

Neutral Citation Number: [2026] EAT 152

Case No: EA-2024-001184-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 October 2026

Before :

HIS HONOUR JUDGE FEENY

Between :

XYZ

Appellant

- and -

BIRMINGHAM CITY COUNCIL

Respondent

Rad Kohanzad for the Appellant

Paul Wilson (instructed by Birmingham City Council, Legal and Governance Department) for the
Respondent

Hearing date: 10 September 2026

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION – Harassment, discrimination arising from disability

AGE DISCRIMINATION

PRACTICE AND PROCEDURE – Time limits

The Claimant appealed the dismissal of his complaint of disability-related harassment, arguing that the ET erred in finding that knowledge of disability was a necessary ingredient. He also appealed the ET's rejection of his claim that continuing with a disciplinary process was discrimination arising from disability and that he had not been constructively dismissed as an act of disability discrimination. Similarly, he challenged the finding that his constructive dismissal was not age discrimination and argued that the ET had misapplied the burden of proof in respect of one allegation. Finally, the Claimant submitted that the ET had erred by finding that he had not adduced any evidence to explain why his ET1 had been presented late.

HELD: The disability-related harassment claim could not succeed on the facts as found so there was no need to analyse further the ET's approach to the "related to" question. However, the ET had erred in failing to consider the Claimant's case that his s. 15 claim included the continuation of disciplinary proceedings and that the Respondent may have acquired knowledge of the relevant disability during that period. Its decision on justification also could not stand. Accordingly, the s. 15 claim and constructive discriminatory dismissal claim on grounds of disability had to be remitted. On the other hand, the ET had not erred in its approach to the age discrimination claim.

The ET had been wrong to hold that the Claimant had not presented any evidence to explain why his claim had been brought late, in that it failed to take into account a passage in his witness statement and his closing submissions. The issue of time limits was also remitted for further consideration.

HIS HONOUR JUDGE FEENY:

Introduction

1. This is an appeal against the judgment of the Midlands West Employment Tribunal (Employment Judge Camp sitting with members: Mr R Virdee and Mr R Spry-Shute) (“the ET”). The reserved judgment dated 22 July 2024 (“the Judgment”) followed a final merits hearing (“FMH”) on 9, 10, 13, 16, 17, 20, 21, and 22 May 2024 (with deliberations in private on 23 May 2024).

2. The parties will be referred to as they appeared below. The Claimant’s identity is subject to a permanent anonymity order for reasons which are not directly relevant to this judgment and need not be rehearsed here.

3. At the FMH the Claimant represented himself with the assistance of his wife. The Respondent was represented by Mr Wilson of Counsel, who continues to represent the Respondent for this appeal.

4. For the appeal, the Claimant has been represented by Mr Kohanzad of Counsel, who drafted the seven Grounds of Appeal, all of which were permitted to proceed to a full hearing pursuant to rule 3(7) on 24 March 2025 by Andrew Burns KC, sitting as a Deputy Judge of the High Court.

Background to the Appeal

Background facts

5. The Claimant was employed by the Respondent local authority initially as a trainee estate caretaker. His age when he joined the Respondent was 34. In autumn 2021 he was promoted into a supervisory role. The Claimant clashed with an older colleague at work, Lee Marsh, who the ET found was resentful of the Claimant’s ambitions and (put colloquially) bullied him as a result.

6. The situation culminated with an angry exchange between the Claimant and Mr Marsh on 5 November 2021 which led to Mr Marsh physically threatening the Claimant with a chair (“the November incident”). The Claimant (as he accepted) was also angry with Mr Marsh during the November incident and shouted and swore at him.

7. Both the Claimant and Mr Marsh were subjected to disciplinary proceedings as a result of the November incident. The disciplinary investigation into the Claimant did not conclude until the end of April 2022. As a result of the investigation, the charge against the Claimant was upgraded from misconduct to gross misconduct and he was told that he would have to attend a disciplinary hearing. Importantly, the investigation failed to take account of a contemporaneous email sent on the day of the November incident by a manager, which tended to support the Claimant’s version of events, and therefore implicate Mr Marsh to a greater extent.

8. The Claimant was unhappy with the way in which the Respondent was handling the situation and sent a number of communications challenging his treatment. This included an email on 7 June 2022 to the Respondent in which he disclosed that he was “a sufferer of PTSD, anxiety, and mild depressive disorder”. He also brought a formal grievance on 29 July 2022 but the Respondent refused to initiate its grievance procedure, instead telling the Claimant that it should be used as mitigation in the disciplinary process.

