EMPLOYMENT TRIBUNALS

Claimant: Mr D Forster

Respondent: Lake District Hotels Limited

Heard at: Manchester (in private)

On: 6, 7, 8, 13 & 14 July 2026 & 13 & 14 September 2026 (in chambers)

Before: Employment Judge Shotter
Members: JK Williamson
E Cadbury

REPRESENTATION:

Claimant: Mr H Menon, Counsel

Respondent: Mr Price, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claim of disability discrimination was not presented within the applicable time limit. There was no course of conduct over a period and it is not just and equitable to extend the time limit. The claim of disability discrimination is therefore dismissed. In the alternative, the complains of disability discrimination are not well founded and dismissed.

2. The respondent was not in breach of contract and the claimant was not constructively unfairly dismissed. The claimant's claim of constructive unfair dismissal is not well-founded and is dismissed.

FINAL DRAFT REASONS 25.9.26

Preamble

1. This is a liability hearing which took place over 5 days plus 2 days in chambers.

2. A number of reasonable adjustments were made for the claimant in accordance with the Equal Treatment Bench Book including breaks as and when required, time for the claimant to consider documents and his response to cross-examination including breaks away from the camera in which to do so with a view to lessening the pressure on the claimant.

3. The issues as agreed between the parties are set out below taking into account the respondent's concession that the claimant was disabled with Autistic Spectrum Disorder (*"autism"*) at all relevant times, under Section 6 Equality Act 2010 (*"the EQA"*). Knowledge remains in issue.

Agreed List of issues

Disability

4. Having regard to the Claimant's Autistic Spectrum Disorder, was the Claimant, at all relevant times, disabled under Section 6 Equality Act 2010 specifically:

    a. Did the Claimant have a mental or physical impairment?

    b. Did the Claimant's impairment have a substantial and adverse effect on the Claimant's ability to carry out normal day to day activities?

    c. If so, was such effect long-term (i.e. had it lasted, or was it likely to last, 12 months or more)?

5. Did the Respondent know, or should the Respondent have reasonably ought to known, that the Claimant was disabled at the relevant times?

Discrimination arising from a disability

6. Did the Respondent subject the Claimant to unfavourable treatment when doing any of the things listed in paragraphs 94 to 102, and paragraph 108, of the Claimant's ET1/Statement of Case?

Namely:

    a. Criticising the Claimant often for slowness, and/or lack of a system in terms of the work he would do (throughout employment – GW).

    b. Criticising the Claimant in an unreasonable way for taking a break (17.24

GW;.19.7.24 Sid Yarrow).

c. By Mr Wilson jumping in to help the Claimant (throughout employment – GW).

d. Swearing at the Claimant (throughout employment – mainly GW, lesser extent Sid Yarrow) and criticising him for taking a break (17.7.24 – GW & Sid Yarrow).

e. Speaking to the Claimant in a patronising and demeaning manner and swearing at him (throughout employment – GW).

f. Speaking over the Claimant and not allowing him to make his point (throughout employment – GW).

g. Giving mixed communications to the Claimant in relation to his holiday request, giving him the expectation that the request would be granted (c.24-30 June 2024 - Leon Knoetzer, manager & Sid Yarrow – head chef)

h. Failing to deal with the Claimant's holiday request in accordance with the respondent's stated policy (GW – June 2024).

i. Making dismissive and discriminatory comments in relation to the Claimant's mother's mental health (6.7.24 – GW).

j. Bullying the Claimant by forcing him, and his partner Katie Mossop, to clean (end Aug 2022 – Feb 2023 – Petr Schmidt Dep Gen Manager and GW), forcing him to wear white gloves (June 2023 – Dec 2023 Petr Schmidt, Dep Gen Manager, and GW) and swearing at him for taking a break.

k. Subjecting the Claimant to unfair and unjustified criticism (throughout employment - mainly GW and to a lesser extent, Sid Yarrow).

l. Refusing to allow the claimant to move to the housekeeping section March 2024 to end of employment GW & Suzanne Barlow, Head of Housekeeping).

7. If so, was the unfavourable treatment because of something arising in consequence of the Claimant's alleged disability, namely those listed in paragraph 4 of the Claimant's ET1/Statement of Case, being that the Claimant:

a. can get angry if he is not given clear instructions which result in him doing the wrong thing;

b. can struggle with group communications, not knowing when to join in, and has difficulty reading emotions and in maintaining eye

contact;

c. prefers things to be ordered, such as packing his shopping in a specific way, and he likes to be in control of plans and finds it easier to make his own version of instructions;

d. likes to have a routine, preferring to do things at specific times and on specific days but he also struggles to keep to a routine and does not like to be interrupted;

e. struggles with busy, noisy or hectic environments, which cause him to become jittery and stressed;

f. can feel claustrophobic if too many people are talking at once, does not like sudden loud noises and struggles to process lengthy written documents;

g. does not like unexpected physical contact.

8. What legitimate aims was the Respondent seeking to achieve when subjecting the Claimant to unfavourable treatment?

9. Was the treatment of the Claimant a proportionate means of achieving those aims?

Failure to make reasonable adjustments

PCP 1

10. The Respondent accepts the provision, criterion or practice submitted by the Claimant in paragraph 105 of their ET1/Statement of Case (*"PCP 1"*), namely the ability for staff members to request a move to another job role, and the Respondent's obligation to consider such requests meaningfully and appropriately (including engaging with staff members to ascertain the reason for any request), and to give reasons for a refusal to allow a move.

11. Did the application of PCP 1 put the Claimant at a substantial disadvantage because of his alleged disability?

12. When applying PCP 1 to the Claimant:

    a. Did the Respondent know, or should the Respondent reasonably ought to have known, that the Claimant was disabled?

    b. Did the Respondent know, or should the Respondent reasonably ought to have known, that the application of PCP 1 would put the Claimant to a substantial disadvantage?

13. Did the application of PCP 1 put the Claimant at a substantial disadvantage in relation to a relevant matter (Claimant's request to transfer to housekeeping) in comparison with persons who are not disabled?

14. Could the Respondent have avoided the above disadvantage by allowing the Claimant to transfer to the housekeeping team?

15. If so, was it reasonable for the Respondent to have taken these steps to avoid the disadvantage?

PCP 2

16. The Respondent accepts the provision, criterion or practice submitted by the Claimant in paragraph 110 of their ET1/Statement of Case (*"PCP 2"*), namely dealing with perceived poor performance by allowing management to speak to staff members in front of other staff.

17. Did the application of PCP 2 put the Claimant at a substantial disadvantage because of his alleged disability?

18. When applying PCP 2 to the Claimant:

    a. Did the Respondent know, or should the Respondent reasonably ought to have known, that the Claimant was disabled?

    b. Did the Respondent know, or should the Respondent reasonably ought to have known, that the application of PCP 2 would put the Claimant to a substantial disadvantage?

19. Did the application of PCP 2 put the Claimant at a substantial disadvantage in relation to a relevant matter (being dealt with for perceived poor performance in front of other staff) in comparison with persons who are not disabled?

20. Could the Respondent have avoided the above substantial disadvantage by doing either of the following?

    a. Talking to him in private;

    b. Allowing the Claimant to take more breaks at a set time; and

    c. Allowing him more leeway in relation to his methods of work.

21. If so, was it reasonable for the Respondent to have taken these steps to avoid the substantial disadvantage?

22. Did the Respondent take such steps?

PCP 3

23. The Respondent accepts the provision, criterion or practice submitted by the Claimant in paragraph 111 of their ET1/Statement of Case (*"PCP 3"*), namely that the respondent operated a holiday policy that prevented employee's taking more than 1 week's holiday during the summer months, namely July, August and September, however, the policy went on to provide that for additional time off a business case must be submitted in writing to the Group Operations Director for consideration.

24. Did the application of PCP 3 put the Claimant at a substantial disadvantage because of his alleged disability?

25. When applying PCP 3 to the Claimant:

    a. Did the Respondent know, or should the Respondent reasonably ought to have known, that the Claimant was disabled?

    b. Did the Respondent know, or should the Respondent reasonably ought to have known, that the application of PCP 3 would put the Claimant to a substantial disadvantage?

26. Did the application of PCP 3 put the Claimant at a substantial disadvantage in relation to a relevant matter (authorising his holiday application) in comparison with persons who are not disabled?

