



EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Olatunde Morohunmubo

Respondent: Ocado Central Services Ltd

Heard at: London South **On:** 13-17 July 2026

Before: Employment Judge Atkins (sitting alone)

Representation

Claimant: Mr P Ntui, Consultant

Respondent: Mr C Ilangaratne, Counsel

JUDGMENT with reasons was given at the hearing on 17 July 2026. Full reasons were requested in accordance with Rule 60(4)(b) of the Employment Tribunal Procedure Rules. The following written full reasons are therefore provided:

FULL REASONS

Claims and Issues

1. The Claimant claims that:
 - (a) He was not paid notice pay, in breach of his contract. In the alternative, this was an unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 ('the 1996 Act').
 - (b) He was not paid holiday pay, in breach of his contract. In the alternative, this was an unauthorised deduction from wages contrary to section 13 of the 1996 Act.
 - (c) He was unfairly dismissed contrary to section 94 of the 1996 Act.
 - (d) He was directly discriminated against on the grounds of disability, contrary to section 13 of the Equality Act 2010 ('the 2010 Act')
 - (e) He was the victim of discrimination arising from disability, contrary to section 15 of the 2010 Act.
 - (f) He was indirectly discriminated against on the grounds of disability, contrary to section 19 of the 2010 Act.
 - (g) His employer failed to make reasonable adjustments in respect of his disability, contrary to section 21 of the 2010 Act.
 - (h) He was harassed, contrary to section 26 of the 2010 Act.
 - (i) He was victimised, contrary to section 27 of the 2010 Act.

2. The Respondent says that some events which took place before 26 February 2024 are out of time, in respect of claims made under the 2010 Act. This is dealt with in more detail below.
3. At the hearing the complaint of unfair dismissal was upheld and (as recorded in the judgment of 18 July 2026) the Claimant was awarded:
 - (a) A basic award of **£2,047.20**.
 - (b) A compensatory award of **£2,076.98**.
4. The other claims were dismissed.
5. The hearing bundle contained a list of issues. The parties confirmed that at the start of the hearing that this list had been agreed. I accordingly proceeded on the basis that those were the issues that I needed to decide. They are¹:

“1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, some of the complaints 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. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.2.1 There were reasonable grounds for that belief;

2.2.2 At the time the belief was formed, the respondent had carried out a reasonable investigation;

2.2.3 The respondent otherwise acted in a procedurally fair manner; and

2.2.4 Dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

¹ I have corrected some errors of numbering and punctuation

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? Should there be any deduction for any contributory conduct? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?

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

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

3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

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

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

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

3.6.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.6.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion? What basic award is payable to the claimant, if any? Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Disability

4.1 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:

4.1.1 Did he have a physical or mental impairment:

(1) Cancer,

(2) stress and depression.

4.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication(s), or take other measures to treat or correct the impairment?

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

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 Did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5 If not, were they likely to recur?

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 Disregard the claimant's sick note dated 01 March 2024 and insist that he attend a disciplinary hearing on 27th March 2024 and on 8 April 2024?

5.1.2 Fail to pay the claimant notice pay and accrued holiday dues his full salary after dismissal?

5.1.3 Decide to carry out an investigation into the claimant's conduct with the full knowledge that the Claimant was absent because of sickness?

5.1.4 Decide to investigate specific matters over which the claimant had no control, such as his sickness?

5.1.5 Dismiss the claimant on 08 April 2024?

5.2 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 he was treated worse than someone else would have been treated. The claimant says he was treated worse than other drivers employed by the Respondent.

5.3 If so, was it because of disability?

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

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

6.1 Did the respondent treat the claimant unfavourably by:

6.1.1 Failing to provide proper support to the claimant by not allowing the son to correspond with the Respondent on his behalf?

6.1.2 Failing to postpone and reschedule the disciplinary hearing?

6.1.3 Failing to pay the claimant notice pay and accrued holiday dues at dismissal?

6.1.4 Failing to take into account the Claimant's sick notes?

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

6.2.1 The claimant's inability to perform his duties normally?

6.3 Was the unfavourable treatment because of any of those things?

6.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent contends that such treatment was a proportionate means of achieving a legitimate aim – satisfactory attendance from its employees in order to meet customer demands, and it operated the long-term sickness procedure in an attempt to achieve this. The Tribunal will decide in particular:

6.4.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims?

6.4.2 Could something less discriminatory have been done instead?

6.4.3 How should the needs of the claimant and the respondent be balanced?

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

7. Indirect discrimination (Equality Act 2010 section 19)

7.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: requiring employees to update the company weekly in relation to the progress of their sickness.

- 7.2 Did the respondent apply the PCP to the claimant?
- 7.3 Did the respondent apply the PCP to persons with whom the claimant does not share the claimant's disability?
- 7.4 Did the PCP put persons with whom the claimant shares the disability at a particular disadvantage when compared with persons who do not in that they were required to work harder but were less able to do so?
- 7.5 Did the PCP put the claimant at that disadvantage?
- 7.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent contends it requires satisfactory attendance from its employees in order to meet customer demands.
- 7.7 The Tribunal will decide in particular:
- 7.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims?
 - 7.7.2 Could something less discriminatory have been done instead?
 - 7.7.3 How should the needs of the claimant and the respondent be balanced?

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

- 8.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?
- 8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:
- 8.2.1 Updating the company/line manager weekly about your sickness?
- 8.3. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was less able weekly update his line manager?
- 8.4 Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at a disadvantage?
- 8.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:
- 8.5.1 Allow the claimant to comply with his GP's instructions to keep away from all work-related issues for some time.
 - 8.5.2 Hire more staff if shortage of staff was the issue until the Claimant fully recovers.
 - 8.5.3 Investigate further to understand why the Claimant was unable to update the line Manager or attend long-term sickness meetings.
- 8.6 Was it reasonable for the respondent to have to take those steps, and when?
- 8.7 Did the respondent fail to take those steps?

9. Remedy for discrimination

- 9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 9.2 What financial losses has the discrimination caused the claimant?
- 9.3 Has the claimant taken reasonable steps to replace lost earnings, for example, by looking for another job?
- 9.4 If not, for what period of loss should the claimant be compensated?
- 9.5 What injury to feelings has the discrimination caused the claimant, and how much compensation should be awarded for that?
- 9.6 Has the discrimination caused the claimant personal injury, and how much compensation should be awarded for that?

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

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

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

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

9.11 *By what proportion, up to 25%?*

9.12 *Should interest be awarded? How much?*

10. Harassment (Equality Act 2010 section 26)

10.1 *Did the Respondent harass the Claimant by doing the following things:*

10.1.1 *Insist repeatedly that the Claimant come for a long-term absence meeting?*

10.1.2 *[Insist on 6 December 2022²] that the Claimant must not request for any more absence for sickness reasons within a time frame?*

10.3 *Was the harassment because of the Claimant's protected characteristic?*

10.4 *If so, did this amount to unwanted conduct?*

10.5 *If so, was the unwanted conduct related to the Claimant's protected characteristic (disability)?*

10.6 *If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, degrading, humiliating or offensive environment for the Claimant?*

10.7 *If so, was it reasonable for such conduct to have that effect on the Claimant, taking into account his perception and all the circumstances of the case?*

10.8 *The Claimant believes his disability was the palpable reason since no other colleague in a similar condition would have suffered such humiliating, intimidating, degrading and/or offensive conduct on the part of the Respondent.*

11. Victimisation (Equality Act 2010 section 27)

11.1 *Did the Claimant do a protected act? The Claimant relies on the following as being protected acts:*

11.1.1 *On or about April 2023 the Claimant raised a verbal complaint to the Transport Manager Daniel Newman that he cannot with his present health do a double shift and that he needs more time to rest and be able to attend his appointments.*

11.2 *If so, did the Respondent subject the Claimant to a detriment? The acts relied on by the Claimant are:*

11.2.1 *Termination of his employment on 08 April 2024.*

11.2.2 *Giving him unnecessary workload when undergoing his cancer (chemotherapy) treatment.*

11.2.3 *Refused to pay C's notice pay and holiday dues.*

11.3 *If so, was the detrimental treatment because of the alleged protected act(s)?*

12. Breach of Contract

12.1 *Was there a valid contract between the Claimant and Ocado Central*

² This date was provided by the Claimant at the start of the hearing

Services Ltd?

12.2 Did the respondent make unauthorised deductions from the claimant's wages by not paying C's full notice pay at dismissal, and holiday dues?

12.3 If so, how much was deducted?

13. Unlawful deduction of wages (in the alternative)

13.1 Did the Respondent make unauthorised deductions from the Claimant's wages contrary to section 13 of the ERA 1996 by not paying the C's full notice pay at dismissal and holiday dues?

