40).

6.30 Should a claim have been brought outside the three month period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s. 123 (1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time and, if he/she advanced no case in support of an extension, he/she would not be entitled to one (*Rathakrishnan-v-Pizza Express* [2016] ICR 23 and *Moray Hamilton-v-Fife Council* UKEATS/0006/20/SS). The Tribunal's discretion was wide and there was no rule of law that extensions were only to have been made in exceptional case (*Robertson-v-Bexley College* [2003] EWCA Civ 576, *Caston-v-Chief Constable of Lincolnshire Police* [2009] EWCA Civ 1298 and *Jones-v-Secretary of State for Health and Social Care* [2024] EAT 2).

6.31 Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated, albeit that the absence of one would not necessarily be determinative. A tribunal was not bound to refuse an extension in the absence of an explanation having been provided for the delay, but such an absence was undoubtedly a relevant consideration (*ABMU-v-Morgan* [2018] IRLR 1050 (CA), *Concentrix CVG Ltd-v-Obi* [2022] EAT 149 and *Owen-v-Network Rail* [2023] EAT 106). Nevertheless, there must be *some* material upon which a tribunal can exercise its discretion in favour of the Claimant (*Habinteg Housing Association-v-Holleron* EAT 0274/14 and *Edomobi-v-La Retraite RC Girls School* EAT 0180/16, per Laing J);

> *"In neither case, in my judgment, is there material on which the ET can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a Claimant from the consequences of any delay."*

6.32 Tribunals had been encouraged to consider the factors listed within s. 33 of the Limitation Act 1980 (the *Keeble* factors), although it was not necessary to use the section as a framework for the approach (*Adedeji-v-University Hospital Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 and *Oluwafunto Dada-v-The Scottish Ministers* [2026] EAT 13);

> "*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors which it*

considers relevant to the question of whether it is just and equitable to extend time, including, in particular, the length of, and the reasons for, the delay in presenting the claim".

7. Discussion and conclusions

Constructive unfair dismissal

7.1 As stated above, the nine alleged breaches of the implied term of mutual trust and confidence shrank dramatically during the course of the hearing; the matters relied upon in paragraphs 2.1.1 to 2.1.5 were not ultimately relied upon as breaches [52-3]. The Claimant also accepted that the allegations within paragraphs 2.1.7 and 2.1.9 occurred after she had resigned and could not therefore have caused that resignation. That left paragraphs 2.1.6 and 2.1.9.

7.2 In relation to paragraph 2.1.6, we refer to paragraph 5.56 above; we were not capable of making any factual finding to support that complaint.

7.3 The remaining allegation within paragraph 2.1.8 had always been the focus of the claim. Before dealing with it *as* an allegation, however, there was an issue of vicarious liability to address.

7.4 Many of those involved in the central issues in the claim had not actually been employed by the Respondent (for example, Mr Lumsden). Further, it appeared that the position for which the Claimant had applied, Payroll Manager, was not going to have been with the Respondent, but Cavendish Nuclear Ltd [367].

7.5 That did not matter according to Mr Pincott. He expressly took no point on the issue. The key decision maker, Ms Armour, was employed by the Respondent in any event.

7.6 As to the complaint itself, it was really in two parts; the advertisement itself and, secondly, the failure to shortlist were both breaches.

7.7 In relation to the first, the Tribunal considered that the Respondent had a reasonable and proper cause for the requirement. It was worth noting that it had not been framed as an *essential* criterion, as we were used to seeing in some advertisements [148]. Indeed, Ms Armour subsequently said that she would have been prepared to look at anybody with three years' experience, as long as it had been at the appropriate level [306].

7.8 But more fundamentally, given the problems that had been experienced on site, the size of the workforce, the complexity of the work, the unionisation on site and the growing size of the Payroll Team, we considered that the Respondent had a reasonable and proper cause for trying to seek a person with a reasonable amount of management experience who had been working in a payroll function at a senior level (see paragraph 5.26 above).,

7.9 As to the second aspect of the complaint, the decision not to have selected the Claimant for interview was clearly explained by Ms Armour and was supported by the surrounding documentation. Her involvement in the payroll problems discussed in paragraph 5.13 above and the views expressed Ms Armour, Mr Lumsden, Mr Jackson and others in late 2023 and early 2024 all supported that view ([110-1], [141], [145] and [174]). The evidence showed that the Respondent had hoped that the Claimant would have gained the necessary experience to have been eligible for such a post had it been created in late 2024 or early 2025, but it also showed that she had failed to grow into the Team Leader's role quickly from her appointment in April 2023 and was still a long way short of possessing the skills considered necessary for the Manager's role in early 2024.