9. The Claimant resigned on 16 October 2022. The letter of resignation made clear that the Claimant regarded himself as constructively dismissed. The letter runs to seven pages and sets out in full his reasons for resigning.

The Claim and the FMH

10. The Claimant presented his ET1 on 10 January 2023. He attached a lengthy narrative

summarising the claims brought, which included constructive unfair dismissal, age discrimination, and disability discrimination, but did not particularise each head of claim by reference to the factual complaints. This particularisation of claims was subsequently done through further case management and the Respondent was given the opportunity to submit an amended response (which it did). There was a list of issues of sorts before the ET at the FMH, albeit it was essentially just a list of factual issues with the head of claim specified (“the list of issues”); it did not follow the usual format for a list of issues, as generally annexed to a Case Management Order.

11. As noted earlier, the Claimant acted as a litigant in person at the FMH with his wife assisting him to present his case. The Judgment records that the Claimant withdrew a number of his claims, which were then dismissed as part of the overall Judgment. Annex B of the Judgment records a “judgment by consent” which specifies which claims were remaining for determination, by reference to the list of issues.

12. The Respondent also made a number of admissions. A number of facts were admitted, such as the Claimant’s description of what Mr Marsh had said and done to him. This was notwithstanding that a witness statement had been produced for Mr Marsh. In light of the Respondent’s admissions, Mr Marsh was not called to give evidence.

13. The Respondent also admitted liability for the unfair dismissal claim (as well as a claim for unpaid annual leave). As the ET noted, the effect of the admission of liability for unfair dismissal was that the Respondent accepted that it had breached the implied term of mutual trust and confidence and that the Claimant had resigned in response to this. The ET expressed some concern with the effect of this admission in paras. 40-42 of the Judgment. The ET was unclear on the basis upon which the admission was made, particularly given that it appeared that the main reason for the admission – namely the failure to include potentially relevant and exculpatory evidence in the investigation report

– was not known to the Claimant at the time that he resigned (and could not therefore be causative of his resignation). Nonetheless, the ET was prepared to accept the admission and proceeded to decide the remaining claims in light of this admission.

14. Disability had been conceded at an earlier stage of proceedings. It was therefore common-ground at the FMH that the Claimant was disabled by reason of PTSD, anxiety, and depressive disorder.

The Judgment

15. The Judgment dismissed all claims other than those for which liability had been admitted, namely unfair dismissal and unpaid annual leave/wages.

16. The ET noted that the disability discrimination claim had primarily been advanced on the basis that the Respondent’s conduct had made the Claimant ill and/or the Respondent had failed to take reasonable care for his mental health. The ET (correctly) stated that this would amount to a claim in negligence for personal injury, it is not the basis of a claim under the Equality Act 2010 (“EqA”). The ET also considered – and rejected – the Claimant’s case that the Respondent’s managers were conspiring to get rid of him because of their (alleged) prejudices about employees with mental health conditions.

17. However, the ET accepted that the behaviour for which the Claimant had been subject to a disciplinary investigation (i.e. the November incident) was something arising in consequence of a specific disability, namely PTSD: Judgment para. 97. The ET, however, went on to find that the section 15 claim failed because, at the relevant times, the Respondent did not have knowledge of disability (Judgment para. 101) and the decisions taken during the disciplinary procedure were justified as a proportionate means of achieving a legitimate aim (Judgment paras. 102-104, read with

paras. 86-87).

18. The ET rejected all allegations of disability discrimination and harassment in respect of Mr Marsh’s treatment of the Claimant (for which the Respondent accepted vicarious liability), principally because Mr Marsh did not know that the Claimant had the relevant disability at the material time and his conduct could not have been because of, or related to, the protected characteristic: Judgment paras. 57-63.

19. The ET found many of the allegations of age discrimination and harassment against Mr Marsh proven. However, it still dismissed those complaints on the basis that the ET1 had been presented around six months late and it was not just and equitable to extend time: Judgment paras. 167-180. It rejected on the merits a claim that Mr Marsh had called the Claimant a “grass” on 5 December 2020 for age-related reasons: Judgment para. 113.

20. The ET rejected the claim that the (admitted) constructive dismissal was discriminatory, as defined in s. 39(7) EqA. It rejected the disability discrimination complaint on the ground that the Claimant had not resigned in response to the November incident and that the matters that he had resigned in response to did not arise in consequence of disability: Judgments paras. 158-159. It rejected the age discrimination complaint on the ground that the November incident (which had been upheld as harassment related to age, subject to time limits) was “no more than background to the reasons for the resignation” (Judgment para. 153).