14. Remedy for breach of Contract:

14.1. Compensation for financial loss."

Procedure, documents, and evidence heard

6. I have seen a witness statement bundle and a hearing bundle paginated to 477 pages.
7. The bundles were accompanied by a list of key documents, a chronology, and a cast list prepared by the Respondent.
8. I have heard oral evidence from the Claimant.
9. The following witnesses gave oral evidence on behalf of the Respondent:
 - (a) Mr Robert Sidlow, one of the Claimant's managers, who issued the final written warning.
 - (b) Mr William Hanley, a manager, who made the decision to dismiss.
 - (c) Mr Charles Bullock, a manager, who chaired the appeal hearing.
 - (d) Mr Danel Newman, a manager, who is said to have received a complaint by the Claimant.
 - (e) Mr Roy Morris, from the Respondent's payroll team.
10. In making this decision, I have taken account of all of the evidence before me, even if I have not mentioned any specific part of it.

Fact findings

The background to the claim

11. It is common ground that:
 - (a) The Claimant was employed by the Respondent as a LGV Class 1 driver.
 - (b) His employment began on 24 May 2021.
 - (c) He was based at the Respondent's Erith depot.
 - (d) He was dismissed from his employment by the Respondent on 8 April 2026.

The Erith depot

12. It may be helpful to briefly describe the work carried out by drivers at the Erith depot.

13. A trip to and from any given location is a 'run'. A 'single run' is a whole trip to and from that location. A 'double run' is two trips to and from that location. A (Waitrose) store to which supplies are delivered is known as a 'spoke'.
14. A run delivering sale goods to a spoke is done under some time pressure, as it will be delivering goods to be sold in the spoke that need to be there 'just in time' before the spoke runs out of goods. There are limited opportunities on a spoke run for stops and breaks.
15. Drivers are employed to undertake 40 hours of work over a block of either 4 or 5 days. These working patterns are known as '40 over 4' and '40 over 5' respectively.
16. Drivers work a day or a night shift. The '7-11 shift' is a day shift starting between the hours of 7am and 11am.
17. Drivers also have to abide by the relevant laws concerning hours of driving and requirements to take breaks.
18. Drivers will be assigned a run on or shortly before their shift. Once they have completed their assigned run they will return to depot. If they have not yet worked their contracted hours they are given the choice of going on another run (and potentially earning overtime if that run then takes longer than their contracted hours) or going home. There is no financial penalty for a driver who goes home early – their hours are 'topped up' by the Respondent to their contractual hours. The system is designed to incentivise drivers to take on extra work – which benefits both the driver, as they earn overtime, and the Respondent, as it does not have to top up their hours.
19. The 'Bracknell Nippon run' was a single run. It involved taking a load of pallets to the spoke in Bracknell. The driver would wait while pallets would be unloaded by the team at the spoke and empty containers would be replaced in the vehicle. The driver had an opportunity to take a break at that point. The driver would then take the empty vehicle to a second depot near Heathrow. The driver would unload empty containers from the vehicle and load the vehicle with dry ice pellets. Once those pellets were loaded and secured by the driver, the driver would take a break (if necessary) and drive the vehicle back to the Erith depot. The dry ice pellets would be used where necessary to keep sale goods cool during other runs. Because this run was not a run delivering sales goods, it was not under any time pressure, meaning there were more opportunities for stops and breaks.
20. There was some dispute over how long this run took. The Claimant said that this run would take up to 12 hours on a normal day, and could take up to 15 hours if there was heavy traffic. Mr Sidlow and Mr Newman said that it should take around 8 hours on a normal day, and could take up to 10 hours if there was heavy traffic. In the end, I do not think that anything turns on this.

The Claimant's employment and alleged discriminatory acts

21. Prior to his employment, the Claimant had previously been treated for prostate cancer between 2011 and 2013. That treatment was successful and the cancer went into remission.
22. The Claimant's employment began in 2021. The Claimant worked a 40 over 4 pattern and was originally assigned to the night shift. The Claimant was originally managed by Michael Long.
23. At some point Mr Long stopped working at the Erith depot. The Claimant's management was taken over by Mr Sidlow and Mr Bullock. The Claimant says that there was an immediate change of atmosphere and he was singled out for prejudicial treatment at this time. However, this does not form part of the list of issues, and so I do not consider it further.
24. The Claimant's cancer returned in 2022. He began to need to attend medical appointments and treatment. During this time he was away from work long enough to fall under the Respondent's absence management policy. He was invited to a meeting to discuss his attendance in December 2022. As a result the Respondent wrote to him on 6 December 2022 to confirm that he was being placed on Stage 1 of the Attendance Management Procedure. The letter says that *"If you are absent on a further two occasions or ten or more consecutive rostered shifts in the next 12 months, you will progress to Stage Two of the Attendance Management Procedure"*.
25. The Claimant says that he was threatened that if he took further sickness absence he would be dismissed. This letter is the only evidence he points to of that threat. It clearly does not say that. It simply says that he will progress to stage two. It does not say that he cannot take sick leave or that he will be dismissed. In any event, I note from the policy that dismissal is not considered as an option until stage three of the procedure. Options at stage two include progressing to stage three, putting an attendance management plan into action or taking no further action.
26. After his absence in 2022 the Claimant then returned to work.
27. The Claimant says that in April 2023 he made a complaint to Mr Newman about the way in which he was treated by Mr Bullock. He said that Mr Bullock was singling him out, pressuring him, and treating him differently because of his disability.
28. The Claimant says that he also said to Mr Newman that he could not do double shifts and needed time to attend medical appointments and rest.
29. Mr Newman said that he had no recollection of any complaint against Mr Bullock. He accepted that a lack of recollection is not the same as something not happened. He said that if he received a complaint about a senior manager, he would contact HR for advice, and record it in an email.
30. Mr Bullock was clear that he was unaware of any complaint being made, either at the time or until late stage in the Tribunal proceedings (when he saw the bundle).

31. I find that no complaint about Mr Bullock was made, on the basis that:
- (a) The only evidence that it has been made is the Claimants account. He could not give details of exactly what was said. Neither could he identify a date or a rough date of when it was said. The best he could do was speculate that it must have been before 10 April 2023, before he went on leave. This is not necessarily fatal to the claim. However:
 - (b) If it had been made, then I see no reason why Mr Newman would not have spoken to HR and created a record of it. There is no record. This strongly indicates that no complaint was made.
 - (c) If it had been made, then it is highly likely that either Mr Newman or Mr Bullock would have remembered it. It was a serious allegation against the most senior manager in the Erith depot. Neither of them remember of it. The Claimant did not put to either witness that they were not telling the truth. This strongly indicates that no complaint was made.
32. The Claimant was on holiday between 10 and 30 April 2023. The Claimant returned for one shift on 3 May 2023 and then went on sick leave. This was originally attributed to back injury but that was updated to refer to the Claimant's cancer.
33. On 4 July 2023 a phase one long term sickness meeting was held with the Claimant. The Claimant asked to stay on a 40 over 4 pattern but change to the day shift and specifically to the 7-11 shift. He asked to be allocated to single runs. He also said that he needed to take more toilet breaks as a result of his ongoing treatment.
34. Email correspondence in the bundle shows that the Respondent's managers made some considerable effort to grant this request. They received push back from the planning team who were worried about the amount of hours they would need to top up, and suggested that the Claimant move to a 40 over 5 pattern. Mr Bullock made the case for the Claimant to be given what he had asked for. He successfully negotiated that arrangement on a temporary basis. The arrangement was later made permanent.
35. On 17 July 2023 the Claimant returned to work. He worked for two shifts and then took absence to have an operation for cataracts. He later took a short holiday in August 2023.
36. Upon return from his holiday the Claimant was assigned to the Bracknell Nippon run, on the basis that this would facilitate any toilet break that he needed to take.
37. At some point after his return, in or around October 2023, the Claimant complained about the Bracknell Nippon run, on the grounds that he could not cope with the loading and unloading. Mr Bullock explained that they had not given the Claimant spoke runs because the Claimant would not be able to stop for the toilet as easily. The Claimant told Mr Bullock that he could manage on a spoke run. The Claimant was then moved onto spoke runs.
38. The Claimant went off sick on 27 February 2024. He provided a fit note on 1 March 2024. The fit note covers the period 1 March 2024 to 5 May 2024. The reason given on the fit note was "*stressed and depression*".