27. Could the Respondent have avoided the above substantial disadvantage by allowing the Claimant to take his holiday?

28. If so, was it reasonable for the Respondent to have taken these steps to avoid the substantial disadvantage?

Harassment

29. Did the Respondent engage in unwanted conduct by doing any of the things listed in paragraph 116 of the Claimant's ET1/Statement of Case, namely:

    a. Forcing the Claimant to clean the staff accommodation (end Aug 2022 – Feb 2023 – Petr Schmidt Dep Gen Manager and GW);

    b. Forcing the Claimant to wear white gloves when other staff were not ((June 2023 – Dec 2023 Petr Schmidt, Dep Gen Manager, and GW);

    c. Shouting at and swearing at the Claimant frequently (throughout employment – mainly GW and to a lesser extent, Sid Yarrow);

    d. Invading the Claimant's privacy (end Oct 2022 – GW);

e. Verbally abusing the Claimant (throughout employment – GW and to a lesser extent Sid Yarrow);

f. Subjecting the Claimant to unwarranted criticism and negative comments regularly from October 2023 to termination (mainly GW; to a lesser extent Sid Yarrow);

g. Accusing the Claimant of not being genuinely ill and openly commenting to staff when he was legitimately signed off due to a hand injury (Sid Yarrow, Head Chef & several kitchen and bar staff 12.6.23);

h. Harassing the Claimant to return to work before his sick note expired (12.6.23 - Sid Yarrow);

i. Refusal to properly consider and/or grant the Claimant's holiday request (GW – June 2024);

j. Subjecting the Claimant to derogatory and insulting language (throughout employment – GW and to a lesser extent, Sid Yarrow);

k. Speaking to the Claimant in a derogatory and abusive manner, including swearing at him (throughout employment – mainly GW and to a lesser extent Sid Yarrow);

30. If so, did the Respondent's conduct relate to the Claimant's disability?

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

32. If any unwanted conduct did not have that purpose, did it nevertheless have that effect?

33. If so, was it reasonable for such conduct to have that effect?

<u>Constructive Dismissal</u>

34. It is denied that the Claimant's resignation amounts to a dismissal within the meaning of section 95(1)(c) Employment Rights Act 1996. The Respondent contends that the Claimant resigned so he could go on holiday.

35. Is it part of the Claimant's pleaded case that his dismissal was discriminatory in that it was caused in more than a trivial way by a pleaded breach of Equality Act 2010? If yes, was the dismissal discriminatory, having regard to the matters set out in para 33 below?

36. Did the Respondent's:

a. treatment of the Claimant, as summarised in paragraph 116 and 121 of

the Claimant's ET1/Statement of Case amount to a series of breaches of the implied term of trust and confidence, namely:

i. the forced cleaning of the staff accommodation;

ii. being forced to wear white gloves when other staff were not;

iii. being shouted and sworn at frequently;

iv. invasion of privacy;

v. being subjected to verbal abuse;

vi. unwarranted criticism and negative comments regularly from October 2023 to termination;

vii. accusing the claimant of not being genuinely ill and openly commenting to staff when he was legitimately signed off due to a hand injury;

viii. harassing the claimant to return to work before his sick note expired;

ix. the refusal to properly consider and/or grant the claimant's holiday request;

x. subjecting the claimant to derogatory and insulting language;

xi. speaking to the claimant in a derogatory and abusive manner, including swearing at him;

xii. the general allegation of bullying and harassment in paragraph 121.

b. actions listed in paragraph 122 of the Claimant's ET1/Statement of Case amount to a repudiatory breach of the implied term of trust and confidence namely the Respondent's refusal to properly consider/grant the Claimant's holiday request.

c. refusal of the Claimant's holiday request amount to the *"final straw"* in a series of breaches by the Respondent?

37. If so, did the Claimant resign in consequence of those breaches?

Time Point

38. Taking Early Conciliation into account, has any alleged breach of the Equality Act 2010 relied upon by the Claimant been brought within the time-limit in s.123(1)(a) of the Act?

39. If not, in respect of any allegation, does that allegation form part of a series of acts / omissions, within the meaning of s.123(3), the last of which was within time?

40. To the extent that the answer to 36 above, is no, would it be just and equitable to extend time to allow that allegation to proceed as part of this claim?

41. Did the application of PCP 3 put the Claimant at a substantial disadvantage in relation to a relevant matter (authorising his holiday application) in comparison with persons who are not disabled?

42. Could the Respondent have avoided the above substantial disadvantage by allowing the Claimant to take his holiday?

43. If so, was it reasonable for the Respondent to have taken these steps to avoid the substantial disadvantage?

44. allow that allegation to proceed as part of this claim?

Witness evidence

45. The claimant produced a revised witness statement dated 12 June 2026, and the Tribunal heard oral evidence from him. The claimant's Mother, Julia Forster, also produced a revised unsigned and undated witness statement and gave oral evidence which largely dealt with the background of the case and what she had been told by the claimant, his partner, Katie Mossop and sister, Morgan Blakely. The Tribunal also heard evidence from claimant's sister, Morgan Blakely, who had been employed by the respondent as assistant restaurant manager in the Inn on the Lake Hotel, Charlie Creig, kitchen porter, Ethan Scott, employed as a kitchen porter at Inn on the Lake Hotel and the claimant's friend and Katie Mossop, the claimant's partner who had worked as a cleaner at the hotel.

46. Kayleigh Blakely, the partner of Morgan Blakely provided a witness statement but did not appear to give oral evidence and the Tribunal has not given any weight to the disputed elements in her undated and unsigned witness statement. The Tribunal noted Morgan Blakely, in her capacity of food and beverage supervisor at Inn on the Lake Hotel, describes in her witness statement how she helped the claimant.

47. On behalf of the respondent the Tribunal heard from Gary Wilson, general manager of the respondent's Inn on the Lake Hotel, who had been in the business for 25 years, Petr Schmidt, deputy general manager, and Suzanne Barlow, duty manager.

48. There were a number of contradictions and conflicts in the evidence. With reference to credibility issues, including the claimant's inability to recollect events the Tribunal had in mind the well-known case of *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) [16] – [22]. *Gestmin* set out a number of principles that are highly relevant to the case before the Tribunal and the claimant's evidence, which the Tribunal found was largely unreliable on the basis that he had difficulties with his recollection, the medical evidence as that the claimant had problems with his memory and yet the claimant was able to give instructions in order that a letter before actions could be sent to the respondent going back in excess of 19 months without any notes or diary entries. After hearing the claimant's oral evidence the Tribunal concluded that the events relied on to a large extend were built up and re-written through discussions with his family, particularly Ms Forster who was instrumental in managing his resignation and this litigation, and his partner, Ms Mossop. In contrast the witnesses appearing on behalf of the respondent gave more credible evidence, although there was an issue as to whether Gary Wilson and/or Suzanne Barlow made the decision not to transfer the claimant to

housekeeping as neither could remember due to the passage of time. The issue was resolved by the Tribunal on the balance of probabilities who concluded that it was initially Suzanne Barlow followed by Gary Wilson who agreed with her, and the decision had no causal link with the claimant's autism.

49. The key principles in *Gestmin* are:

    a. *"We are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are;*
    b. ***Memories are fluid and malleable, being constantly rewritten whenever they are retrieved****;*
    c. *External information can intrude into a witness's memory as can his or her own thoughts and beliefs; both can cause dramatic changes in recollection;*
    d. ***Memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory is already weak due to the passage of time;***
    e. *e.* ***The best approach for a judge to adopt is to base factual findings on inferences drawn from the documentary evidence and known or probable facts****" [the Tribunal's emphasis].*

50. The Tribunal had before it an agreed bundle consisting of 297 pages, the claimant's chronology (not agreed), Skeleton Arguments and covert recordings taken by the claimant on his phone which the Tribunal listened to on three occasions, one with the parties and the other two during deliberations. Having considered the documents to which it was taken to, written and oral evidence, written and oral submissions (which the Tribunal has not repeated in any detail but has taken them into account) and the recordings, the Tribunal has made the following findings of facts resolving to conflicts in the evidence and credibility on the balance of probabilities.

<u>Findings of fact</u>

51. The respondent is a small hotel chain based in Lake District. It is part of a group of six hotels including Inn on the Lake, Ullswater. Inn on the Lake employs approximately 65 employees, including Gary Wilson, the general manager, who has worked in the respondent for over 25 years, Petr Schmidt, deputy general manager as employed as duty manager during the events concerning this litigation and Suzanne Barlow, housekeeping manager at the time, Thomas Batty, deputy general manager at the time (who is no longer employed by the respondent), and Sidwell Yarrow, chef, no longer employed by the respondent.

Neither Thomas Barry nor Sidwell Yarrow (also referred to as Chef Yarrow) did not give evidence in this case as neither were employed by the respondent.

52. The claimant, (DOB 31 Marc 2004) had worked one week for the respondent when he was at school on work experience in the kitchen as a *"pot wash"* washing dishes. Julia Forster, the claimant's Mother, gave oral evidence that the claimant had also worked for the respondent during his summer holidays. Julia Forster did not work for the respondent at any time and was employed as an accountant for a different employer. However, she was friendly with a manager, Madelaine Pretorius (Referred to as *"Maddie"* in communications) and it appears from the contemporaneous correspondence that they were in regular contact including during Madelaine Pretorius' maternity leave.

53. Morgan Blakely and her partner, Kayleigh Blakely, worked for the respondent and had done so for several years. Morgan Blakely started work in June 2018 until her resignation in October 2023, and her position was food and beverage supervisor. Morgan Blakely did not work in the kitchens. Kayleigh Blakely was the assistant restaurant manager and had been employed from July 2019 to October 2023 when she also resigned.