Grounds of Appeal

21. The Claimant appeals various aspects of the Judgment through seven numbered grounds.

22. Ground One challenges the ET’s finding that Mr Marsh’s treatment of the Claimant was not

related to disability. This Ground initially consisted of three limbs but the perversity appeal was withdrawn during submissions, leaving two parts to the Ground. Firstly, the Claimant argues that if Mr Marsh bullied the Claimant because of a perceived vulnerability, that (the perception of vulnerability) was a feature of the Claimant's disability and this is sufficient to meet the "related to" test, notwithstanding a lack of direct knowledge of disability on the part of Mr Marsh. Secondly, the ET should have considered the claim in the alternative as one of discrimination arising from disability.

23. Ground Two challenges the rejection of the discrimination arising from disability complaint about the disciplinary proceedings. Firstly, the Claimant argues that the ET should have found that the Respondent had knowledge of disability (for the purposes of s. 15(2) EqA) from 5 November 2021 onwards (thereby capturing the entirety of the disciplinary process) on the basis of a conversation he had with his line manager in which he disclosed his mental health issues. Secondly, it is said that the ET's approach to the justification defence was erroneous.

24. Ground Three argues that the ET failed to properly consider and dispose of the Claimant's claim that continuing to subject him to disciplinary proceedings up to his resignation was discrimination arising from disability.

25. Ground Four argues that the ET applied the wrong legal test when considering whether the constructive dismissal amounted to disability discrimination (specifically s. 15 EqA), in particular the ET posed the question "did the Claimant resign in response to the something arising?", rather than asking whether the Claimant resigned in response to the unfavourable treatment that was because of the "something arising".

26. Ground Five challenges the ET's rejection of the claim that Mr Marsh calling the Claimant "a grass" was age discrimination. It is argued that the ET impermissibly jumped to a positive finding on

the reason for the treatment, without properly applying the shifting burden of proof provision.

27. Ground Six argues that the ET erred in rejecting the complaint that the constructive dismissal was age discrimination, given the finding that Mr Marsh’s conduct during the November incident, which led to the Claimant’s disciplinary, was harassment related to age.

28. Ground Seven challenges the refusal to extend time on just and equitable grounds in respect of the otherwise meritorious age discrimination complaints.

Legal Framework

29. The Grounds of Appeal cover a number of different provisions in the EqA. The relevant legal framework under which the appeal falls to be considered is as follows.

Harassment

30. Harassment is defined in s. 26(1) EqA:

- (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.

31. This appeal concerns the “related to” part of the definition. This was described by the EAT (HHJ Richardson) in **Hartley v Foreign and Commonwealth Office Services** (2016, unreported) as a “broad test”. The EAT (HHJ Tayler) in **Carozzi v University of Hertfordshire and another** [2024] EAT 169, [2025] IRLR 179 made similar observations, namely that: “the term ‘related to’ is designed to have a relatively broad meaning” (para. 17).

32. Relevantly to this appeal, the EAT in **Hartley** went on to observe (para. 24):

“A's knowledge or perception of B's characteristic is relevant to the question whether A's conduct relates to a protected characteristic but there is no warrant in the legislation for treating it as being in any way

conclusive. A may, for example, engage in conduct relating to the protected characteristic without knowing that B has that characteristic.”

Discrimination arising from disability

33. S. 15 EqA states as follows.

- (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.

34. The well-known guidance in **Pnaiser v NHS England and another** [2016] IRLR 170, EAT (Simler P) sets out the various stages of the test. First, the ET must decide whether there has been unfavourable treatment of a claimant. Second, the ET must identify the reason for the treatment. This requires a consideration of the thought processes of the respondent. There can be more than one reason, each having a more than trivial influence on the person making the decision. Third, the something arising in consequence of the claimant's disability must be identified. Fourth, the ET must determine whether the reason for the treatment (as found) is because of the (identified) something arising in consequence of the claimant's disability.

35. Sub-section (2) of s. 15 makes clear that – even if the above stages are all met - liability can only be established if the respondent knew, or ought reasonably to have known, that the claimant was disabled. The question of knowledge must be judged from the time that the treatment occurred (see, for instance, **Stott v Ralli Ltd** [2022] IRLR 148, EAT). The relevant knowledge is of the facts constituting the claimant's disability, not whether, as a matter of law, the claimant meets the legal test for a disabled person (**Gallop v Newport City Council** [2013] EWCA Civ 1583, [2014] IRLR 211).