39. The Claimant says that his GP told him to avoid all work-related matters to manage his stress. This is not recorded on the fit note. There is no medical record anywhere which says as much.
40. As the Claimant had been signed off for a period of more than 4 weeks his absence became eligible once more to be dealt with under the Respondent's absence management policy.
41. On 5 March 2024 the Respondent wrote to the Claimant and asked him to:
- (a) attend a phase 1 long term sickness meeting, with a proposed date of 13 March 2024, and
 - (b) keep in regular contact with his line manager.
42. The Respondent's absence management policy makes clear that '*regular contact*' means weekly updates. Mr Sidlow felt there might be some flexibility about the contact intervals, especially in the case of long term illness where there is not much to report from week to week but ad hoc changes could prompt a call. But such flexibility would only apply where regular contact had been established and the manager was comfortable with a more flexible arrangement.
43. The Claimant clearly received the letter of 5 March 2024 because on 9 March 2024 he called the manager on duty, Natasha Rex. Ms Rex made a contemporaneous record of the call as follows:
- "Michael called me to say he is not in a good way mentally. He is still signed off from his doctors until May, I said he needs to send us an updated cert. He then went on to say that he could not attend his meeting this Wednesday as he is not mentally prepared for it and it is giving him anxiety. I looked on the calendar and appears there is nothing booked, but I have urged Michael to call us next week regardless for another update"*
44. The Claimant also claims that he told Ms Rex that he was unable to attend any meetings at all, and that any contact should be made via his son. Neither of those things appear on the record.
45. I find that the Claimant said neither of these things. This is because I see no reason why Ms Rex would not record them, or pass them on to other managers, if he had said them.
46. I am supported in this conclusion by an email dated 10 March 2024 from Anna Krowlikowska, another manager at the Erith depot, which simply says "*Michael called yesterday and told Tash he is unable to attend a meeting booked for Wednesday.*" Mr Rex had clearly told her fellow managers about the call but does not mention ongoing inability to attend meetings or any need to speak to the Claimant via his son.
47. The phase 1 long term sickness meeting was rescheduled to 14 March. An email was sent to the Claimant to inform him of the new date.
48. Mr Sidlow says that the Claimant did not attend the 14 March 2024 meeting. The Claimant had not contacted the Respondent and did not answer his

phone on the day. Mr Peto of the Respondent's HR team emailed the Claimant and rescheduled the phase 1 long term sickness meeting to 20 March 2024, again asking the Claimant to keep in touch with his line manager.

49. Mr Sidlow says that the Claimant did not attend the 20 March 2024 meeting, did not contact the Respondent, and did not answer his phone on the day.
50. On 22 March 2024 Claimant was invited to a disciplinary hearing on 27 March 2024 because he had not contacted the Respondent and had missed three meetings. The letter said *"This hearing is being held to discuss your failure to follow the long term absence management policy. You have been absent from work since 26th February 2024 due to Stress and depression. You have failed to adhere to the long term absence management policy by failing to attend scheduled meetings to discuss your absence."*
51. The disciplinary hearing took place on 27 March 2024 (a Wednesday). Mr Sidlow says that the Claimant did not attend the hearing, did not contact the Respondent, and did not answer his phone on the day. At the meeting Mr Sidlow read into the record a series of pre prepared questions. The record shows that the Claimant did not answer because he had failed to attend. Mr Sidlow decided at the meeting to issue a final written warning to the Claimant. The meeting lasted one hour.
52. The Claimant also did not attend a further rescheduled phase 1 long term sickness meeting on 29 March 2024.
53. The final written warning was sent to the Claimant on 3 April 2024 (a week after the disciplinary hearing itself, also a Wednesday). It gave him 7 days to appeal that decision (namely, until 10 April 2024, also a Wednesday).
54. Thereafter things moved very swiftly. I note Mr Bullock's evidence that, as the Respondent ran a 24/7 operation, he considered weekend days to be working days.
55. On 5 April 2024 (a Friday) several things happened.
56. First, a decision was made to take the disciplinary matter further. It is not known who made that decision, or why. Somebody on behalf of the Respondent made that decision and then made the decision to:
 - (a) invite the Claimant to a further disciplinary meeting on 8 April 2024 (the following Monday), and
 - (b) give conduct of that meeting to Mr Hanley.
57. Neither Mr Sidlow nor Mr Hanley was able to explain who made the decision to take further disciplinary action, or why.
58. Second, the Respondent invited the Claimant to the further disciplinary meeting of 8 April 2024. The letter was sent out in the name of Mr Hanley.
59. Third, Mr Peto tried to contact the Claimant but was not successful.

60. Fourth, Mr Peto contacted the Claimant's son (who was listed as an emergency contact) and asked him to ask the Claimant to get in touch. Mr Peto did not explain that the Claimant was facing disciplinary proceedings or that he had received a final written warning.
61. The Claimant did not reply to any attempt at communication.
62. Mr Hanley confirmed in oral evidence that:
- (a) He was not notified that any meeting would happen until the day before, 7 April 2024 (Sunday).
 - (b) He did not receive any information about the Claimant's case before the meeting (on Monday).
 - (c) At the start of the meeting he was told by the Respondent's HR team that he would be chairing the meeting, that the issue was lack of contact, that the Claimant had not contacted the Respondent since 9 March 2024, and that an attempt to reach the Claimant via his emergency contact was made on 5 April and had not been successful.
 - (d) During an adjournment he read some of the papers in the file.
 - (e) That new information was still reaching him during the meeting.
 - (f) That at no point during the meeting was he aware of the content of the Claimant's phone call of 9 March 2024 or that the Claimant was suffering from cancer.
63. The Claimant did not attend the meeting of 8 April 2024. He did not answer his phone or email. At the meeting Mr Hanley read into the record a series of pre prepared questions. The record shows that the Claimant did not answer because he had failed to attend. Mr Hanley made the decision to dismiss the Claimant at the meeting. In oral evidence he explained that a final written warning having been given, he felt that he had no option but to move to the next logical sanction, dismissal, rather than issue a second final written warning. The meeting, including adjournments, lasted just under two hours.
64. The decision to dismiss the Claimant was sent to him on 10 April 2024 (two days later, a Wednesday, and the same day as the deadline to appeal the final written warning).
65. Mr Sidlow says that, throughout this period, the Respondent was unable to refer the Claimant to Occupational Health due to the lack of contact from the Claimant.
66. The Claimant appealed the decision to dismiss him on 16 April 2024.
67. An appeal meeting took place on 10 May 2024. Mr Bullock chaired the appeal.
68. At the meeting the Claimant said in respect of his call with Ms Rex:
- "I then got a letter for a meeting
I called up and said I could not attend - asked you to call my GP
My son took my phone and closed it all down to help with my stress
My GP said I needed to bring down my stress levels
My son took my phone and I did not have access to anything"*

and

*"I said I could not discuss anything I told Natasha
My son said Dad let it happen and see what happens"*

69. Mr Bullock decided not to uphold the appeal on the same day. The notes of the meeting give Mr Bullock's reasons as:

"I have established after investigation you did not follow the Long Term Sick Process. As per the policy if you fail to comply with the procedure this may be dealt with under our Disciplinary procedure. I feel every effort was taken to contact you throughout the process and meetings were held in your absence as per the policy. Taking all the above into consideration, my decision is to uphold the original decision of dismissal for misconduct for failure to follow the Long Term Sickness Procedure."

70. The Claimant was notified that his appeal was rejected on 28 May 2024.

71. The Claimant was sent a final payslip dated 19 April 2024. The payslip shows that:

- (a) The Claimant was credited with £116.76 statutory sick pay.
- (b) The Claimant was credited with £1,419.20 notice pay.
- (c) The sum of £1,570.16 was deducted in respect of 'holidays due'.
- (d) The net sum was £0.

72. Mr Morris says that the deductions to the 19 April 2024 payslip were made to claw back money against a sum of £1,604.36 that the Claimant owed to the Respondent in respect of holidays he had taken but had not yet accrued entitlement to over the leave year. Mr Morris confirmed that the Respondent does not seek to recover remaining £34.20.

73. The Claimant concedes that he had taken the holiday recorded, and he does not dispute the Respondent's calculations of either how much leave he was entitled to take or how much he had taken in excess of that.

74. The Claimant's argument is that he was forced to use up that annual leave to attend medical appointments. Had he been given sick leave instead he would have retained his entitlement to:

- (a) full notice pay, and
- (b) an unspecified amount of holiday pay.

75. I accept Mr Morris' explanation. The Claimant does not dispute that the Respondent's calculations of his annual leave record and entitlement were correct, and if so then there must have been an overpayment which the Respondent was entitled to claw back.

76. I do not accept the Claimant's argument. While he may have chosen to take leave, he was not forced to do so on pain of dismissal. At worst he would have attended a stage two meeting, which may not in any event have resulted in any move to stage three.

77. I accordingly find that the money was deducted from the Claimant's 19 April 2024 payslip because the Claimant had taken holiday leave he had not yet accrued, and the resulting overpayment was clawed back from his final salary.