54. In their capacity as managers Morgan Blakely and Kayleigh Blakely would have been aware of the respondent's policies and procedures to which the Tribunal was referred. A number of family members had an input in to the claimant's employment before and during the period leading to his resignation, including the claimant's partner, Kate Mossop, who lived with the claimant before they both moved into hotel accommodation. Julia Forster and Morgan Blakeley were instrumental in the claimant and Kate Mossop taking up employment with the respondent.

55. There is a conflict in the claimant's evidence and that of Julia Forster and Morgan Blakely as to when the claimant worked for the respondent prior to 8 August 2022. The claimant's evidence was that he worked one week in the winter on work experience, and the evidence of Morgan Blakely is that the claimant worked a month during the summer holiday, which was undisputed the respondent's busiest period. The Tribunal concluded on the balance of probabilities that the claimant had worked for the respondent in the kitchen when he was on work experience and during holidays. The effect of the claimant working was that he was fully aware of how busy and pressurised the kitchen was before starting his employment on the 8 August 2022. He was also aware of the fact that people including managers raised their voices in the busy kitchen and would on occasions swear as a matter of course. This was not an issue for the claimant until his holiday request was refused, he decided to resign and build up a case against the respondent, and so the Tribunal found as recorded below.

Allegation 3a: Criticising the Claimant often for slowness, and/or lack of a system in terms of the work he would do (throughout employment – GW).

Allegation 3c: By Mr Wilson jumping in to help the Claimant (throughout employment – GW).

Allegation 3d: Swearing at the Claimant (throughout employment – mainly GW),

Allegation 3d: Speaking to the Claimant in a patronising and demeaning manner and swearing at him (throughout employment – GW).

Allegation 3e: Speaking over the Claimant and not allowing him to make his point (throughout employment – GW).

<u>First day of employment 8 August 2022 and induction.</u>

56. The claimant and Kate Mossop started employment on the same date and attended the induction together. The claimant was initially employed as a food runner and Kate Mossop, who had no previous experience, a cleaner/housekeeper. Whilst the claimant had previously been employed and had work experience with the respondent, Kate Mossop had not. There is a conflict in the evidence as to how long the induction period took and what was said about the claimant's autism. The claimant's evidence was that Morgan Blakely helped him fill in the Medical Questionnaire and ticked the mental health box. Kate Mossop's evidence was that she did not help the claimant complete the form and the claimant ticked mental health at the interview and the induction from start to finish took 5 minutes which included the claimant referring to being tested for *"ASD"* thus putting the respondent on notice that he had autism from the outset.

57. The Induction Sign off Sheets referred to *"a contract of employment must be issued on day one."* The claimant and Kate Mossop were provided with their contract of employment, and the claimant signed each section of the Induction Sheet, the medical questionnaire and the induction sign off sheet. In the Medical Questionnaire the claimant circled all the boxes. The claimant's evidence before this Tribunal was that he cannot read documents and did not understand them,

yet it is apparent that he signed the Induction Sheet on the 5 August 2022 three days before he attended the induction. In oral evidence Morgan Blakely confirmed the claimant had completed the Medical Questionnaire but did not say when.

58. On the balance of probabilities, the Tribunal found the claimant, who had dated and signed the form on the 5 August 2022, confirmed that he had *"mental illness"* and previously worked with noisy machinery. Additional information was requested, but none provided by the claimant, who had also not filled the box under the following note *"Under the Disability Discrimination Act the company is obliged to make reasonable adjustments that may be required to assist you if you are offered employment in the workplace? If yes, please detail below."* The claimant provided no details. Given the contradictions in the evidence, and the credibility issues with the claimant's evidence, the Tribunal concluded on the balance of probabilities that had the claimant indicated at the induction he was being tested for ASD and adjustments were necessary, there would have been a written record, and there is none. The medical evidence that was not before the respondent until these proceedings, was the claimant was experiencing *"anxiety"* and had difficulty remembering *"from only a few minutes ago."* During this period the claimant was being assessed for ASD. The Tribunal concluded the claimant did not inform the respondent that he was being tested for autism until later in the chronology.

59. There is no satisfactory evidence that Thomas Batty, when he carried out the induction, questioned the claimant about his mental health issue and had he done so the Tribunal would have expected the relevant boxes to have been completed, which they were not. Thomas Batty has not been called to give evidence as to what transpired at the induction meeting, and the evidence given by Gary Wilson to the effect that Thomas Batty would have consulted with the human resource department (*"HR"*) had any reference been made to autism was not persuasive. Thomas Batty should have investigated the mental health position, and there is no evidence that he had.

60. The Tribunal does not find credible Kate Mossap's evidence on what took place at the induction, including that that it took 5 minutes for both she and the claimant. The Tribunal satisfied that no reference was made to the claimant being tested for ASD by the claimant or anybody else, and as at the 8 August 2022 to around the 22 September 2022 the respondent was not put on notice that the claimant was disabled under section 6 of the EQA with autism. At no stage during this period did the claimant or members of his family/partner raise any issue with the claimant's employment as a food runner and the Tribunal finds on the balance of probability the Gary Wilson had not behaved in the manner alleged from the outset of the claimant's employment.

The Employment Contract

61. The claimant was employed as a food and beverage assistant working 40 hours per week on a split shift. In clause 6.6 and 6.7 the contract provided that *"**holidays need to be authorised. Holidays requested are unlikely to be approved. Holiday dates must be agreed in advance with the Employer. You must seek agreement from the Employer at least 4 weeks prior to proposed holiday dates in respect of holidays lasting [five] consecutive days or more. Holidays should not be booked or arranged without written approval by the General Manager**, your head of department or management. **You may not have more than 10 consecutive working days holiday at any one time unless specifically agreed by the Employer in writing**" [*the Tribunal's emphasis]. Para 6.8 confirmed unauthorised absences will not be paid and any payment can be deducted from wages.

62. According to para 9 the claimant was contractually required to give the respondent 2 weeks' notice.

63. Para 27 provides that *"accommodation allocated to you may be varied from time to time and at para 27.2* ***"the management and the control of the accommodation shall remain vested in the Employer which shall have a right of entry at all times for the purpose of exercising such management control****. At 27.3 "you should not do or permit or allow anything which may be illegal or immoral or cause nuisance or annoyance to the Employer or to the occupiers of the premises. You shall take necessary care of the interior of the accommodation including all fixates, fittings furnishings and equipment, and shall keep the same clean and tidy."* Costs of any repairs could be deducted.

64. In Schedule one at clause 3 titled *"Unauthorised Absence"* is defined as without genuine medical reasons and without prior permission or without genuine medical reasons without proper notification. Such absence has a very disruptive effect on the organisation of work and can cause serious inconvenience to your colleagues. **For this reason, unauthorised absence cannot be permitted and will lead to disciplinary action, and ultimately dismissal. Unauthorised absence will not be paid**" [the Tribunal's emphasis]. The claimant was aware of the fact that if he took a 4 week unauthorised holiday it would not be paid with the result that the joint impact possible on the claimant and Kate Mossop was a loss of 8 weeks wages, disciplinary action and possibly dismissal and the contractual position was factored in when the claimant decided to take an unauthorised holiday in South Africa during the respondent's busiest period.

65. It is undisputed the claimant received a copy of his contract of employment and if had he any issues with understanding it there were a number of individuals including his family, who could have assisted him with an explanation. The

Tribunal concluded the claimant fully understood the contractual position, as did Julia Forster, Kate Mossop, Morgan Blakely and Kayleigh Blakely.

The Employee Handbook

66. The claimant was provided with a copy of the Employee Handbook at the induction meeting, another reason why it did not take 5 minutes. The Employee Handbook included an Anti-harassment and Bullying Policy, Grievance Procedure and an Equal Opportunity Policy. It included strict rules concerning the appearance of staff, e.g. a maximum of two rings including one wedding ring, clean shaven or trimmed beard, plain earrings, no coloured nail vanish, a requirement to regularly bath. There is no reference to visible body tattoos.

67. Under the Anti-Harassment and Bullying Policy, a number of steps were available to the claimant if he considered himself to have been bullied by Gary Wilson, including speaking informally to a director or in the alternative, raising a grievance, which the claimant did for the first time immediately on his resignation. The Tribunal took the view that the Anti-Bullying Policy was clear and had the claimant any issues with Gary Wilson as he now alleges, members of his family could have helped the claimant raise a grievance, including Julia Forster, who was good friends with Madeline Pretorious. It is notable that Julia Forster raised the issue of the claimant's holiday request before he resigned (see below). It is also notable that in para 6 an employee can raise a complaint of harassment and bullying verbally, in writing or through a third party. Reference is made to the worker obtaining advice and assistance from the HR team.