36. Moreover, the respondent's knowledge of disability can be established constructively. This poses the question: “what might [the respondent] reasonably have been expected to have known” (**A**

Ltd v Z [2020] ICR 199, EAT, 214, para. 41). This may include an analysis of what information may have been obtained following a referral to occupational health (“OH”) (ibid.).

37. It is important to note, however, that knowledge that the “something arising” which was the reason for the treatment arose in consequence of the claimant’s disability is not required for a successful claim for discrimination arising from disability: **Pnaiser**, para. 31(g)-(h).

38. The defence of justification is available to a respondent facing a section 15 claim: sub-section 1(b). The respondent must show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. This requires the ET to assess the discriminatory effect of the treatment on the claimant balanced against the reasonable needs of the respondent: see summary of the relevant principles in the judgment of the EAT (Judge Clarke) in **Department for Work and Pensions v Bovers** [2022] EAT 76, [2022] IRLR 741, 748, paras. 21-27.

39. Ultimately, the classic statement of the justification test remains that of the Court of Appeal (Pill LJ) in **Hardy and Hansons plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565, 1577, para. 32:

“Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (*Barry v Midland Bank plc* [1999] ICR 859) and I accept that the word "necessary" used in *Bilka-Kaufhaus* [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.”

Constructive discriminatory dismissal

40. S. 39(7)(b) EqA defines “dismissal” to include a constructive dismissal:

“(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
[...]
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.”

41. This is intended to reflect the common law test for constructive dismissal, i.e. where an employee accepts a repudiatory breach of contract on the part of the employer and brings the contract to an end. Most constructive dismissal claims – as here – rely on an alleged breach of the implied term of mutual trust and confidence (as defined in **Malik v BCCI** [1998] AC 20). The correct approach to deciding such claims, in particular where the claimant relies on a “last straw” in a series of acts amounting to a breach of trust and confidence, is set out in para. 14 of the Court of Appeal’s judgment (Dyson LJ) in **Omilaju v Waltham Forest LBC** [2004] EWCA Civ 1493, [2005] ICR 481.

42. The Court of Appeal (Underhill LJ) subsequently gave guidance on how the question of affirmation of the contract should be approached in a “last straw” case: **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, [2019] ICR 1; see also the further guidance of the EAT (HHJ Auerbach) on this point in **Williams v Governors of Alderman Davies Church in Wales Primary School** [2020] IRLR 589, EAT.

43. It is not sufficient for there to be a breach of the implied term of mutual trust and confidence and a resignation: the claimant must resign in response to that breach. The reason for resignation need not be solely the breach of contract, but it must be at least in part (**Mickle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1, 11-12, para. 33).

44. Where the ET is required to consider whether a constructive dismissal is discriminatory in a “last straw” case it must decide whether some of the “discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach” (**Williams**, para. 89). The test was summarised by the EAT (Cavanagh J) in **De Lacey v Wechsels Ltd (t/a Andrew Hill Salon)** [2021] IRLR 547,

553, para. 69:

“I respectfully agree with the test as it is set out in paragraph 90 of the *Williams* judgment. Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue.”

Burden of proof

45. S. 136 EqA contains provisions on the burden of proof in discrimination cases:

- “(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.”

46. This generally involves a two-stage process. First, the claimant is required to prove facts from which the ET could conclude that, in the absence of an adequate explanation, the discrimination occurred. If the claimant succeeds in doing so, the burden moves to the respondent for it to prove that it did not discriminate against the claimant: **Igen Ltd v Wong** [2005] EWCA Civ 142, [2005] ICR 931 *et seq.*

47. In **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054 the Supreme Court (Lord Hope) observed that the burden of proof provisions operate “where there is room for doubt as to the facts necessary to establish discrimination... [but] they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other” (para. 32). However, the EAT (HHJ Tayler) in **Field v Steve Pye & Co (KL) Ltd** [2022] EAT 68, [2022] IRLR 948 cautioned against ETs too readily by-passing the burden of proof provisions, observing that where there is significant evidence that could be suggestive of discrimination, the ET should

explain why it felt it was able to jump straight to the second stage and make a positive finding on why the treatment occurred (**Field** paras. 37-45).

Time limits

48. The time limit for bringing a claim to the ET under the EqA is three months (plus time spent in ACAS early conciliation, if applicable). A claim presented outside the primary time limit can still be upheld by the ET but only if it was presented with a further period of time that the ET thinks “just and equitable”: s. 123(1)(b) EqA. The ET therefore has a discretion on whether to uphold an “out of time” claim, depending on whether it is “just and equitable” to do so.