78. The Claimant went to ACAS on 25 May 2024. The ACAS certificate is dated 6 July 2024. The Claimant presented his claim to the ET on 6 August 2024. Subject to what is said about jurisdiction below, the parties are content, as am I, that this is within the relevant time limits in the 1996 Act and the 2010 Act.

The law

Standard of Proof

79. Throughout employment tribunal proceedings, the standard of proof is the balance of probabilities.

Unauthorised deductions from wages

80. Section 13 ERA 1996 prohibits unlawful deductions from wages unless authorised by statute, contract, or prior written consent. **Delaney v Staples** [1992] ICR 483 established the definition of "wages" and that wages must be "properly payable" to constitute an unlawful deduction.

81. **Garratt v Mirror Group Newspapers** [2011] EWCA Civ 425 established that even where money is owed, there must be clear contractual authorisation for any deductions.

Unfair Dismissal

82. Sections 94 and 98 of the Employment Rights Act 1996 establish the framework for ordinary unfair dismissal claims. Section 94 grants employees the right not to be unfairly dismissed, while section 98 sets out the test for fairness.

83. Section 98(1) and (2) require the employer to show the reason for dismissal and that it falls within one of the potentially fair reasons including conduct under section 98(2)(b). Section 98(4) then requires the Tribunal to determine whether the dismissal was fair or unfair in all the circumstances, having regard to whether the employer acted reasonably in treating the reason as sufficient for dismissal.

84. Section 108(1) establishes the qualifying period of two years' continuous employment for ordinary unfair dismissal claims, subject to exceptions including automatically unfair dismissal under section 103A.

85. **British Home Stores Ltd v Burchell** [1980] ICR 303 established the three-stage test for conduct dismissals:

- (1) genuine belief in misconduct,
- (2) reasonable grounds for that belief, and
- (3) adequate investigation.

The EAT emphasised that the question is not whether the employee actually committed misconduct, but whether the employer genuinely believed they did based on reasonable grounds following adequate investigation.

86. **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 established the "band of reasonable responses" test, requiring tribunals to determine whether dismissal was a response that a reasonable employer could have taken, without substituting their own decision for that of the employer.
87. **Laws v London Chronicle** [1959] 1 WLR 698 established that gross misconduct constituting fundamental breach of contract justifies summary dismissal without notice.

Disability

88. Disability is defined in section 6(1) of the 2010 Act, which reads:

*"A person (P) has a disability if—
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

89. Section 6(3) of the Act makes it clear that a reference to a person who has a disability is a reference to a person with a particular disability. In the Claimant's case this is a reference to his conditions set out above.
90. To decide whether or not the Claimant's conditions amount to a disability within the meaning of the Act, the Tribunal will need to apply the four stage test for assessing disability in **Goodwin v The Patent Office** [1999] IRLR 4, namely:
- (1) Does the Claimant have a mental and/or physical impairment?
 - (2) Did that impairment affect the Claimant's ability to carry out day to day activities?
 - (3) Was the adverse condition substantial?
 - (4) Was adverse condition long term?
91. I further note that:
- (a) When assessing the effect of the impairment upon day to day activities the Tribunal may need to deduce those effects from the evidence. In doing so it should disregard the effects of treatment or 'but for' measures such as counselling and therapy.
 - (b) 'Substantial' means more than minor or trivial, per section 212(1) of the 2010 Act.
 - (c) 'Long term' means that an impairment has lasted for more than 12 months, is likely to last for more than 12 months, or is likely to last for life, per paragraph 2(1) of Schedule 1 to the 2010 Act.
 - (d) An impairment which ceases to have a substantial adverse effect upon day to day life is treated as continuing to have such an effect for so long as the effect is likely to recur, per paragraph 2(2) of Schedule 1 to the 2010 Act.
 - (e) The relevant time to assess the disability is the time of the alleged discriminatory act: **Cruikshank v VAW Motorcast Ltd** [2002] ICR.

Time Limits under the 2010 Act

92. Section 123 of the 2010 Act reads:

“123 Time limits

(1) ... proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

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

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

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

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

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

93. Guidance for the test for a “continuing act” is set out in **Hendricks v Metropolitan Police Commissioner** [2002] EWCA Civ 1686. Recent case law regarding the exercise of discretion for the purposes of the just and equitable provisions includes **Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23.

94. Section 33(3) of the Limitation Act 1980 (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had co-operated with any requests for information;

(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

95. In **British Coal Corporation v Keeble** [1997] IRLR 336, it was held that the Tribunal’s power to extend time was similarly as broad under the ‘just and equitable’ formula. However, it is unnecessary for a tribunal to go through the above list in every case, “*provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion*”: **Southwark London Borough v Afolabi** [2003] IRLR 220.

96. The Court of Appeal in **Robertson and Bexley Community Centre (trading as Leisure Link)** [2003] IRLR 434 made it clear that there is no

presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.

97. In **Abertawe Bro Morgannwg University v Morgan** [2018] EWCA Civ 640 the Court of Appeal however stated that the "*such other period as the employment tribunal thinks just and equitable*" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "*factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent*". There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the Claimant's favour.

Burden of proof under the 2010 Act

98. Section 136 of the 2010 Act (so far as is relevant) reads as follows:

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

99. There is accordingly a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons: **Igen v Wong** [2005] EWCA Civ 142 as affirmed in **Ayodele v CityLink Ltd** [2018] ICR 748 and **Efobi v Royal Mail Group Ltd** [2021] ICR 1263.

100. In **Madarassy v Nomura International Plc** [2007] ICR 867, Mummery LJ stated: "*The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. 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 the balance of probabilities, the respondent had committed an act of discrimination*".

101. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status 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 the Respondent had committed an unlawful act of discrimination: **Madarassy**. “Could conclude” must mean that “a reasonable Tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

102. In **Igen** the Court of Appeal cautioned tribunals ‘against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground’ but made it clear that a finding of ‘unexplained unreasonable conduct’ is a primary fact from which an inference can properly be drawn to shift the burden.

Direct Discrimination

103. For a claim for direct discrimination, under section 13(1) of the 2010 Act 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.

104. Direct discrimination claims require a comparison between the treatment of the Claimant and the treatment of individuals who do not share the Claimant’s protected characteristic/s. In doing so there must be no material difference between the circumstances relating to each individual, per section 23 of the 2010 Act. The Tribunal therefore must compare ‘like with like’.

Discrimination arising out of disability

105. Section 15 of the 2010 Act states:

“Discrimination arising out of 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.”

106. The Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65, said “...section 15 appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?”.

107. **Williams** also said that unfavourable treatment did not require a hypothetical or actual comparator but measured against an “objective sense of that which is adverse and that which is beneficial”.

108. **Pnaiser v NHS England** [2016] IRLR 170 identifies the proper approach to be taken in cases involving consideration of discrimination arising out of disability. The court said at paragraph 31 that the position is:
- (1) Was there unfavourable treatment and by whom?
 - (2) What caused the impugned treatment, or what was the reason for it?
 - (3) Motive is irrelevant.
 - (4) Was the cause/reason 'something' arising in consequence of the claimant's disability?
 - (5) The more links in the chain of causation, the harder it will be to establish the necessary connection.
 - (6) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
 - (7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.
 - (8) It does not matter in which order these matters are considered by the tribunal.
109. **Pnaiser** emphasised the focus of the analysis to be on the state of mind of the alleged discriminator as to the underlying reason for the allegedly unfavourable treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but it must have at least a significant (or more than trivial) influence on the mind of the person alleged to have caused the unfavourable treatment.
110. In **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** UKEAT/0397/14 the EAT said that it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.
111. **Pnaiser** also clarified that:
- (a) there need only be actual or constructive knowledge as to the disabilities themselves, not to the causal link between the disability and its consequent effects which led to the unfavourable treatment.
 - (b) The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability... The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator."
112. It is for the tribunal to reach its own judgment when fairly assessing proportionality based upon a detailed analysis of the working practices and business considerations involved having regard to the business needs of the employer: **Monmouthshire County Council v Harris** UKEAT/001/15, **Hensman v Ministry of Defence** UKEAT/0067/14.

Indirect discrimination

113. Section 19 of the 2010 Act (so far as is relevant) reads:

“19 Indirect discrimination

(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.”

114. In relation to the protected characteristic of disability, a reference to persons who share a protected characteristic is a reference to persons with the same disability: section 6(3) of the 2010 Act

115. The justification defence allowed by section 19(2) places the burden on the employer but gives rise to an objective test, requiring the Tribunal to carry out its own assessment as to whether the means adopted were proportionate, weighing the real needs of the employer against any discriminatory effects of the requirement: **Hardy & Hansons plc v Lax** [2005] ICR 1565.