68. Para 5.2 provides that *"bullying may include overbearing and intimidating levels of supervision or inappropriate derogatory remarks about someone's performance. However, legitimate REASONABLE AND CONSTRUCTIVE CRITICISM OF A WORKER'S PERFORMANCE OR BEHAVIOUR OR REASONABLE INSTRUCTIONS GIVEN TO WORKERS DURING THE COURE OF THEIR EMPLOYMENT WILL NOT AMOUNT TO BULLYING ON THEIR OWN."*

69. The claimant signed the document on the 5 August 2022 3 days before he started work on the 8 August 2022. The Tribunal concluded the claimant had enough time to read the document with the assistance of family and friends including his sister and sister in law, and it is not credible that had the claimant's allegations been as serious as he made them out to be in this litigation, neither the claimant nor his family were unaware of the internal steps that could have been taken to stop the treatment now alleged. The Tribunal concluded taking into account the entire factual matrix, that the claimant has exaggerated his claims for this litigation.

Allegation 3J: Bullying the Claimant by forcing him, and his partner Katie Mossop, to clean (end Aug 2022 – Feb 2023 – Petr Schmidt Dep Gen Manager and GW), and the alleged treatment of the claimant by Gary Wilson.

70. The claimant and Kate Mossop lived together in accommodation provided by the respondent in a room with shared common spaces including a bathroom. The respondent expected all staff provided with accommodation to keep the rooms and common areas clean and instructed all staff to carry out the cleaning, including the claimant, and inspections were carried out. On the balance of probabilities, the Tribunal did not find the claimant was told to clean after other staff. The claimant and Kate Mossop carried out some of the cleaning and it became apparent that the rota system which had been set up was not working because the claimant complied with instructions when other staff did not. Gary Wilson informed all the staff residents, including the claimant, that if the common areas were not cleaned the respondent would arrange for a cleaner to come in and charge the individuals the cost. Eventually, on an unknown date, a cleaner was employed but no charge was made. On the balance of probabilities, the Tribunal found the claimant was not *"intimidated"* into carrying out cleaning; he and Kate Mossop took the decision to clean when others did not, but felt the position was unfair, which it was until Gary Wilson intervened and employed a cleaner at the cost of the respondent. At an unknown date the claimant moved to alternative accommodation provided for by the respondent and cleaning was no longer an issue. The lack of dates underline the poor memory recollection of the claimant and the prejudice caused to the respondent as a result of this out of time claim.

End of September 2022 Claimant provides front page of ASD assessment dated 22 September 2022 marked *"Draft."*

71. At the end of September 2022, the claimant handed to Thomas Batty the first page of a NHS Report clearly marked *"draft"* right across the document confirming he had been diagnosed with Autistic Spectrum Disorder. The report was incomplete, Thomas Batty did not share it with HR and did not provide Gary Wilson with a copy. Thomas Batty informed Gary Wilson of the diagnosis and Gary Wilson did not ask to see the report and he did not discuss it with the claimant. Gary Wilson's evidence was that Thomas Batty asked the claimant if he had any reasonable adjustments and the claimant stated he did not. The claimant's evidence is that he was not asked, which was preferred by the Tribunal given there was no contemporaneous documentation supporting the respondent's version of events and Thomas Batty did not give evidence on this point. Had Gary Wilson asked for a copy of the report it would have been clear to him that there was more including a reference to an autism assessment team meeting held on the 24 August 2022.

The full ASD assessment dated 22 September 2022 prepared by Dr Ben-Hamida, consultant community paediatrician and Lorna Watson, specialist speech and language therapist.

72. The report set out the diagnostic criteria for ASD with reference to the claimant to include the following as paraphrased:

    a. The claimant can follow conversations but struggles to know when to join one and often keeps quiet.

    b. **Insisting on sameness, keeping to routines *"he likes to have a routine but can struggle to keep it. He doesn't like others to interrupt it. He needs to do things at a specific time on a specific day"*** [the Tribunal's emphasis].

    c. *"Dylan struggles with environments at work and gets jittery and stressed. This can be due to there being too many people or it being too loud. If there are too many people talking at the same time he becomes claustrophobic."*

73. The report made no mention of the claimant's allegations concerning Gary Wilson before this Tribunal, despite a reference to his workplace. Bearing in mind the fact that the claimant's family were supporting the claimant during this period, no explanation has been given as to why the respondent was provided with a draft report limited to page one, and not the full report. Likewise, no explanation has been given as to why Thomas Batty did nothing with the first page of the report and failed to ask the claimant for the rest of it.

7 October 2022 medical report provided by Dr Ben Hamida

74. In the 7 October 2022 medical report also provided by Dr Ben Hamida following a meeting attended by the claimant and Kate Mossop on the 5 October 2022, he recorded the following; *"I am pleased to hear that you knew your traits and were having strategies to support you in dealing with them.* ***I am pleased to hear that you have a job at the Inn on the Lake Hotel and you are one of the junior managers and you are enjoying your work****"* [the Tribunal's emphasis]. In the report Dr Ben Hamida discharged the claimant from his clinic. This report was not before the respondent, and its contents undermines the claimant's evidence together with that of Kate Mossop concerning how the claimant was treated by Gary Wilson during this period. At no point was the claimant employed as junior manager, but more importantly as far as the Tribunal is concerned, the medical records reflect Dr Ben-Hamida, consultant

community paediatrician, had a number of meetings with the claimant over time, and it is apparent that the claimant raised no issues concerning Gary Wilson's behaviour towards him and being forced and/or bullied into cleaning his accommodation. The Tribunal concluded that the claimant was capable of pursuing a complaint that Gary Wilson was singling the claimant out with excessive levels of abuse, and yet there was no reference to this by Dr Hamida, and no grievance was raised bearing in mind the fact the claimant had family members in managerial positions who were allegedly looking after the claimant's interests during the majority of his employment. The Tribunal concluded that the claimant's evidence was unreliable and the allegations had no basis.

Allegation 26 d: 31 October 2022 Claimant's allegation regarding cannabis incident invading the claimant's privacy.

75. On the 31 October 2022 Gary Wilson received a complaint from a client who could smell cannabis and immediately carried out an investigation that included knocking on the doors of the accommodation above the Ramblers Bar where the smell was noted. It is undisputed Gary Wilson knocked on a number of doors before he came to the claimant's room which he shared with Kate Mossop. It is undisputed that the claimant was working at the time and would not be in his room. The investigation had nothing to do with the claimant. As far as Kate Mossop's evidence was concerned, in her witness statement, Gary Wilson said he knew it was the claimant's room, did not knock on the door as Kate Mossop was getting dressed and barged in on her when he was allegedly worse the wear from drinking alcohol. The Tribunal did not find Kate Mossop a credible witness on this issue, and concluded on the balance of probabilities, Gary Wilson knocked on her door as he had knocked on other doors, she did not answer, he thought it was empty, let himself in as far as the doorway, noticed Kate Mossop was in the process of dressing and apologised before leaving. The Tribunal did not find it credible that Gary Wilson had walked into the room, as described by Kate Mossop in oral evidence, whose written statement confirmed Gary Wilson looked around the room *"from the doorway"* and asked where the claimant was.

Allegation 3j and 26(b): Forcing the Claimant to wear white gloves when other staff were not ((June 2023 – Dec 2023 Petr Schmidt, Dep Gen Manager, and GW);

76. In approximately December 2022 the claimant moved from the bar as a food runner to the restaurant team, and in April 2023 the claimant moved from the restaurant to the kitchen as kitchen porter, aka pot boy responsible for cleaning and washing the dishes until termination of employment. The dates set out in the agreed list of issues cannot be correct. It is not possible on the chronology

that the claimant was told to wear gloves from June 2023 to December 2023. The claimant was working as a kitchen porter from April 2023 and would not have been required to wear white gloves as he was not serving food. In his witness statement the claimant stated that it had been suggested that he spend more time working in the restaurant as the manager thought it would be a more supportive environment than the kitchen, which could not be the case as the claimant did not work in the kitchen until April 2023. It is undisputed that early on in his employment the claimant tried his hand as a chef but he was unsuitable for the role and it did not work out. The claimant wanted to be a chef as recorded in the medical evidence. In the claimant's ET1 there is a reference to the first 5 months when the claimant worked as a food runner, with visible tattoos. The dates are confusing and inconsistent, however, there was a short period of time on an unknown date when the claimant and those colleagues who had visible tattoos were required to wear white gloves during food service as the respondent aimed towards two rosettes and fine dining as befits a five star hotel. The white gloves were also used because the plates were very hot, and the Tribunal concluded the white glove wearing did not exclusively affect the claimant and was unconnected to his autism.

02 & 03 2024 allegation: Claimant requests move to housekeeping.

Allegation 3l: Refusing to allow the claimant to move to the housekeeping section March 2024 to end of employment GW & Suzanne Barlow, Head of Housekeeping).