49. In considering the exercise of this discretion the two factors that tend to be most important are: (a) the length and reasons for the delay and (b) the prejudice to the parties, in particular the respondent. See the observations of the Court of Appeal (Leggatt LJ) to this effect in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, [2018] ICR 1194, 1201, paras. 18-19. Leggatt LJ also gave guidance on the appellate court’s role in considering an appeal on this test (para. 20):

“The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle—for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant—or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre (trading as Leisure Link)* [2003] IRLR 434 , para 24.”

50. Further useful guidance on the application of the “just and equitable” test was given by the EAT (HHJ Eady QC) in **Thompson v Ark Schools** [2019] ICR 292, 298-302, paras. 13-23.

51. As for the approach to assessing the evidence in support of an extension of time, the EAT (Cox J and members) in **Doherty v The Training and Development Agency for Schools** (2009,

unreported) observed:

“Whilst there must be evidence before the Tribunal, upon which they can make findings as to the reason for the delay, and be satisfied that it is just and equitable to extend time, that evidence can come from a variety of sources and not just from the claimant in a witness statement or in the witness box. This is likely to be the case where, as here, there are many allegations of victimisation made on a “continuing act” basis, involving different events and personnel over a lengthy period of time, but where eventually only one of them succeeds. It is in our view unrealistic, in such circumstances, to expect a claimant, in evidence, to have dealt with the extension of time point separately, in respect of each, discrete allegation, on the somewhat artificial and entirely hypothetical basis that only one of them might succeed.” (para. 243)

52. It follows that the ET should take a relatively liberal approach to identifying the evidential material that may explain why a claim was presented late.

Discussion and Conclusions

Ground One

53. The Claimant submits that in directing itself that bullying due to a perceived vulnerability is not conduct related to disability where the perpetrator does not know about the disability the ET erred in law. If there is a causal link between the perceived vulnerability and the bullying the “related to” test is satisfied; the perpetrator’s knowledge is no part of the statutory test.

54. As for the second limb, the Claimant submits that if the ET’s findings of fact “call out” for consideration of a section 15 claim then it was obliged to raise the matter with the parties, citing **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185, [2025] ICR 1231 in support.

55. The Respondent submits that both arguments are fatally defeated by the clear finding in Judgment para. 61 that Mr Marsh did not perceive the Claimant to be vulnerable, or at least that was not a reason why he acted the way he did. Alternatively, the ET applied the correct legal test, relying on **Carozzi** and the *obiter* observations of the Court of Appeal in **Sandhu v Enterprise Rent-a-Car** [2025] EWCA Civ 190, [2025] IRLR 479, 489, para. 99, which are consistent with the approach taken

by the ET in this case.

56. On the first point, I am far from convinced that the ET did get the test wrong, given that it began its analysis by correctly directing itself that the perpetrator’s knowledge of disability was not a necessary condition of disability-related harassment (Judgment para. 62).

57. In any event, I agree with the Respondent that this is a rabbit hole down which we do not need to travel. There was a finding of fact in Judgment para. 61 that Mr Marsh’s conduct towards the Claimant was not influenced by a perception of him as weak or vulnerable. It is not therefore necessary to consider whether the Claimant was in fact weak or vulnerable due to mental health issues and/or whether Mr Marsh realised this.

58. In oral submissions, Counsel for the Claimant sought to challenge this ancillary finding by arguing that, in using the word “because” and applying a “but for” test, the ET had erroneously imported the wrong test for causation into a harassment claim. But in this passage the ET was not applying the “related to” test, it was making a finding on Mr Marsh’s motivation in bullying the Claimant. This was a finding of fact that cannot be disturbed on appeal. It is not therefore necessary to analyse the ET’s approach to the “related to” question in any further detail.

59. As for the second part of this Ground, this relies on a particularly benevolent interpretation of the *ratio* in **Moustache**. The Claimant accepts he did not plead a section 15 claim relating to this allegation, his argument on appeal is that the ET should have prompted him to make an application to amend his claim to include one during the FMH, once it became apparent to the ET that such a claim might succeed. In my judgment, such a submission is in complete opposition to what the Court of Appeal said in **Moustache**. I note in particular the observation of Warby LJ in para. 37:

“The ET has no general duty to take pro-active steps to prompt some expansion or modification of the

case advanced by a party where that might be to their advantage.”

60. Moreover, even were the Claimant’s reading of **Moustache** to be correct, the ET in this case would not have been obliged to prompt the Claimant to make an application to amend to include a section 15 claim, given that the ET was of the view that the reason for the unfavourable treatment (the bullying) was not something arising in consequence of the Claimant’s disability (i.e. the perception of weakness or vulnerability). (A section 15 claim would also have – permissibly – brought the question of Mr Marsh’s knowledge of disability into play.)