7.10 Fundamentally, we were not determining whether *we* would have interviewed the Claimant or appointed her to the Manager's position. In our experience, internal candidates in this sort of situation were frequently interviewed as of right (see, also, Mr West's evidence to the grievance investigation; box 5 [311]). Given the evidence that we found, we did not consider that would have made any difference in the Claimant's case. But that was not the correct approach; we were simply assessing whether the Respondent had reasonable and proper cause for not having done so itself. The Claimant candidly accepted in cross-examination that Ms Armour did not consider that she was ready to act in that role by January 2024 and that her decision was based upon her view of her performance and experience.

7.11 Accordingly, there was no fundamental breach of the implied term of mutual trust and confidence in this case.

7.12 Finally, we noted that the Claimant had relied upon six 'Acts' of fundamental breach in her Skeleton Argument, C1, at paragraphs 41-8, which were different from those in the List of Issues. Given the nature and status of the List, the Claimant was not, of course, free to redraw it in her submissions and our findings were not determined by the new headings in C1. Some of those arguments might have been compelling. 'Act1', for example, covered the strain that was placed upon her through overwork and under resourcing (paragraph 41). But a determination of that argument would have required a a very different analysis of different evidence, and one which the Respondent had obviously not arraigned its case for.

7.13 If matters had proceeded beyond the question of breach, for the sake of completion, we did not accept that the Claimant had obtained a role with EDF before she had resigned, a matter that she specifically denied in her evidence and addressed in her further closing submissions, C1.1, paragraph 6.

7.14 Further, as to the issue of waiver and/or affirmation, the fact that the Claimant worked her notice and issued and pursued a grievance were not detrimental to her. Having been told that she was required to work her notice, the fact that she did not leave immediately did not stand against given her fear as to the possibility of having been deemed a 'bad leaver'. In respect of the grievance, see *Sandra Brooks*, above.

<u>Discrimination arising from disability</u>

7.15 There had been some query as to what the Claimant had relied upon as having 'arisen from' her disability. Paragraph 4.2 of the List of Issues framed the question in very broad terms [54], but the Claimant's Skeleton Argument, C1, was more specific in that she relied upon her "*breakdown on 24 January 2024*" (paragraph 10). We approached it on that basis.

7.16 The two acts of discrimination relied upon were contained within paragraphs 4.1.1 and 4.1.2 of the Case Summary. We addressed them in turn;

7.16.1 Deliberately excluding her from the appointment process for the Payroll Manger role due to her ill-health.

As was clear from the findings made within paragraphs 5.37 to 5.40, we did not consider that the proximity between the creation of the criteria for the post of Payroll Manager and the Claimant's illness absence indicated that it had been drawn to deliberately exclude her from the position for reasons associated with her absence in January 2024. The need for a manager with extensive experience was part of a conversation which had been ongoing for some time and, on 24 January, all that the Respondent knew was that the Claimant had been off work for a day. Her initial fit note, which was only for a week, had not even then been received.

Further and more fundamentally, the decision to 'exclude her from the appointment process' by not interviewing her did not arise from that absence. It arose from the Respondent's views that she lacked the necessary experience to have met the additional requirements of that role, having taken quite a while to meet the requirements of the Team Leaders role that she was appointed into in April 2023 (see [110-1]);

7.16.2 Requiring her to work in the site office during her notice period rather than on site in her usual place of work, thereby depriving her of her support network, which she needed due to her anxiety;

The request for her to work at the SDC in Bridgwater during her notice did not arise from her disability and/or from an effect of it. Rather, she was directed to work there because the matters set out in paragraph 5.49 above and, most importantly, her initial request *not* to have worked back at the 'site', which the Respondent had understood to have meant Hinkley Point C (paragraph 5.48 and [314]).