77. The claimant continued to work for the respondent without incident. Nothing was heard from the claimant, his partner or members of the family until the claimant requested a move to housekeeping in February 2024 when the claimant spoke with the acting head chef explaining he wanted to move to housekeeping. The claimant also spoke with Gary Wilson, who understood the claimant wanted to work in the same team as Katie Mossop so he could spend more time with her. Gary Wilson indicated he would speak to Suzanne Barlow, which he did. Nobody got back to the claimant.

78. The contemporaneous evidence reflects text messages between the claimant and Kate Mossop concerning the claimant's request for a move to housekeeping. Kate Mossop's evidence was that the claimant had a breakdown in February 2024 and in April 2024 that he was feeling *"suicidal."* This evidence is not reflected in the medical records and unknown to the respondent at the time.

79. The contemporaneous evidence is key. The claimant exchanged WhatsApp messages with Kate Mossop on the 21 April 2024. Kate Mossop wrote *"I've spoken to Sue she said she will speak to Garry bout u moving to housekeeping tomorrow when he's in. She said only problem is days off and holidays but we struggle to get the same ones anyway not to mention least if we don't have the same days off we will still have the afternoon together so I said it would still be a better outcome."* The WhatsApp message undermines the claimant's case that he was seeking a transfer to housekeeping for mental health reasons and had told either the acting head chef and/or Gary Wilson that this was the reason. The Tribunal concluded on the balance of probability, preferring Gary Wilson's evidence supported by the contemporaneous WhatsApp message that the claimant had informed him he wished to be transferred to housekeeping so that he could spend more time with his partner, it was reasonable for Gary Wilson to accept this explanation and it did not cross his mind that there was a link with the autism diagnosis, which was not mentioned by the claimant at the time as the reason for seeking the transfer to housekeeping cleaning duties.

15 April 2024 holiday boking update

80. All employees, including the claimant, received an email sent on the 15 April 2024 at the start of the new holiday year setting out rules requiring written approval of holidays on a holiday form including taking a maximum of 10 consecutive days at any one time unless agreed in writing and *"special considerations for July, August and September: during the busiest trading months, only 1 week's holiday will be authorised per person…for additional time off a business case must be submitted to the Group Operations Director for consideration. Adherence to these guidelines is crucial…"* The claimant was aware of the requirements before he booked flights to South Africa for a four week holiday without obtaining authorisation or making a business case and the Tribunal found the evidence given by the claimant and Kate Mossop that they were not aware is not credible taking into account the contemporaneous documents.

Allegation 1 June 2024: Claimant suffers hand injury. Claimant's Xbox allegations.

Allegation 26 g: Accusing the Claimant of not being genuinely ill and openly commenting to staff when he was legitimately signed off due to a hand injury (Sid Yarrow, Head Chef & several kitchen and bar staff 12.6.23);

Allegation 26h: Harassing the Claimant to return to work before his sick note expired (12.6.23 - Sid Yarrow).

Allegation 29g & 33vii: accusing the claimant of not being genuinely ill and openly commenting to staff when he was legitimately signed off due to a hand

injury (Sid Yarrow, Head Chef & several kitchen and bar staff 12.6.23);

Allegation 28h & 33viii: harassing the claimant to return to work before his sick note expired (12.6.23 - Sid Yarrow);

81. The date of the allegation 12 June 2023 is confusing as there is no evidence the claimant sustained an injury and submitted sick notes in June 2023, and the allegations brought in relation to Sid Yarrow cannot have taken place on the 12 June 2023. The claimant is confused about the dates and the number of sick notes he submitted in June 2024, which calls into question the reliability of his evidence.

82. On the 1 June 2024 the claimant had an injury at work and by the 3 June 2024 he was absent and submitted a sicknote from 3 to 6 June 2024 confirmed *"thumb injury not for work"* with no adjustments suggested.

83. For the period 5 June to 12 June 2024 a second sick note was issued *"left thumb injury amended duties…unable to do work involving use of left thumb."*

84. On the 5 June 2024 the claimant asked Gary Wilson if he could return to work on lighter duties working in housekeeping, which Gary Wilson refused on the basis that the claimant had been signed off unfit for work, housekeeping duties were not light duties and the claimant's hand would have been further damaged. The claimant did not indicate that housekeeping duties were required as an adjustment for him due to autism and the difficulties he had working in the kitchen, and nor did he produce any medical evidence to this effect. The claimant's case is not that his thumb injury was a disability that required adjustments, it was a minor injury that resulted in a short period away from work and this had nothing to do with the claimant's autism.

85. The claimant was absent from 3 June and returned to work on the 12 June 2024.

<u>Gary Wilson's visit</u>

86. Gary Wilson visited the claimant during his sickness absence to check to see how he was feeling and found him playing on the X-box with friends. When asked how he was feeling the claimant said he was *"okay"*. Gary Wilson reported to staff that the claimant *"okay"* and the claimant was playing on his X-box. The Tribunal preferred Gary Wilson's evidence that he did not *"accuse the claimant"* of not being genuinely ill to other employees, managers and Sid Yarrow, and he did report the claimant was *"okay"* and playing on his X-box which was factually correct.

87. The contemporaneous documents reflect a WhatsApp exchange took place on 9 June 2024 between the claimant, Charlie Craig and Kate Mossop concerning the claimant's return to work on the 10 June 2023 to which the claimant responded to the effect that he had a sick note until 12 June 2024 and it was illegal. The claimant agreed to come in and talk to Sid Yarrow. It is undisputed the claimant did not return to work on the 10 June 2024, and he returned when the second sick note expired. The claimant's written evidence is that Sid Yarrow told the claimant he had already been off for a week and the doctors could not dictate when he could work, *"belittled"* the claimant by stating he was not injured and *"all he was doing was playing games"* information he had allegedly obtained from Gary Wilson. In the claimant's grievance submitted on the 7 August 2024, some 2 months after the alleged incident had taken place there is no reference to the specific allegations referred to above as set out in the Grounds of Complaint. In the letter before action dated 19 November 2024 a chronology is set out which gives a different picture, namely, that Sid Yarrow told the claimant's colleague he wanted the claimant back at work *"unless he handed in another sick note"* when the sick note expired on 12 June 2024. The fact is that two sicknotes were issued, the first expired on 6 June and the second 12 June 2024.

88. Taking into account the lengthy delay of approximately five months before the allegation was raised for the first time in the 12 page letter before action, and the less than credible evidence given by the claimant on a number of other matters, the Tribunal was not satisfied that Sid Yarrow had accused the claimant of not being genuinely ill and openly commented to staff when he was legitimately signed off due to a hand injury, harassing the claimant to return to work before his sick note expired. Informing the claimant that Sid Yarrow wanted the claimant to return to work unless he had a sick note does not amount to harassment, and the factual matrix reflects the claimant returned when his sick note expired with no consequences to him.

89. Charlie Creig's evidence was that the claimant had bene signed off for *"a week or two"* and he had not witnessed what transpired between the claimant and Sid Yarrow.

90. Taking into account the entire factual matrix in this case and credibility issues, the Tribunal was satisfied on the balance of probabilities that Gary Wilson had not told Sid Yarrow and other staff the claimant was fabricating his injury and had related the fact that the claimant was *"okay"* and playing on his X-box with friends, which he was. Sid Yarrow did not tell the claimant he was *"not genuinely ill"* and did not harass the claimant to return to work before his sick note expired. The claimant returned on the expiry of his sick note and that was the end of the matter. In arriving at this finding the Tribunal took into account the fact that Sid Yarrow did not give evidence about this matter concluding the burden of proof

had not shifted to the respondent. If the Tribunal is wrong on this point and the claimant had met the burden of proof, the Tribunal in the alternative is satisfied that the complaint was substantially out of time against a backdrop of the claimant making no mention of this allegation until the letter before action, and the respondent was substantially prejudiced as a result.

Allegation 3g: Giving mixed communications to the Claimant in relation to his holiday request, giving him the expectation that the request would be granted (c.24-30 June 2024 - Leon Knoetzer, manager & Sid Yarrow – head chef)

91. On the expiry of his sick note the claimant returned to work in the kitchen on the 13 June 2023 where he continued to work without complaint.

92. By this date Suzanne Barow had recruited two new members of the housekeeping team which comprised of five people including Katie Mossop and decided with Gary Wilson not to transfer the claimant into her team. Suzanne Barlow's understanding at the time was that the claimant wanted to work in the same department as Katie Mossop and she had concerns about this, including them not being able to align holidays and shifts. Suzanne Barlow did not have in her mind the claimant's autism diagnosis when she made her decision and she had not seen the medical evidence before this Tribunal until this litigation or noticed any changes in the claimant's mental health during the relevant period. At no stage was Suzanne Barlow informed the claimant wanted to transfer due to mental health reasons and Katie Mossop's evidence that she was is not supported by any contemporaneous documentation and found not to be credible on the balance of probabilities.