116. To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were “reasonably necessary” in order to achieve the legitimate aim/s: **Barry v Midland Bank Plc** [1999] IRLR 581.

Failure to make reasonable adjustments

117. Section 20 of the 2010 Act (so far as is relevant) reads:

“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."

118. Section 21(1) of the 2010 Act provides that "*A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*"

119. Paragraph 20(1) of Schedule 8 to the 201 Act provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid.

120. In view of this, the EAT in **Secretary of State for Work and Pensions v Alam** 2010 ICR 665 has said that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(a) First, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? If the answer to this question is 'no' the tribunal must then ask itself the second question.

(b) If not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? If the answer to this second question is 'no' the employer avoids the duty to make reasonable adjustments.

121. In respect of the first duty in section 20, it is necessary for a tribunal to identify the provision, criterion or practice ('PCP') applied by or on behalf of the employer, the identity of the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant: **Environment Agency v Rowan** [2008] ICR 218.

122. In considering the reasonableness of the proposed adjustment the question of whether the adjustment would work in practice is relevant. Having identified whether an adjustment is reasonable the burden of proof shifts to the respondent to show that an apparently reasonable adjustment that has a prospect of success was not a reasonable adjustment: **Leeds Teaching Hospital NHS Trust v Foster** UKEAT/0552/10.

Harassment

123. Section 26 of the 2010 Act says, so far as is relevant:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

124. In deciding whether the conduct had the effect set out in (1)(b), the Tribunal must apply a two stage test:

(a) A subjective test to determine the Claimant's perception of the effect.

(b) An objective test to determine whether it was reasonable in all the circumstances for the conduct to have that effect.

125. In respect of the second, objective test the EAT in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, considered in **Pemberton v Inwood** [2018] IRLR 542, said that a high threshold applied before section 26 was engaged:

“...not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

126. The Court of Appeal in **Grant v HM Land Registry** [2011] IRLR 748 also said that *“Tribunals must not cheapen the significance of the words 'intimidating, hostile, degrading, humiliating or offensive environment'. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”*

127. The Tribunal must also be content that the conduct of the alleged perpetrator was associated with the claimant's protected characteristic: **Unite v Naillard** [2017] ICR 121. Conduct may be unwanted and have the proscribed purpose or effect, but section 26 does not bite unless it is related to the protected characteristic, no matter how offensive or otherwise inappropriate the tribunal may consider it to be: **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495.

Victimisation

128. Section 27 of the 2010 Act reads, so far as is relevant:

“27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) *B does a protected act, or*
 - (b) *A believes that B has done, or may do, a protected act.*
- (2) *Each of the following is a protected act—*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this Act;*
 - (c) *doing any other thing for the purposes of or in connection with this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."*

129. While the truth of discrimination allegations is irrelevant to whether a protected act occurred, the complaint must have been genuinely made. A protected act requires that the claimant actually alleged a contravention of the 2010 Act.

130. **Nagarajan v London Regional Transport** [1999] UKHL 36 established the test for causation in victimisation claims, requiring that the protected act be a reason for the treatment complained of. The House of Lords held that the question is whether the protected act had a significant influence on the outcome, applying a "reason why" test rather than requiring the protected act to be the sole or main reason.

Conclusions

Disability

131. There are some preliminary issues relating to disability. The Claimant says that his disabilities are:

- (1) Cancer
- (2) Stress and depression

132. The Respondent accepts that cancer is a disability within the meaning of the 2010 Act, and the Respondent was aware of it at all relevant times.

133. The Respondent does not accept that stress and depression is a disability within the meaning of the 2010 Act. They say that this is because there is insufficient evidence that it had lasted, or would be likely to last, for over 12 months. They also say that they were not aware that the Claimant was suffering from stress and depression until he submitted a fit note on 1 March 2024.

134. I remind myself of the four stages of the **Goodwin** test and apply them as follows:

135. Did the Claimant have the claimed impairment? I am content that the Claimant did. There is a fit note recording that he suffered from stress and depression.

136. Did the impairment affect his ability to carry out day-to-day activities? Was the adverse condition substantial? I have dealt with these two tests together. I am content that they are met. The Claimant has provided a disability impact statement. The contents of the statement have not been challenged by the Respondent.
137. The Respondent has suggested that the effects in the statement might not all, or wholly, be caused by stress and depression. The Respondent has noted that the Claimant in his evidence was unable to link specific parts of his statement to stress or depression. I agree that it may be possible that some of the other conditions contributed to the impact on day-to-day activities. However it is also both possible and consistent that the stress and depression may also have been a contributing factor. In my judgment, there is enough evidence to link the impairment to sufficient impact on to day to day activities, and to conclude that it has a substantial effect.
138. Was the adverse condition substantial? I am content that it was. The Claimant has set out a series of effects in his disability impact statement which are more than minor or trivial, and they have not been challenged by the Respondent.
139. Was the adverse condition long term? I have considered this carefully. I have borne in mind that:
- (a) I need to look at whether the adverse condition was long term at the time of the discriminatory acts (which centre around and culminate in the dismissal in March and April 2024).
 - (b) I need to decide whether the adverse condition had either lasted 12 months by the time of the discriminatory act or was likely to last 12 months at that time.
140. The Claimant has pointed to a diagnosis of hypertension in August 2023 and restless leg syndrome in September 2023 as indications that his stress was present, albeit undiagnosed, at that time. This does not assist him, as even if I were to accept this evidence it would not establish that the adverse condition had lasted for 12 months at the time of the discriminatory acts.
141. The medical evidence shows that the diagnosis was made in January 2024, at which point the Claimant was prescribed antidepressants. He was prescribed them again in February, May, and July 2024.
142. The Respondent points to:
- (a) The fact that the Claimant was able to work between his diagnosis in January 2024 and going off sick on 27 February 2024. However, the fact that the Claimant was able to work does not mean he was not suffering from the adverse condition. It had been diagnosed and he was taking antidepressants.
 - (b) The fact that the fit note of 1 March 2024 says "*stressed and depression*" and only covers around two months. It is not indicated that the stress

and depression are severe or are likely to last for longer. This may be the case, but the other medical evidence shows that in fact it did.

- (c) The fact that the Claimant was able to engage in some work-related activity. He presented his fit note in person on 1 March 2024, called a manager on 9 March 2024, and attended the appeal hearing on 10 May 24. This is correct, but it does not change either the fact that during this period he had been diagnosed with the adverse condition and was taking medication for it.
- (d) The fact that the Claimant said during the appeal hearing that that he was feeling better, and in oral evidence that he had better days and worse days. This may be the case, but it not does not mean that the Claimant was not suffering from the adverse condition to a greater of lesser extent throughout this period.

143. The Claimant says that his stress and depression are continuing. This has not been challenged by the Respondent, they do not assert he is making it up. The most recent prescription in September 2025.

144. I am therefore satisfied that the adverse condition was likely to occur for at least 12 months, and in fact it did occur over the next 12 months.

145. For those reasons I find that the Claimant had the claimed impairment, namely stress and depression.

146. There is however no evidence whatsoever to show that the Respondent was or should reasonably have been aware of this condition before 1 March 2024.

Jurisdiction

147. The Respondent contends that claims in respect of any act which took place before 26 February 2024 have not been brought within the time specified in the 2010 Act and so are out of time. They identify those parts of the claim as:

- (a) In respect of the direct discrimination claim, the decision to investigate the claimants conduct (List of Issues 5.1.3)
- (b) In respect of the victimisation claim, the Claimant's workload during his treatment for cancer (List of Issues 11.2.2)

148. The Claimant does not challenge the Respondent's calculation of the date. He says that:

- (a) acts before February 2024 formed part of a continuing series of acts, or
- (b) in the alternative, it is just and reasonable to extend time.

149. I have considered whether the acts formed part of conduct extending over a period. If that is the case then the time limit will not apply until the last event in the series.

150. I am content that the decision to investigate the Claimant's conduct under the long term sickness policy was part of a continuing series of acts that eventually led to his dismissal. It was the start of the process which ended in dismissal. That process has to be viewed as a whole. The

Respondent does not dispute that the dismissal itself was within the time limits. It follows that the decision to investigate (in respect of the direct discrimination) is within time.