61. For all of these reasons, Ground One fails.

Grounds Two and Three

62. I will take Grounds Two and Three together.

63. The first point to Ground Two is that the ET erred in its approach to the assessment of whether the Respondent knew, or ought to have known, that the Claimant was a disabled person. However, I accept the Respondent’s submission that the conversation between the Claimant and his line manager in November 2021 about his mental health difficulties cannot be relevant. This is because the ET made a clear finding in Judgment para. 101 that the relevant disability for the complaints about the disciplinary process was PTSD. As the Claimant did not know he had PTSD until March 2022, it is hard to see how the Respondent could have known about it any earlier than then; certainly it could not have come up during the conversation in November 2021.

64. In oral submissions, Counsel for the Claimant suggested that it was sufficient for the Respondent to know that the Claimant was disabled by reason of mental health difficulties for liability under s. 15 to arise, the precise diagnostic label is irrelevant. I do not accept that submission. To take

an extreme example, a person may be disabled due to a broken leg and also have undiagnosed PTSD. It cannot be right that the employer would be fixed with liability for a section 15 claim that relates solely to a symptom of the undiagnosed PTSD if it only knows about the broken leg. I accept that a precise diagnosis is not a pre-requisite for a finding that there is a mental impairment, when considering the issue of disability *per se*, but that is not the test the ET was considering. On the facts of this claim, the ET was entitled to separate PTSD from the other mental impairments relied upon (anxiety and depression) when assessing the Respondent's knowledge of disability for the purposes of the section 15 claim.

65. However, the Claimant also relies on the fact that in June 2022 he wrote to the Respondent to tell it that he was "a sufferer of PTSD". This communication therefore arguably changed the picture for the Respondent. It now had possession of information that might have prompted a review of the nature of the Claimant's disability.

66. The ET did not expressly consider this point. Its finding on knowledge of disability for the purposes of PTSD was that the Respondent knew that the Claimant was disabled by reason of PTSD "by October 2022": Judgment para. 156. It did not make a finding on whether knowledge of disability by reason of PTSD crystallised any earlier than that, i.e. at any point between June 2022 and October 2022. It appears that the ET felt that it did not need to do so as it had not identified an act of unfavourable treatment that had occurred between those two dates.

67. At this stage, it is necessary to consider Ground Three. This argues that the ET erred in failing to properly address the Claimant's complaint about "continuing to" subject him to a disciplinary process. His complaint (as recorded by the ET) was that there were three stages to the unfavourable treatment: (1) subjecting him to the disciplinary process in the first place, (2) uprating the charge from misconduct to gross misconduct at the end of the investigation, and (3) continuing to subject him to

disciplinary proceedings up until his resignation.

68. The ET rejected on the facts the third limb of his claim, deciding that the last decision relating to the disciplinary process that amounted to unfavourable treatment was the decision in April/May 2022 to upgrade the charge to gross misconduct and invite him to a disciplinary hearing: Judgment para. 104. Such a conclusion was notwithstanding that, at least for limitation purposes, being subject to an on-going disciplinary process amounts to conduct extending over time: **Tait v Redcar and Cleveland Borough Council** (EAT, 2008, unreported).

69. I was initially attracted to the Respondent's submission that this was simply a finding that it was open to the ET to make, having heard the evidence; it does not amount to an error of law. However, the difficulty with that submission is that the ET expressly directed itself that the Respondent did not have any particular reason for asking itself whether the disciplinary charge should be reviewed post-May 2022 (Judgment para. 104). By doing so, the ET failed to recognise that the issue of whether the Respondent had acquired knowledge of the PTSD as a disability in the meantime might be just such a reason.

70. Moreover, the ET had been asked to consider whether receipt of the Claimant's June 2022 email (in which he disclosed his PTSD diagnosis) should have prompted a decision to pause or drop the disciplinary process, albeit in the context of it exacerbating his mental ill health (Judgment para. 93.4). In my judgment, the ET was obliged to consider the same question in the context of a potential change in the Respondent's knowledge of disability, given the way in which the Claimant had put his case.

71. I should add that the Respondent's submission that, even had the Claimant been sent to OH at that point, the Respondent would not have known that the PTSD was the cause of his behaviour in

the November incident, is misplaced. As per **Pnaiser**, there is no requirement that the Respondent know that the reason for the treatment was because of something arising in consequence of disability.