7.17 Although academic in light of the findings above, the Tribunal could not find any evidence to support any defence of lack of knowledge under s. 15 (2). It was not a point advanced in Mr Pincott's Closing Submissions either, R5 and/or R5.1.

7.18 As to the issue of justification, see, further, below.

<u>Indirect age discrimination</u>

7.19 The Respondent had accepted that there was a provision, criterion and/or practice (a 'PCP') that was applied to the position of Payroll Manager, in the form of the 5 year experience criterion which was therefore applied to the Claimant when she had applied (see paragraph 4.2.1 of the List of Issues R4 and the Closing Submissions at paragraph 71, R5). Even though the criterion was not 'essential' [148] (as demonstrated by Ms Armour's apparent willingness to have interviewed the right person with three years' experience [306]), even an expectation of a certain level of experience could have qualified as a PCP (see *Carreras-v-United First Partners Research* UKEAT/0266/15/RN).

7.20 As to the issue of group disadvantage, this was denied by the Respondent. In paragraph 80 of his Closing Submissions, R5, Mr Pincott argued that the "*Claimant* [had] *not provided any evidence in support of her case that individuals within her age bracket (seemingly pleaded only as aged 29)* [had been] *put at a particular disadvantage in comparison to those not in her age bracket*".

7.21 The relative comparative groups had not been identified in the Case Summary within paragraph 5 [54-5], but the Claimant had asserted that the group that she was in was defined as "*persons under 35*" (paragraph 23 of her Skeleton Argument, C1). Could it have been said that persons under 35 suffered a particular disadvantage as a result of the imposition of that criterion?

7.22 Referring back to the decision in *Dobson* above, no statistical information had been produced in respect of the asserted group disadvantage and the point was not necessarily demonstrated by the Claimant's own experience (*Dobson* (i) and (ii)). That said, disadvantage did not need to have been statistically quantified and it was difficult to understand where the Claimant might have obtained data on the issue if we had taken such an empirical approach.

7.23 But the Claimant here pointed to Mr Wooding's evidence and the ratio of *Essop,* above; she did not have to explain *why* the PCP disadvantaged the group, only that it did (paragraph 23, C1). Mr Wooding recognised that the criterion would have made it more difficult for younger people to have applied (paragraph 20 of his statement) and we had little difficulty in accepting, therefore, that the older the sample group, the higher the likelihood there was that there would have been more people within it who would have been able to fulfil the criterion and *vice versa* (*Dobson* (iii)). The Tribunal's Members, in particular, strongly supported that view through their own experiences.

7.24 The personal disadvantage was more difficult. The Claimant had accepted that she had not met the criterion *not* because of her age but, rather, because of the route that she had taken to the position that she had gained by March 2024. She accepted that she could have achieved 5 years' experience in a payroll manager's position had she followed a different career and/or training route. Had she, for example, gone down the apprenticeship route at age 16, started as an entry level payroll clerk and/or if she had not gone to university to study criminology (see paragraph 5.29 above and [62] and [166]).

7.25 A claimant cannot simply 'coat tail' upon a demonstrated group disadvantage without showing that the particular disadvantage that they suffered had also been caused by the protected characteristic. That was the Claimant's problem here.

7.26 Nevertheless, what of the defence of justification? The legitimate aim relied upon the Response was (paragraph 47 [39]);

"*The Respondent's need to appoint the best available candidates based on competence and skills. This aim was applied proportionately in that the window of relevant experience, 5 years, is a sufficiently short period to assess whether a candidate had in that period gained the necessary knowledge and skills to work in a key managerial role in a heavily managed environment.*"

7.27 It was expressed slightly differently in the List of Issues in the Case Summary (paragraph 5.7.1 [55]);

"*To ensure the appointee had sufficient experience due to the seniority of the role, the need to lead and develop a team, and to deal with industrial relations and trade unions and satisfy other performance criteria.*"

7.28 We did not consider that there was a significant difference and the Claimant certainly ought to have understood the basis upon which the Respondent was running its case. She did not suggest otherwise.