151. I am not content that the Claimant's workload during his treatment for cancer is part of conduct ending over a period. The Claimant went off sick on 27 February 2024. He did not work on that day. He has not worked for the Respondent since. Any act before that day is out of time.
152. I turn to consider a potential extension of time for this part of the claim. The test to extend time is whether it is just and equitable in the circumstances to do so. I bear in mind that:
- (a) The burden is on the Claimant to justify any extension of time.
 - (b) The test does not require exceptional circumstances
 - (c) The best approach is to consider all the relevant factors, including the length and reasons for the delay and the prejudice caused to either party by granting or refusing an extension
153. In respect of the Claimant's workload between his return to work in July 2023 and February 2024, I bear in mind that:
- (a) The work over that period was a continuing act.
 - (b) The delay is minimal, the Claimant is only a few days out of time.
 - (c) The time in between 26 February 2024 and the date the claim was brought was taken up with the disciplinary process and ACAS conciliation. The Claimant was not inactive.
 - (d) The Respondent would suffer the prejudice of having to defend a claim which is out of time. However the Respondent has not lost that opportunity; they have prepared their defence and advanced both oral and documentary evidence in order to do so.
154. In those circumstances, I am content that it is fair and equitable to extend time for that period.
155. I do not consider, although the Claimant does not appear to argue it, that the same logic extends to the Claimant's workload between his return to work in 2022 and going off sick in May 2023. In that case the Claimant made no efforts to assert his rights, the delay is significantly longer, and the prejudice to the Respondent greater. It is not just and equitable to extend time in respect of the Claimant's workload before July 2023.

Unfair dismissal

156. It is agreed that the Claimant was employed by, and dismissed by, the Respondent.
157. The Respondent says that the Claimant was dismissed for reasons of conduct. That is a potentially fair reason for dismissal. The burden of proof is upon the Respondent to show that the dismissal was fair.
158. The decision makers were Mr Hanley and Mr Bullock. Applying **British Home Stores**, I need to consider whether:
- (a) They genuinely believed the Claimant was guilty of misconduct.
 - (b) They had reasonable grounds for that belief.

- (c) They carried out a reasonable investigation.
- (d) They followed a reasonably fair procedure.
- (e) Dismissal was within the band of reasonable responses.

159. I remind myself of the margin of discretion to be afforded to the Respondent per **Iceland Frozen Foods**. It is not my role to substitute my view for that of the employer. Different employers have different practices and it is not my role to pronounce upon the merits or otherwise of them.

160. I am content that both decision makers genuinely believed that the Claimant was guilty of misconduct, and that they had reasonable grounds for that belief. This is because:

- (a) The long term sickness policy is clear that there should be regular contact. I accept that this is a reasonable requirement of an employer to help them to monitor an employee's health and make plans for their return to work. Failing to do these things would be negligent and might expose them to legal action.
- (b) The disciplinary policy is clear that failing to comply with that requirement was gross misconduct. Gross misconduct is capable of justifying dismissal without notice, per **Laws**.
- (c) There is no evidence that the Claimant was incapable of making that contact. I do not accept that the fit note saying he was incapable of work means that he was incapable of making calls or attending meetings, which is much less onerous than driving a single or double run. The Claimant did in fact make contact, on 9 March 2024. The Claimant claims he was told not to make contact by his GP but there is no medical evidence to back that up. The Claimant may have chosen to, or allowed his son to, switch off the phone and not respond. But that was his choice rather than because of his incapacity to make the required calls.
- (d) I have found that the Claimant did not tell Ms Rex that he was incapable of making any meetings or of requesting alternative contact via his son.
- (e) There is clear evidence that the Claimant (1) had been out of contact for a month without explanation, (2), had missed five meetings after the call of 9 March 2024, and (3) had failed to pick up calls on several occasions.
- (f) A final written warning had been issued (I come to the overall reasonableness of this further below).

161. I am not content that the process carried out by Mr Hanley was not fair. This is because Mr Handley did not carry out a reasonable investigation:

- (a) He was given a single day's notice of the hearing.
- (b) He was given limited information on the day.
- (c) Further information was still becoming available to him during the hearing.
- (d) There was even further information, which was relevant, that he still did not know.
- (e) He proceeded to make a decision on the same day, in a procedure lasting two hours, despite the seriousness of the issue and his awareness of the limits of his own knowledge.

162. I also bear in mind that an attempt had been made to contact

the Claimant's emergency contact before the disciplinary meeting was held.

163. I find that Mr Hanley did not investigate at all. He simply accepted the information that was given to him and made his decision on that basis. He was the decision maker and it was his responsibility to ensure that a fair investigation was carried out and he had all the relevant information that he needed to make a fully informed decision. He did not do so. That was unfair.

164. The ACAS Code of Practice says that:

"Employers should ... give [employees] an opportunity to put their case in response before any decisions are made."

and

"The meeting should be held without undue delay whilst allowing the employee a reasonable time to prepare their case."

165. For the following reasons, I do not consider that the Claimant was given a reasonable opportunity to put his case.

- (a) A final written warning had only just been issued. I do not accept the Respondent's submission that the Claimant should be taken to have had notice of the final written warning from 27 March 2024 because he could have attended the meeting. He did not, and the Respondent knew it. The decision was not in fact communicated to him until 3 April 2024. This was the first point he could have known about it.
- (b) No explanation has been put forward as to why it was decided to move to the next stage so quickly. Mr Sidlow and Mr Hanley did not take that decision or know why it had been taken. No other reason or explanation has been given.
- (c) The whole dismissal process was over within three calendar days. Even treating these as working days that is an extraordinarily quick time. It is difficult to see how the claimant could have prepared his case in that time even if he did respond to the emails of 3 or 5 April 2024.
- (d) There was no apparent reason to justify the urgency or speed, and none has been given.
- (e) There were some attempts made to contact the Claimant. Mr Peto had called the Claimant's emergency contact and asked the Claimant to get in touch. However, he did not say that the Claimant was facing disciplinary action that could have cost him his job. He failed to use that opportunity to pass the message on.
- (f) This was even more unreasonable in light of the fact that the Claimant could still have appealed the final written warning. If he had done so, and succeeded, it would have rendered the rest of the process null and void.
- (g) The Respondent cannot assume that the Claimant would not have appealed. His son had been contacted and messages were being checked, as is shown by the quick response after dismissal letter. The opportunity to appeal the first written warning was overtaken by events.

166. I am aware that the Claimant was afforded a right of appeal which he used. I take that into account. It is also correct that none of these defects appeared in the appeal process carried out by Mr Bullock. Mr Bullock had access to the necessary information. The Claimant had adequate notice of the issues and was given time to prepare. He had the benefit of participation by and an explanation from the Claimant. He took account of all of this information in his decision. Although swift, that part of the process was transparent and accessible to the Claimant and so not unfair.

167. For those reasons, I find that:

- (a) the initial investigation was defective, although the appeal process was not;
- (b) the procedure was not fair; and
- (c) the Code of Practice was accordingly not followed.

168. It is correct that an unfair procedure does not automatically render a dismissal unfair. I need to consider the overall fairness of the dismissal.

169. I do not consider dismissal to be outside the band of reasonable responses in these circumstances, where an employee has failed, without reasonable explanation, to follow the long term sickness policy and in doing so has committed gross misconduct.

170. In considering the overall fairness of the dismissal I have taken into account:

- (a) that the Claimant had failed to comply with the long term sickness policy;
- (b) that he had not provided a reasonable excuse for doing so, and
- (c) that this was gross misconduct for which dismissal was a reasonable response.

171. Putting all of that together, in my judgment the grievous unfairness caused to the Claimant by the rushed disciplinary process, in circumstances where:

- (a) the appeal period for a final written warning had not expired;
- (b) the Respondent knew he was seriously ill and did not know what condition he was in;
- (c) the Respondent set an unjustifiably short timetable, and
- (d) there was no reason, given or apparent, for the urgency means that the dismissal was not procedurally fair.

172. For those reasons, I find that the Claimant was unfairly dismissed.

Breach of contract/unlawful deductions

173. These claims can be taken together and disposed of quickly. I have found above that the money deducted from the Claimant's final salary was done so in order to recoup money owed by the Claimant for overpaid holiday. The Claimant does not dispute that he took the holiday, or the calculation of the sums, or that the Respondent was entitled to recoup the money under contract.

174. I have not accepted the Claimant's claim that he was forced to take

holiday in order to attend medical appointments on pain of dismissal. It was open to him to take sick leave if he wished. In any case, the Claimant has not particularised which holidays he means and how much is said to be owed to him. It is for the Claimant to particularise those claims and he has failed to do so.

175. It follows that the deductions complained of were lawful, did not breach the contract of employment, and so these claims must fail.

Direct disability discrimination

176. The Claimant has identified four allegedly discriminatory acts. I deal with them in turn.

177. The first is in two parts: that the Respondent allegedly disregarded the Claimant's sick note and that the Respondent requested that Claimant attend disciplinary meeting. The Respondent says they did not do the first and admits they did the second.

178. I do not see how the sick note was disregarded. It said that the Claimant was suffering from stress and depression. It did not say that he could not be or was incapable of communicating with his employer. The Claimant has failed to discharge the burden of proof, and it does not move to the Respondent.