72. That is not the end of the matter, however, as the ET found that the disciplinary proceedings were justified as a proportionate means of achieving a legitimate aim. I must therefore return to Ground Two to consider whether such a finding was also an error of law.

73. Strictly speaking, an error by the ET on knowledge of disability should not disturb a finding on justification. That is because the ET's conclusion on the justification defence must presuppose that – contrary to its primary finding – the Respondent did know (or ought to have known) that the Claimant was disabled by reason of PTSD. In other words, it is considering the defence in the alternative to its primary finding that there was no relevant knowledge of disability at the material time.

74. The ET was clear in its conclusion that the disciplinary proceedings would always be justified because “what the Claimant had admitted to doing was, objectively, such a serious matter” (Judgment para. 87). In the same paragraph, however, the ET went on to observe that if the Respondent had dismissed the Claimant it would not have been able to justify the treatment, given by then it knew that he was disabled by reason of PTSD.

75. The Claimant argues that the ET did not apply the correct test for justification in this passage, in that it did not properly recognise the discriminatory effect on the Claimant and did not balance that against the reasonable needs of the Respondent, as per the test in **Hardys and Hanson** (which the ET had not expressly cited in its Judgment). Further, the ET did not fully analyse the less discriminatory means open to the Respondent. For instance, whilst it considered the option of reverting the disciplinary charge back to misconduct, it did not consider the option of dropping the charges

altogether, or at least getting an OH report on whether it would be appropriate to continue with the disciplinary process in light of the newly acquired knowledge that the Claimant was (at the material time) disabled by reason of PTSD.

76. With some hesitation, I accept the Claimant's submissions. I cannot be satisfied that the ET correctly applied the justification test to the Respondent's conduct of the disciplinary proceedings. Whilst this is academic in respect of limbs (1) and (2) of the section 15 complaint, given that I do not consider that the Respondent could reasonably have acquired knowledge of PTSD as a disability before receiving the Claimant's email in June 2022, it means that I cannot be satisfied that the ET's conclusions on justification for limbs (1) and (2) of the Claimant's section 15 claim can be safely extrapolated to limb (3).

77. The appeal on Grounds Two and Three therefore succeeds to the extent that the ET erred in law in failing to address limb (3) of the Claimant's discrimination arising from disability claim in circumstances where it was at least arguable that the Respondent gained knowledge of the PTSD as a disability at some point between June and October 2022.

Ground Four

78. As the parties accept, Ground Four is parasitic on Grounds Two and Three. Given that I have held that the ET needs to reconsider its conclusion on whether the act of continuing with the disciplinary procedure post-June 2022 was discrimination arising from disability, it will necessarily need to reconsider whether the claim that the constructive dismissal amounts to disability discrimination succeeds.

79. I should add for completeness that I accept the Claimant's submissions that the ET erred in its consideration of the constructive discriminatory dismissal claim by posing the question whether

the Claimant resigned in response to “something arising in consequence of disability”. This error features twice, in paras. 158 and 159 of the Judgment, so it cannot be put down to mere infelicity of wording. The correct test is whether the Claimant resigned in response to the unfavourable treatment that was because of something arising in consequence of disability (and which cannot be justified by the Respondent).

80. In fairness to the ET, I suspect it found itself in difficulties deciding this part of the claim because it did not understand the terms upon which the Respondent had conceded that there had been a breach of the implied term of mutual trust and confidence. Whilst reasoned concessions on the part of respondents are not to be discouraged, it was difficult for the ET to decide whether the breach of trust and confidence included discriminatory acts (applying the **De Lacey** test) given that it did not understand which acts were admitted by the Respondent to make up the breach. Given that the ET was required to make findings on the discriminatory treatment that amounted to the breach of the implied term in any event, the formal concession may have ended up as more of a hindrance than a help.

Ground Five

81. This Ground can be taken shortly. At Judgment para. 110 the ET decided that the Claimant had established a prima facie case that all unwanted conduct or less favourable treatment at the hands of Mr Marsh was related to or because of age (there is an unfortunate typographical error in that paragraph, which refers to “November/December 2021 onwards”, when the ET clearly meant “2020 onwards” based on the finding of fact in the preceding paragraph). The ET went on to uphold many of those claims. It rejected the complaint about being called a “grass” because there was clear evidence that Mr Marsh did this because the Claimant had complained about him. It therefore found that the Respondent had proved that the Claimant’s age had no influence whatsoever on the conduct/treatment. The burden of proof provisions were correctly applied.