<u>26 June 2024 booking the holiday to South Africa</u>

93. The contemporaneous documents show that on the 26 June 2024 at 5.40 the claimant and Kate Mosspo's flights to South Africa were booked. Julia Forster attempted to change the accommodation at Kruger National Park on the at 6.24 to include the claimant and Kate Mossop. At 6.55 Julia Forster instructed the holiday company not to change the accommodation because the claimant had fallen ill (when he had not) and on the 27 June 2024 she confirmed that additional accommodation was required from 12 August to 11 September 2024.

94. By the 27 June 2024 the accommodation at Kruger National Park could not be changed for January 2025 because it was fully booked.

95. The contemporaneous documents reveal two matters that go directly to credibility. Julia Forster was prepared to lie to the holiday company with a view

to avoiding cancellation charges and in direct contrast to information provided by the claimant to the respondent about cancelling his holiday and rebooking it in January 2025, the claimant was aware from 27 June 2024 that he could not have rebooked for January 2025 because there was no available accommodation.

Allegation 3h, 26i and 33aix: Failing to deal with the Claimant' holiday request in accordance with the respondent's stated policy (GW – June 2024).

Claimant's request for holidays

96. In or around 26 June 2024 the claimant asked Leon Knoetzer, deputy manager, for 4 weeks holiday in the knowledge that the respondent's holiday policy only allows staff one week's leave during the months of July, August and September and a business case was required. The claimant was aware that approval was not routine, and the claimant's oral and written evidence is confused. The Tribunal is satisfied that when the claimant asked Chef Yarrow for consent it was immediately refused. Asa result on the 26 June 2024 the claimant approached Gary Wilson and orally requested 4 weeks holiday during August and September 2024 explaining to Gary Wilson he was accompanying his Mother and Katie Mossop to South Africa. It is undisputed that the claimant had already booked his flights to and from South Africa on the dates requested. The claimant had booked the flights on the 26 June 2024 for a flight on 10 August 2024 returning 12 September 2024. Gary Wilson refused the claimant's request as the business could not spare him and Kate Mossop. The claimant did not attempt to put forward his application and/or a business case orally or in writing.

97. The Tribunal finds that as at 26 and 27June 2024 the claimant's flights and accommodation were booked, there was no prospect of the claimant changing his holiday dates to January 2025, his holiday request had been refused and following discussions with Kate Mossop a decision was made to resign, which Kate Mossop did on the 6 July 2024. The plan was to take the holiday and then find work in Sellafield if Gary Wilson did not change his mind.

98. On the 27 June 2024 Maddie Pretorius exchanged WhatsApp messages with Julia Forster. Maddie Pretorius on maternity leave and had agreed with Julia Forster that she would a photo shoot of the newborn baby. The WhatsApp recorded Julia Forster stating *"I should be through one day next week when Katie and Dylan are off to help them with their passport application. Can I let you know which day…all good.* ***Going to South Africa for a much needed trip to Kruger part in Aug and Sept whoooohooo****."* Maddie Pretorius responded *"…yes you mentioned last time that ooh not long to wait. Bet you are so excited.*

You are defo right; you deserve a good break…" Julia Forser wrote *"Kate has managed to get the time off but Gary isn't letting Dylan have the time off. When we got Kate's okay,* ***we assumed Dylan's would have been approved so booked and paid for their flight. Now Gary is saying Gary can't have the days off. It's so dam frustrating****"* [the Tribunal's emphasis]. It was left that Maddie Pretorius would try and find out what had happened.

99. Gary Wilson disputes the claimant's evidence that he was told by the claimant that he wanted to go to South Arica because of his Mother's threat to commit suicide. There is no contemporaneous evidence supporting the claimant's allegation that he told Gary Wilson his Mother had threatened to commit suicide in South Africa which is why he wanted to go on holiday with her, and the Tribunal preferred the evidence given by Gary Wilson that he was not told this. It is notable that the claimant and Julia Forster give conflicting evidence on the suicide threat. The claimant's case is that he needed to accompany Julia Forster because she intended to commit suicide in South Africa, Julia Forster's evidence is that she intended to visit South Africa and Kruger National Park before committing suicide in the UK. Either way, Gary Wilson was unaware and the only information (on a date which is unclear) he was given was that Julia Forser had mental health issues. At the time Gary Wison was aware against of Julie Forster's communications with Maddie Pretorius and providing assistance to the claimant and Katie Mossop which included picking them up to sort out passports.

100. It is notable that the claimant did not surreptitiously record the meeting he had discussing his holidays with Gary Wilson on 6 July 2024. However once his holiday request had been refused the claimant covertly recorded conversations with a number of people and it is apparent to the Tribunal that he was preparing for this litigation in so doing. It is notable that the claimant took it upon himself to question colleagues about Gary Wilson in the knowledge that he was recording answers when they had no idea they were being recorded. Likewise, during recorded conversations with Gary Wilson (see below) whilst the claimant intentionally recorded it and behaved accordingly, Gary Wilson did not know he was being recorded. The Tribunal has spent a considerable amount of time listening to recording 4 and reading a number of transcripts, noting it was common for people to swear including Gary Wilson and the claimant, concluding that it was a regular practice within the respondent. In addition, it is also clear that people were under pressure in the kitchen, service and housekeeping and the Tribunal accepts high levels of stress is a factor in the five star hotel industry where keeping guests happy (and business coming in) a priority. The claimant was aware of the work pressures early on when he carried out work experience and was employed during school holidays, and the swearing and stress employees found themselves under, for example during service, would not have taken him by surprise as it was part of the job and so

the Tribunal found, concluding the claimant's attitude towards the respondent and Gary Wilson changed when his holiday request had been refused and the claimant was unable to change the accommodation dates for January 2025.

Meeting 6 July 2024 covertly recorded by the claimant

101. The claimant has produced a transcript which includes an initial commentary. The conversation with Gary Wilson covered the rumours around the business that the claimant and Katie Mossop were resigning as a result of their holiday request being refused. The agreed transcript is informative and reads as follows. The emphasis is the Tribunals;

"Gary: Well I've heard you're putting in your notice…"

Dylan: "**No, we're not putting our notice in. When the first time it happened, when the holidays got declined, I was saying beforehand about how stressed I was and I said I need to leave if it doesn't get accepted**…*we weren't planning on leaving in August because we cancelled our flights to go down, luckily we had the insurance to be able to cancel."*

Gary: "…I find out so much from other people, on we're going to South Arica for a month. ***Alright, he told me his bloody mum's ill and he needs to be with his mother****…You know and then I find out,* ***I see your mum pulling in the other day on her car, driving, gets out the car, looks as right as a bobbin, taking you to and for your passports and I'm told oh his mums really really ill…he's really worried about her****…"*

Dylan: ***It's not physical its depression…it's not physical illness****…"*

Gary: ***"All this exaggeration, you know****."*

102. The claimant explained his Mother had approached Maddie Piaetorius about the holiday when she was taking photo shoots. Gary Wilson was aware of the exchange with Maddie Piaetorius.

103. Part way thought the meeting Suzanne Barlow entered the meeting to discuss the recent email about holiday restrictions and Katie Mossop bypassing the correct procedure.

104. *Suzanne Barlow: "…she knew that wouldn't be granted that month, so obviously Gary said no we can't do that, we can't have a month [off] so then I've got all the staff coming up to me saying on she's going to hand her notice*

*in…she's been talking to Maddie about it…**obviously the company can't afford to allow people to have a month off in August…she told me you were thinking of leaving around the 8 to 9 in August**…"*

105. Dyan: *"**our 2 plans were either to do that, because that was our first one were everything was going down, I was under stress, we might just have to leave. But I've been talking with my Mom to see if we can re-arrange the holiday towards January when it is quieter.** Then we'd be able to go with her…until we can go to South Africa with her so she can get her head straight before we can come back. We applied for August because it was literally a spur of the moment thing…and when we got told we couldn't do it, I obviously was stressed out because I didn't realise that August was our busiest like…"*

106. A discussion took place about the resignation and notice periods and the claimant stated *"**we are still trying to figure out what we're doing, we're having the holiday in January or whether were leaving later on in the year…were not starting work anywhere else, we are thinking of going once we come back from our holiday in case we do leave or we come back in January because were trying to save here so we can get a house. Getting another job somewhere else without live in would make that harder. So that's what we are trying to do with that, still balancing the pros and cons of both sides…cause currently we don't have any flights to go down there so in order to get it its gonna cost a lot more, so we can't really leave the job now until January to be able to afford the flights again…"***

Garry: *She's handed her notice in hasn't she?*

Suzanne: *She's writing her notice for me this morning. She's told me she's going working at Sellafield.*

Dylan: ***No we're planning on working at Sellafield when we leave….***

Suzanne: *You're her partner and you're telling a different tale than what she is."*

Dylan: *I'm the one that's arranging everything. Yeah that's why I came to sort it…"*

Gary: *"She's handed her notice in?"*

Suzanne: *"yeah."*

Gary: *"**As far as I'm concerned I don't want to renege it…Just get on to Indeed and just get somebody else."***