179. The Respondent accepts that it invited the Claimant to a disciplinary meeting at a time when they knew he was suffering from cancer and depression. The burden of proof shifts to the Respondent. I do not however consider that an invitation to a disciplinary meeting would amount to less favourable treatment on the grounds of disability. Another driver without the Claimant's disabilities on long term sickness absence, who had failed to contact their employer or provide a reasonable excuse why not, would also be at risk of disciplinary action. Nor do I accept that the treatment was because of the Claimant's disability. It was because of his failure to comply with the long term sickness policy. For these reasons, although the Claimant has demonstrated facts which might (in the absence of an explanation) show discrimination, the whole of the evidence demonstrates that no breach of section 13 has taken place.

180. The second is the allegation that the Respondent failed to pay notice and holiday pay. I have already found that this did not happen. The Respondent lawfully deducted monies owed to them. The Claimant has failed to discharge the burden of proof, and it does not move to the Respondent.

181. The third is that the Respondent chose to investigate the Claimant's conduct in the full knowledge that he was absent because of sickness.

182. The Respondent accepts that it investigated the Claimant's conduct at a time when they knew he was suffering from cancer and depression. The burden of proof shifts to the Respondent. I do not however consider that this would amount to less favourable treatment. Another driver on long term sickness absence without the Claimant's disabilities, who had failed to

contact their employer or provide a reasonable excuse why not, would also have their conduct investigated. Nor do I accept that the treatment is because of the Claimant's disability. It was because of his failure to comply with the long term sickness policy. For these reasons, although the Claimant has demonstrated facts which might (in the absence of an explanation) show discrimination, the whole of the evidence demonstrates that no breach of section 13 has taken place.

183. The fourth is that the Respondent chose to investigate matters over which the Claimant had no control, such as his sickness. This is not further particularised. There is no evidence to suggest that the Respondent carried out any such investigations. The Claimant has failed to discharge the burden of proof, and it does not move to the Respondent.

184. The fifth is that the Respondent dismissed the Claimant. The Respondent accepts that it did so at a time when they knew he was suffering from cancer and depression. The burden of proof shifts to the Respondent. However, I do not consider that this would amount to less favourable treatment. Another driver without the Claimant's disabilities who committed a similar gross misconduct would also be liable to be dismissed. Nor do I accept that the treatment is because of the Claimant's disability. It was because of his gross misconduct. For these reasons, although the Claimant has demonstrated facts which might (in the absence of an explanation) show discrimination, the whole of the evidence demonstrates that no breach of section 13 has taken place.

185. For these reasons, the claims of direct discrimination on the basis of disability must fail.

Discrimination arising from disability

186. I remind myself that:

- (a) I must decide whether there was unfavourable treatment, and if so by who. This is an objective question.
- (b) I must then decide what the reason for that unfavourable treatment was. I will need to identify what was in the mind of the Respondent.
- (c) The 'something arising from disability' that causes the unfavourable treatment need not be the main or sole reason, but must have an influence that is more than trivial.

187. The Claimant says that the 'something arising' was his inability to perform his duties normally. I found this hard to understand. The Claimant was not performing his normal duties of employment at the relevant time because he was off sick. I conclude that the Claimant means his alleged inability to contact the Respondent, be contacted by the Respondent, or participate in meetings by the Respondent. I have rejected those claims for the reasons given above.

188. That would indicate that there is nothing 'arising' that could found a claim under section 15 of the 2010 Act. However, if I am wrong about that, I go on to consider the four acts which the Claimant says are unfavourable treatment in turn.

189. The first is the allegation that the Respondent failed to correspond with the Claimant via his son as requested on 9 March 2024. This can be disposed of quickly. I have found above that no request was made. There can accordingly be no unfavourable treatment. The Claimant has failed to discharge the burden of proof, and it does not move to the Respondent. There is accordingly no need to examine whether the Respondent has a defence of objective justification.
190. The second is the allegation that the Respondent failed to postpone the disciplinary hearing. This could potentially be unfavourable treatment. However I am content that it did not arise from the Claimant's disability. From both Mr Sidlow and Mr Hanley's perspective, a meeting had been scheduled which the Claimant did not attend, and he did not respond to attempts to contact him. The Claimant had made no request to postpone. The fit note did not indicate that he would be unable to make a request or participate in the hearing. There was nothing to demonstrate a need to postpone (the reasonableness of Mr Hanley's conduct aside). The Claimant has failed to discharge the burden of proof, and it does not move to the Respondent. There is accordingly no need to examine whether the Respondent has a defence of objective justification.
191. The third is the allegation that the Respondent failed to pay notice and holiday pay to the Claimant. This can also be disposed of quickly. I have found above that the deduction to final pay was lawfully made because the Respondent deducted monies owed to them. The Claimant has failed to discharge the burden of proof, and it does not move to the Respondent. There is accordingly no need to examine whether the Respondent has a defence of objective justification.
192. The fourth is the allegation that the Respondent failed to take into account the Claimant's sick notes. This is not further particularised. To the extent that the Claimant suggests that the fit note of 1 March 2024 established that the Claimant should not be contacted and was incapable of contact, I have rejected that suggestion. No other allegation of failing to take sick notes into account has been made. The Claimant has failed to discharge the burden of proof, and it does not move to the Respondent. There is accordingly no need to examine whether the Respondent has a defence of objective justification.
193. For those reasons, the claims of discrimination arising from disability must fail.

Indirect Disability Discrimination

194. The parties agree that the Respondent had a PCP of requiring weekly contact from employees on long term sick leave. It is also agreed that the PCP was applied to the Claimant, and would also be applied to other employees on long term sick which who did not share the Claimant's disabilities.
195. It is possible that the PCP might place persons with stress, depression, and/or cancer at a particular disadvantage compared to persons without. These conditions might impede such a person from being

able to make regular weekly contact with the Respondent.

196. However, I could not see that the Claimant was actually put at that disadvantage. As I have set out above, the medical evidence does not support the Claimant's claim that he was unable to contact the Respondent or participate in meetings, although he chose not to (or acquiesced in his son's choice to break contact).

197. If that is correct, then the Claimant has failed to discharge the burden of proof, and it does not move to the Respondent.

198. If I am wrong about that, and the burden of proof does move to the Respondent, I am nevertheless content that they have established the defence of objective justification. I accept that keeping in touch with employees on long term sickness to monitor her health and progress, and help plan a return to work, are legitimate aims – indeed an employer who did not do so would be rightly criticised. I consider that weekly contact is a proportionate way of achieving those legitimate aims. I note the ability to be flexible with the contact period, which in my opinion confirms my view. This is proportionate both overall and when applied to the Claimant (who, as have said, has not shown that he was able to carry out the weekly contact).

199. For those reasons, the claims of indirect disability discrimination must fail.

Failure to make reasonable adjustments

200. The parties agree that the Respondent had a PCP of requiring weekly contact from employees on long term sick leave.

201. The Claimant contends that the following reasonable adjustments were not made.

202. First, to allow the Claimant to stay away from 'all work related issues' for 'some time'.

203. The fit note of 1 March 2024 does not instruct the Claimant to keep away from all work related issues. As I have found above, there is no evidence to suggest that the Claimant was incapable to do.

204. Given that, it follows that the PCP did not put the Claimant at a substantial disadvantage compared with another driver on long term sickness absence but without the Claimant's disabilities. The Claimant has accordingly failed to discharge the burden of proof, and it does not move to the Respondent.

205. Second, to hire further staff to cover the Claimant's workload

206. I could not see how hiring further staff was relevant in any way to the PCP. If further staff were hired, the Claimant would still be required by the PCP to make weekly contact. The evidence does not show that he would be placed at a substantial disadvantage to do so compared with another driver on long term sickness absence but without the Claimant's disabilities.

The Claimant has accordingly failed to discharge the burden of proof, and it does not move to the Respondent.

207. Third, to investigate further to understand why the Claimant was unable to make contact or attend meetings.

208. The first point is that the proposed reasonable adjustment is based upon a false premise. For the reasons given above I am satisfied that the Claimant has not demonstrated that he was unable to make contact with the Respondent or attend meetings. The second point is that the Respondent had already tried to contact the Claimant several times. The reasonable adjustment, such as it is, was already in place. The third point is that the Claimant had not replied or answered to any of those attempts. In the lack of any ability to obtain information from the Claimant, it is not possible to put the proposed reasonable adjustment in place. In these circumstances, the Claimant would not be put at a substantial disadvantage compared with another driver on long term sickness absence, who was failing to contact the Respondent, but without the Claimant's disabilities. The Claimant has accordingly failed to discharge the burden of proof, and it does not move to the Respondent.