Ground Six

82. My decision on Ground Six is similarly straight-forward. The ET was perfectly entitled to find that the acts of age discrimination by Mr Marsh dating back to November 2021 and earlier were part of the background to the resignation and not causative of it. The main factor the ET relied upon was the Claimant's own resignation letter in which he did not refer to Mr Marsh's conduct towards him as a reason for resigning: Judgment para. 149. Such a conclusion is unassailable.

Ground Seven

83. The Claimant submits that in holding that he had provided no explanation on why his claim was presented outside the primary time limits in respect of the allegations against Mr Marsh, the ET erred in law. In particular, the ET directed itself that what the Claimant said in closing submissions was not evidence, which was contrary to **Doherty**. The ET also failed to take into account a reason given by the Claimant in his witness statement, which was to the effect that bringing a claim was a last resort as he would find it "triggering". Further, the ET wrongly disregarded the explanation that the Claimant considered there was conduct extending over time as a reason to delay bringing his claim.

84. I accept the Claimant's submission that there was relevant evidence in his witness statement that the ET overlooked. On this point, I have considerable sympathy for the ET. Buried within (what I am told was) a 100-page witness statement running to 420 paragraphs was half a sentence that addressed the reason why the Claimant did not bring a claim earlier. It does not appear that the Claimant expressly directed the ET's attention to it during closing submissions. Nonetheless, it means that the ET was wrong to state that there was "no evidence" before it on why the Claimant did not bring his claim earlier.

85. Furthermore, as the Respondent concedes, the ET had misdirected itself in holding that the reasons put forward in the Claimant's closing submissions were not "evidence", given the *ratio* of **Doherty**. This would include his evidence that one of the reasons he did not submit a claim earlier was because he believed there was conduct extending over time.

86. It is fair to observe, as the Respondent submits, that the ET nonetheless went on to attempt to consider possible reasons why the claim was not presented earlier. In doing so, it considered the issue of ill health but rejected it based on the evidence before it. The problem with this submission is that, in speculating as to how the Claimant might have said ill health was the reason why he did not bring his claim earlier, the ET did not identify the actual reason he gave, which was that he would find having to re-live events through an ET claim "triggering". The ET looked only at ill health in a more general sense of whether he was capable of lodging a claim, which does not quite answer the point.

87. The Claimant also challenges the ET's approach to balancing the prejudice to the parties, in particular its refusal to grant an extension because the Claimant could not identify specific prejudice to him that would not be suffered by all claimants in the generality of cases. In my judgment, it is not necessary to further analyse the ET's approach to the "just and equitable" test, given that it took a wrong turn at the outset by directing itself it had no evidence before it on why a claim was not brought earlier.

88. Ground Seven also succeeds.

Disposal

89. Given that some Grounds have succeeded, I am required to consider disposal. I am satisfied, applying **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] ICR 920, that this is a case that needs to be remitted back to the ET for further consideration.

90. The Claimant urges me to remit to a freshly constituted ET, citing **Sinclair Roche and Temperley & Ors v Heard & Anr** [2004] IRLR 763, EAT and suggesting that the original ET would be too fixed in its views to properly consider the matter afresh.

91. I disagree. I consider the Judgment as a whole shows that the ET was scrupulously fair to the Claimant. The ET was at pains to understand the way in which the Claimant was putting his case and even went so far as to consider alternative cases which it was not even sure the Claimant was advancing. I do not detect any conduct on the part of the ET, sub-conscious or otherwise, that might suggest it would approach remittal as “a second bite of the cherry”.

92. Moreover, no further evidence needs to be heard. The ET can consider its conclusions on the remitted issues based on the evidence it has already heard. It makes obvious sense for this to be done by the original ET, rather than imposing what would be a far more difficult task on a freshly constituted ET. It is also worth bearing in mind that the original ET still needs to determine remedy for the claims upheld by consent, so it will have to revisit the evidence in any event.

93. For the avoidance of doubt, the issues to be remitted are:

- a. Whether the Respondent had knowledge of the relevant disability (PTSD) at any point between June 2022 and October 2022.
- b. If so, whether the decision to continue disciplinary proceedings from June 2022 to the Claimant’s resignation was unfavourable treatment because of something arising in consequence of disability which cannot be justified.
- c. The constructive discriminatory dismissal claim on disability grounds.
- d. Whether any upheld discrimination claims which were prima facie out of time were

presented within a further period of time that was just and equitable.

Conclusion

94. The appeal is allowed on Grounds Two, Three, Four, and Seven. The appeal on Grounds One, Five, and Six is dismissed.

95. The matter is remitted to the same ET to re-consider its conclusions on those issues that have been set aside on appeal.