7.29 The Respondent repeated that latter iteration of its defence within its Closing Submissions (paragraph 51.1, R5), but it also suggested that there was a further legitimate aim which was implicit; to ensure working conditions were as harmonious as possible (paragraph 52.1). Not only did we reject the notion that that second limb was 'implicit in the evidence presented to the Tribunal', but we also considered that it represented at unpleaded and unsupported amendment which ought not to have been determined.

7.30 Nevertheless, on the case which had been advanced, we concluded that the Respondent's stated aims had been legitimate. The seniority of the role, the size of the team, the staff that the payroll function served and the industrial relations and trade union issues which had been, and were likely to have been, experienced going forward all legitimised the Respondent's desire to have appointed somebody with significant experience (see paragraphs 5.26 and 7.8 above).

7.31 Was the criterion that was chosen 'reasonably necessary and appropriate'? The Respondent might have left the requirement of a number of years' experience out of the description of the role entirely. It might have simply specified that it wanted someone with experience in a broad sense. But just because a different, less discriminatory measure might have been adopted did not mean that this one was incapable of having been justified (see *City of Oxford Bus Services*, above, at paragraph [22] (iv)).

7.32 In our judgment, it was reasonably necessary and appropriate for the requirement to have been included in the *way* that it was included; a non-essential requirement which was applied in a loose fashion (see [306]). As an expectation or aspiration, given the issues which the MEH faced on site and the problems which it had experienced, we were satisfied that it was a legitimate aim for the criterion to have been applied, in other words, for a candidate to have been sought who had experience of dealing with complex payroll issues in the unionised workforce over a number of years. We accepted Ms Armour's evidence on that issue.

7.33 Further and in any event and for the reasons stated above, even if the advert had simply read 'significant experience', whilst the Claimant may have been interviewed, we saw no prospect of her having been appointed in light of the views held by Ms Armour at that time; the Claimant then lacked general management and industrial relations experience and had demonstrated naivety in some of her dealings as Team Leader.

7.34 We could not help but feel that the Claimant's real case was under s. 15 (which we considered above) and/or s. 13 on the grounds of age. She specifically stated in her evidence that she considered that "*the criterion was used to prevent* [her] *from being shortlisted for interview*" (paragraph 32 of her witness statement). In other words, that the criterion had been constructed to deliberately disadvantage *her* on the grounds of her age.

7.35 For the avoidance of doubt, we rejected that allegation; we considered that the Respondent had wanted her to have succeeded and developed quickly in the role of Team Leader and then been the prime candidate for promotion to the role of Team Manager. A combination of her failure to develop in that role quickly and a sooner than expected demand for the role prevented her from having been as desirable as had been hoped.

<u>Limitation</u>

7.36 Any act or omission which took place before 5 September 2024 (which allowed for any extension under the Early Conciliation provisions) was potentially out of time. In this case, that meant that the key event of the recruitment to the Payroll Manager's position was out of time (see paragraph 1.1 of the Respondent's List of Issues, R4, with the amended dates in, which we accepted were correct).

7.37 The Claimant nevertheless ran two arguments; that there was an allegation that was part of a course of conduct under s.123 which in time and which anchored and saved the earlier one(s) (paragraph 3.1.2 relating to the requirement for her to have worked off site during her notice period). Secondly and in any event, she argued that it was just and equitable to have extended time.

7.38 Like so many cases of this sort, the issue of limitation appeared to have been overlooked in the evidence. Given the findings that we made on other issues in the case, it was not necessary for us to reach a concluded view on the matter limitation but, had we been required to do so, we considered it likely that we would have exercised our discretion in the Claimant's favour. The Respondent was able to address the issues. The relevant documentation was available as were the relevant witnesses. We were aware that she had been considering litigation in June [216], but she was still then exhausting the grievance process. The prejudice experienced by her in shutting out her claims would have been greater than that suffered by the Respondent in dealing with them and, whilst that was not the only test, it was important.

Employment Judge Livesey

Date 24 April 2026

JUDGMENT AND REASONS SENT TO THE PARTIES ON

01 May 2026

Phoebe Hancock

FOR THE TRIBUNAL OFFICE

Notes

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