Gary:…*Kate must have told you she had that conversation with Sue…*

Dylan: *"**She said we may not be able to get it and I said the least we could do was try to see if there is a way**…I was going to be coming to speak to you but Leon was the only person in at the time."*

Gary: *"Leon's been with me for 2 weeks and he's leaving…he's not an experienced manager and I sign off all wages. I sign off all holiday forms. Not Leon, not Petra, Not Jonnie Wild, not Maddie, the general manager because I am constantly responsible for everything that goes on and I have to answer to a board of directors…and after you've know me for such a long time and you've come to me so many times I've always helped you. You went to Leon; Leon can't sign it off."*

Gary: *" so what do you want to happen right now then."*

Dylan: *"**If I could possibly have a word with Kate just to discuss between the two of us for the plan going forward and what would be best way to help out the company and ourselves at the same time**…"*

Suzanne: *"I was like that were a bit naughty Katia **because you know you could only have a week. We had this conversation. Nobody has been allowed time of in the summers before** and after I fought to be able to get em to have holidays in the summer and then she's tried to take the piss, oh well, then I'll have a month then. You know that's just not going to happen…**I need to know so if you have a chat and have a think about it today if you can just let me know Dylan what the plan is going forward. Whether you are going to stay until Christmas and then take your month off in January. Start afresh somewhere else or whatever. Just let me know."***

107. On the 7 July 2024 the claimant and Katie Mossop met with Suzanne Barlow and the claimant covertly recorded the conversation which included the following:

108. *Dylan:…**We're staying till January as we might be leaving after January. We were looking for other places,** how the rumour spread that we were leaving when it first got declined. **I was pissed off in the kitchen and I said I'm fucking done and because I was panicking for my mom**. But then that was it and I was blowing my top off and then trying to sort out another plan from there. **We were looking at other places and then we were balancing whether it was worth doing this because of our savings buying a house, doing that or should we stay a few more months until January, we go on our holiday and then we leave shortly after that…So that is the plan**."

109. It was left that Suzanne Barlow would look at holiday entitlement in January 2025 and speak with Gary Wilson.

18 July 2024 incident and covert recording

110. It is undisputed that the claimant was working cleaning dishes and before service ,and it became apparent to Gary Wilson that the claimant had fallen behind in his work which would have a knock on effect on service and the clients. Gary Wilson Rolled up his sleeves and carried out the claimant's duties to help the claimant out, which he continued to do before noticing the claimant had disappeared. When he asked about where the claimant was, the chefs stated the claimant had gone on a break. Gary Wilson was not happy and when the claimant returned from his break had a discussion with him. Sydwell Yarrow opened the conversation which was covertly recorded by the claimant. Not all the recording has been set out below.

111. Sydwell: *Hey Jou, You should really start to think. And you should be ashamed that a 64 year old man doing your job for you. Like seriously. There is a pile of stuff waiting there and you fuck off on a break."*

112. Dylan: *"But al those pots were already washed though."*

113. Sydwell: *Noooo, Gary took 10 minutes to help you guys and then you just fucked off. You should be ashamed of yourself.*

114. Gary*: I can't tell you how angry I am. I go in and say I'll give you ten minutes to help you get this cleared off because we've got service starting soon, I turn around and you've fucked off on a break."*

115. Dylan*: I go on my break at 6 because, if I go."*

116. Gary:". What I don't want is someone to go oh look he's fucking washing up. I'll fuck off on a break. That is insulting."

117. Dylan: *"well I wanted to."*

118. The Tribunal has listened to recording four three times and read the transcript three times concluding that it was not a disciplinary hearing in any form and there was no indication from the claimant that he had a break due to the effect of autism. Gary Wilson sounded upset and emotional, at the end of his tether and frustrated by the claimant's behaviour and explanation for it; *"well I wanted to."* Gary Wilson was not abusive, there was some swearing but that was the norm in the kitchen which included swearing from the claimant as evidenced in other covert recordings, for example, the claimant used the word *"Motherfucker"* and other people also swore as a matter of course. The claimant did not say he likes to have routine because of autism and there was no reference to autism by either the claimant or Gary Wilson, who did not have in

his mind the claimant's disability. It was unclear who else was present, according to the recording there were background noises and distant talking. Neither the claimant nor Ethan Scott referred to any other person by name, and it appears Ethan Scott only heard a small part of the conversation at the start as confirmed in para 9 and 11 of his written statement. The Tribunal has insufficient evidence to be satisfied that other employees overheard the conversation. Ethan Scott's limited recollection assisted by the claimant playing the recordings to him before he wrote his witness statement.

119. Taking into account the contemporaneous documentation and covert recordings, the Tribunal was not satisfied that the claimant took a break at 6pm on every shift he worked. The evidence before the Tribunal was when the kitchen was busy and people would take breaks, including the claimant, at various times including 5pm. There were no set break times.

120. The claimant also covertly recorded a conversation with someone from payroll about him starting work early and not being paid, reflecting the claimant had no issue discussing matters such as timesheets, clocking in and out and being underpaid.

18 July 2024 covert recording conversation with Ethan Scott

121. On the 18 July 2024 the claimant spoke with Ethan Scott about the 17 August 2024, covertly recording the conversation. The claimant did most of the talking asking what had happened when he was on his break. The reason he gave for taking his break had nothing to do with autism. He said *"So, I went on break at six cause if I had left any later it would be during middle of service and you know how hectic it can get. Like it wasn't really busy that night but you really didn't want to take the risk of it being absolute hell…**it's purely just because Gary is really trying to force me out at this point I would say. Especially him and the chef, they just don't like me**."* The claimant was asking leading questions suggesting answers and the Tribunal found it appeared the claimant was trying to build a case against Gary Wilson and Sidwell Yarrow including constructive unfair dismissal.

122. The claimant's time recording issue was resolved by Gary Wilson by the 2 August 2024 after what the claimant describes to have been a *"constructive discussion."* The Tribunal considered the transcript which reflected an amicable discussion between the claimant and Gary Wilson, with no sense of a manager harassing or bullying him. The discussion was supportive to the claimant, who covertly recorded it.

123. The claimant was due to fly to South Africa on the 10 August 2024 in four days' time without consent and this is the context of the claimant's resignation,

which he had referenced in earlier meetings as a possible option. As indicated above, the claimant was aware of the contractual position. If he went ahead and took the holiday with Katie Mossop they would lose 8 weeks salary and disciplinary investigation with the possibility of a dismissal could result. Kate Mossop had decided to resign earlier and the claimant had threatened resignation at the 6 July 2024 meeting before the incident on the 18 July 2024 which is not relied on as a last straw incident. The Tribunal concluded the claimant took the decision to resign for one reason only, and that reason was the Gary Wilson's refusal to agree the holiday request. The claimant decided to take the holiday in the knowledge that he could not change the date of it to January 2025.

Resignation

124. On the 6 August 2026 the claimant resigned *"with one week's notice…my last working day will be 13 August…I will be off sick for 7 days due to work related stress. I have submitted a resignation to HR advising them of all the grievances related to my resignation…"* The claimant attached a sick note for the period 6 August to 13 August 2024 referring to *"work-related stress."* The sick note was for 7 days and made no mention of the more serious conditions relied on by the claimant including suicidal thoughts, for which there is no medical evidence whatsoever. There is no reference to the claimant's autism.

125. Following his resignation the claimant did not return to work, and Julia Forster informed Gary Wilson of the position when she handed the written resignation to him.

Claimant's grievance

126. The claimant's grievance was sent to Maria Boyd on the 7 August 2026. The grievance raised a number of allegations including whistleblowing, constructive dismissal, verbal abuse by Gary Wilson and Sidwell Yarrow, mental abuse, racism including Gary Wilson referring to a *"pack of Jews," "gaslighting"* and denied leave, age discrimination, injury on duty, intimidation and disability discrimination. Turning to the allegation of disability discrimination the claimant alleged he had been *"mocked by management"* and mental health deterioration in February 2024 when he was not granted days off with his partner, noise pollution, sleep deprivation, financial abuse and lack of food. The claimant referred to having a legal advisor.

127. On the 19 November 2024 the claimant's legal advisors wrote to the respondent in a letter before action and raised a number of allegations referring to the claimant having suicidal thoughts and on two occasions racism when Gary Wilson said *"fucking Jew brigade"* having interpreted a transcript

incorrectly as conceded at this hearing when it was accepted Gary Wilson had not used such racist language. This gives rise to a credibility issue with the claimant and how he was using the covert recordings. The final straw was described as follows: *"being accused of lying by Chef Sidwell…this accusation went to the heart of his honesty and integrity and came to the view that he could not continue to work in an environment where he felt that people did not trust him."* The case the claimant's solicitors were putting forward was different to that before the Tribunal as set out in the Grounds of Complaint and agreed list of issues. Para.122 (page 66) pleads that the *"final straw is the respondent's failure to deal reasonably and sympathetically with the claimant's holiday request…"*

128. The claimant went to South Arica with Julie Foster and Kate Mossop on 10 August 2024 returning to UK on the 11 September 2024.