209. For those reasons, the claims in respect of reasonable adjustments must fail.

Harassment

210. I consider the alleged acts of harassment in turn.

211. First, the allegation that the Respondent repeatedly insisted that the Claimant attend a long term absence meeting.

212. I accept that this can relate to a protected characteristic – the reason the claimant was on long term sick leave was because of his disabilities.

213. I note that the Claimant fell under the long term sickness policy because his fit note had signed him off for over four weeks, and that the policy required regular contact including meetings. The Claimant does not claim that anything about this is per se unlawful.

214. It seems to me that focus of this allegation is that the meeting was rescheduled a number of times due to the Claimant's non attendance, and as a result he was sent a number of invites to the rescheduled dates.

215. The Claimant says that he found this conduct unwanted, and it had the effects specified within the 2010 Act. He was suffering from stress and depression at the time. I accept that in such circumstances he may have found them unwanted and have at least one of the effects set out. The subjective element of the test is made out.

216. However I do not consider that this was a reasonable perception in all of the circumstances. Emails requesting attendance at a meeting are not of themselves intimidating hostile degrading humiliating or offensive. Nor was there anything about these emails which made them

so.

217. I remind myself that it is important not to encourage a culture of hypersensitivity, or to impose legal liability in respect of every unfortunate phrase used at work. To take offence at these relatively innocuous emails, even allowing for the fact that they were closely spaced and the Claimant was unwell, would be to do just that.

218. It follows that the objective element of the test has not been made out. The Claimant has accordingly failed to discharge the burden of proof, and it does not move to the Respondent.

219. Second, the allegation that the Respondent told the Claimant on 8 December 2022 that he could request further sickness absence within a time frame.

220. This can also be disposed of swiftly, because I have found that no such statement was made by the Respondent. The letter of 6 December 2022 was not a ban on requesting further absence as claimed, nor did it threaten dismissal as a sanction. The Claimant has accordingly failed to discharge the burden of proof, and it does not move to the Respondent.

221. For those reasons, the claims in respect of harassment must fail.

Victimisation

222. The Claimant has said that his protected act was the complaint to Mr Newman on or around April 2023. However, I have found above that he did not in fact make this complaint. As there was no protected act, the claim of victimisation must fail.

Remedy

223. The only remedy that falls due is in respect of unfair dismissal.

224. The Claimant does not seek re-instatement or re-engagement. The only remedy sought is compensation.

225. The parties agree on terms of basic award
(a) Gross weekly pay of £682.40
(b) Multiplied, due to length of service, by the rate of 1.5
(c) The Claimant is entitled to claim for 2 years.

226. I accordingly adopt their calculation of **£2,047.20 basic award**.

227. I considered the compensatory award.

228. I reminded myself that parties agree that gross weekly pay is £682.40.

229. I also remind myself that the purpose of a compensatory award is to put the Claimant in the position that he would have been if he was not unfairly dismissed. This means that the Respondent should pay the

Claimant the wages he would otherwise have been paid. If the Claimant was unable to work because of illness the Respondent should not be expected to pay wages that would not have otherwise been paid. If the Claimant was able to find other work and mitigate his loss, the total amount paid by the Respondent would accordingly be less.

230. The Claimant's position was that he remains unable to work since the date of his dismissal due to his medical conditions, but at the point of dismissal he was recovering and he would have continued to recover and come back to work in May or June 2024.
231. The Respondent's position is that the Claimant would not have returned to work, or alternatively that he would have been dismissed in any event.
232. I am not content that the Claimant would have been dismissed in any event, for these reasons. The evidence from the Respondent's witnesses was that he was a good and reliable driver. He only had a first written warning on his record which would have expired within 8 months or so. If contact had been established, he would have been able to explain why he had been out of touch. The explanation he would have given would have been logically consistent with stress and depression. With contrition and renewed engagement from the Claimant the Respondent may not have chosen to dismiss him. They had instead the option of retaining the final written warning which was, in my opinion, a reasonable and realistic option. I return to the likelihood of this later.
233. I am however not content that the C would have returned to work but for the dismissal. This is because of:
- (a) The fact is that he remains ill to this day.
 - (b) That there is no medical evidence which shows he would otherwise have recovered.
 - (c) That there is no medical evidence to link his ongoing illness with the fact of dismissal.
234. The burden of proof is on the Claimant to prove all of these things and he has not discharged it.
235. For those reasons I find on the balance of probabilities that the Claimant would not have recovered and returned to work. This means that the only earnings that he would have received after the effective date of termination were either sickness benefit under the terms of the Respondent's relevant policy, or statutory sick pay.
236. Mr Morris confirmed that at the effective date of termination, the Claimant had exhausted his entitlement to sickness benefit under the terms of the Respondent's relevant policy. This is confirmed by the final payslip which shows the Claimant was receiving statutory sick pay at the effective date of termination. The Claimant has put forward no evidence to dispute this.
237. Despite arguing that the Claimant would only have been entitled to statutory sick pay in the event he was not dismissed, the Respondent was

unable to confirm their view of how long the Claimant would have remain entitled to statutory sick pay. The Respondent could only point to their absence policy which states that "*The rate of SSP is set by the government each year and is payable for up to 28 weeks for each period of absence.*"

238. The Respondent has had the opportunity to argue that a lesser period than 28 weeks should apply, for example by reference to HMG guidelines. They have not done so.

239. I therefore find that, had the Claimant not been dismissed, he would have received 28 weeks worth of statutory sick pay, and after that entitlement had been exhausted, I find that the Claimant would not have been paid anything further.

240. Taking the Claimant's final payslip as an indicator of the amount he would have received, I calculate this as the weekly statutory sick pay of £116.76 multiplied by 28 weeks, giving a total of **£3,269.28**.

241. The Respondent concedes that an employer contribution of 7% would have been paid on pay received by the Claimant after the effective date of termination. I calculate 7% of this figure as a further **£228.85**.

242. Given my findings, I am content that there would have been no future loss after the date of the hearing.

243. The Claimant has asked for a **Smith v Manchester** award in respect of future loss. However, I remind myself that I have found that the Claimant was dismissed because of his conduct, not because of his disabilities. Nor is there any medical evidence linking the cause of Claimant's illness to any action of the respondent. In these circumstances a **Smith v Manchester** award would be clearly inappropriate.

244. The parties agree that the sum due for loss of statutory rights is **£400**. I adopt their calculation.

245. Adding this together makes a total of **£3,958.13** compensatory award.

246. I then considered whether to make a **Polkey** deduction to the compensatory award. The Respondent argued for a 100% deduction. The Claimant argued for a modest 25%.

247. I remind myself that I was content that the Claimant did commit gross misconduct, and that dismissal was within the band of reasonable responses. Even under a fair process, dismissal was a viable option. The Respondent says that the Claimant would have been dismissed in any event. For reasons given earlier, I do not agree.

248. I bear in mind that the Respondent:

- (a) Unreasonably rushed the disciplinary hearing process, for no apparent reason.

- (d) Did so at a time when the Claimant still had the ability to appeal his final written warning, which could have rendered the whole process null and void.
 - (e) Made no effort to pass on the urgency of the situation via the Claimant's emergency contact.
249. Had the Respondent taken a different approach to any of those things it is a realistic prospect that the Claimant may not have been dismissed.
250. I do not know whether it would be more likely than not that the Claimant would still have been dismissed. Because I am not sure which side of the line a different approach would have resulted in, in my judgment it is appropriate to impose a **Polkey** deduction to the compensatory award of 50%.
251. I am not going to make any further deductions on the basis of the claimants contributory fault. This is because I have already taken account of these in when making a **Polkey** deduction. It would be unfair to penalise the claimant twice for the same conduct.
252. I considered whether to apply an uplift to reflect my finding that the Respondent had breached the ACAS Code. The Claimant suggested 25%. The Respondent suggested a more modest 5%.
253. I accept that this was not the most egregious breach of the ACAS Code. But it is correct that the Respondent unreasonably, and unjustifiably, rushed through the decision to dismiss the Claimant at a time that he was ill, and had been signed off work with mental health conditions, having failed to notify his emergency contact of the urgency, and so did not offer him a fair opportunity to present his case before he was dismissed. Bearing all of this in mind, in my judgment it is appropriate to add an uplift of 10%.
254. Applying first the **Polkey** reduction, and then the ACAS uplift, gives me a total of **£2,076.98 compensatory award**.
255. I should be clear that I have used gross figures for both basic and compensatory award. There is accordingly no need to gross up any further.
256. I also note for completeness that the total award is beneath the statutory cap.

Employment Judge Atkins
7 August 2026

Note

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

Public access to Employment Tribunal Judgments

All judgments and written reasons for the judgments are published online shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case. They can be found at: www.gov.uk/employment-tribunal-decisions.