129. The claim was presented on the 14 January 2025 following ACAS early conciliation that took place between 6 November 2024 to 16 December 2024.

Law

130. The law is largely agreed between the parties.

Disability discrimination arising from disability

131. Section 15(1) of the EqA provides-

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably 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.

132. The Equality and Human Rights Commission Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with that of another person. It is only

necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

133. Unfavourable treatment is not the same as detriment. This is relevant to Mr Forster's claim brought under section 15 that Mr Wilson "jumped in to help him" throughout his employment. Helping somebody in their work is unlikely to be considered unfavourable treatment, and it was not in the claimant's case. The test is whether a reasonable worker would consider that the treatment is unfavourable. Useful guidance on the proper approach to a claim under s.15 was provided by Mrs Justice Simler in the well-known case of Pnaiser v NHS England and anor [2016] IRLR, EAT:

1. *"A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

2. *The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it. The Tribunal examined closely the conscious and unconscious thought process of the respondent's witnesses, particularly Gary Wilson who assisted the claimant when he felt it was needed, concluding the explanations they gave were untainted by disability discrimination.*

3. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport [1999] IRLR 572.* A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…"

4. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. …the statutory purpose which appears from the

wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, 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.

5. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. Objectively assessed helping the claimant carrying out his duties in the circumstances of this case was not unfavourable treatment and it was, the justification defence succeeds given the fact the claimant was working in a commercial kitchen taking into account the ECHR Employment Code.

134. In *Sheikholeslami v University of Edinburgh [2018] IRLR 1090,* the EAT held that the approach to this issue requires :An investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (*ii) did tha*t something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the “something” was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.

135. The actual disability does not need to be the cause of the unfavourable treatment under s.15 but it needs to be *“a significant influence”* or *“an effective cause of the unfavourable treatment” - Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893,* EAT. 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 – *Pnaiser* cited above.

136. It is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably. The unfavourable treatment must be because of the something which arises out of the disability - *Robinson v Department of Work and Pensions [2020] EWCA Civ. 859.*

Objective justification

137. A legitimate aim for the purposes of S.15 of the EqA should not be discriminatory in itself and should represent a real, objective consideration. Case law has recognised a range of legitimate aims, including health and safety and the operational needs of the business.

138. The test of justification in S.15(1)(b) requires that the treatment complained of amounts to a proportionate means of achieving a legitimate aim. weighing an employer's justification against the discriminatory impact, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end.

139. The EHRC Employment Code sets out guidance on objective justification that largely reflects existing case law in this area. In short, the aim pursued should be legal, should not be discriminatory, and should represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective. In short, the aim pursued should be legal, should not be discriminatory in itself, and must represent a real, objective consideration.

Disability discrimination – failure to make reasonable adjustments

140. The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 (*"EqA"*). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA.

141. The following matters are key for the Tribunal to decide:

a. What is the provision, criterion or practice (*"PCP"*), physical feature of premises, or missing auxiliary aid or service relied upon?

b. How does that PCP/physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage or to have provided the auxiliary aid or service?

e. Is the claim brought within time?

142. The EHRC's Employment Code states that the term PCP 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A PCP may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a *"one-off"* or discretionary decision' -para 4.5. The protective nature of the legislation meant that when identifying the PCP, a Tribunal should adopt a liberal rather than an overly technical or narrow to identify what it is about the employer's operation that causes disadvantage to the disabled employee.

143. *In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12* the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

The PCP

144. In *Lamb v The Business Academy Bexley EAT 0226/15* the EAT commented that the term "PCP" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

145. "*The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances…The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the* position would be if the disabled person in question did not have a disability" *Sheikholeslami* above.

146. A substantial disadvantage is one which is more than minor or trivial – s.212(1) EqA 2010. The ET must be satisfied that the PCP has placed the disabled person not simply at some disadvantage viewed generally, but at a disadvantage which is substantial - *Royal Bank of Scotland v Ashton [2011] ICR 632.*

Knowledge

147. With reference to the knowledge defence in paragraph 20 of Schedule 8 EQA the defence will succeed unless the Tribunal is satisfied that the employer had knowledge (either actual or constructive) of both the disability and the substantial disadvantage.

Reasonableness of adjustments

148. The statutory duty is for the respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of *"reasonableness"* imports an objective

standard - *Smith v Churchills Stairlifts plc [2005] EWCA 1220.* It is important to identify precisely the step which could remove the substantial disadvantage complained of - *General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43.*

149. The factors found in paragraph 6.28 of the Code is a reminder of some of the factors likely to be relevant to reasonableness. An important consideration is the extent to which the step will prevent the disadvantage.

Harassment

150. The EHRC Employment Code provides that unwanted conduct can be subtle, and include ‘a wide range of behaviour, including spoken or written words or facial expressions’ para 7.7. Where there is disagreement between the parties, it is important that an Employment Tribunal makes clear findings as to what conduct actually took place.

151. Section 26 EQA covers three forms of prohibited behaviour. In the claimant’s case the Tribunal is concerned with conduct that violates a person’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1) It states that a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a), and 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 — S.26(1)(b).

152. The word ‘unwanted’ is essentially the same as ‘unwelcome’ or ‘uninvited’ confirmed by the EHRC Employment Code at para 7.8. Unwanted conduct means conduct that is unwanted by the employee assessed subjectively.

153. S.26(4) states that, in determining whether conduct has the proscribed effect, a tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There can be cases where the claimant when alleging the acts violated his or her dignity, is oversensitive and it does not necessarily follow that an act of harassment had objectively taken place despite a subjective view that it had.

154. In order to decide whether any conduct has either of the proscribed effects under s.26 (1)(b) EA 2010, the ET must consider both (by reason of s. 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of s.4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the

objective question). All the other circumstances must also be taken into account (s.4(b)) - *Pemberton v Inwood [2018] EWCA Civ 564.*

155. 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 - *Richmond Pharmacology v Dhaliwal [2009] IRLR 336.* It is submitted that a claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention.

Related to a protected characteristic.

156. This is a very broad test, but some guidance about how the Tribunal should approach the issue was provided *in UNITE the Union v Nailard [2018] EWCA Civ. 1203*. It should make findings as to the mental processes of the alleged harassers, which the Tribunal has done in the case of Mr Forster, satisfied that the conduct alleged was not related to the claimant's autism or its effect.

157. Whilst the view of a claimant might be that the conduct related to the protected characteristic is relevant, it is not determinative - *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 EAT.* The ET has to apply an objective test in determining whether the conduct was related to the protected characteristic in issue. The intention of the actors concerned might form part of the relevant circumstances, but it is not the only factor.

<u>Burden of proof</u>

158. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the 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 provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

159. In determining whether the respondent discriminated the guidelines set out in *Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332* and *Igen Limited and others v Wong [2005] IRLR 258* apply, as affirmed in *Ayodele v CityLink Ltd [2018] ICR 748*. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the

respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Constructive unfair dismissal

160. Section 95(1)(c) of the Employment Rights Act 1996, as amended (*"the ERA"*) states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

161. "In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract" - Harvey on Industrial Relations and Employment Law.

162. The Tribunal's starting point was the test laid down by the Court of Appeal in *Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221* whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal *"made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."* This is an important point in the claimant's given the respondent complied with the terms of the contract when it refused the claimant's holiday request.

The implied term of trust and confidence

163. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of *Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121*, and this is an objective test.

164. The House of Lords in *Malik v Bank of Credit; Mahmud v Bank of Credit [1997]* UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which *"a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited,"* and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Course of conduct

165. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a *"last straw"* incident. The last straw itself does not need to amount to a breach – *Lewis v Motorworld Garages Limited [1986] ICR 157 CA*. Glidewell LJ said at para 169F *"The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which*

leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

166. The Court of Appeal decision in *Omilaju v Waltham Forest London Borough Council [2005] ICR 481* the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

Employee must resign in response to repudiatory breach.

167. The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation.

168. In the well-known EAT case of *Walker v. Josiah Wedgwood & Sons Ltd [1978]* ICR 744, IRLR 105 the EAT held *"… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves …* ***And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him****"* (per Arnold J). The Tribunal's emphasis as this point is relevant to Keith Samuel's case as it took the view the claimant left for reasons other than the alleged breaches of contract, namely, because he did not like the work he did for the respondent and left when he was offered a role with a substantial increase in pay.

Waiver of breach

169. *Weston Excavating* cited above; The employee *"must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"*.

170. In the well-known EAT case of *W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443*, EAT an employee censured by employer in July 1980 for taking leave without previously advising the employer. He

demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract.

171. *Da'Bell v National Society for the Prevention of Cruelty to Children [2010] IRLR 19,* an EAT decision also relevant to whether a delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. It may alternatively indicate that the repudiatory breach is not the effective cause of the resignation. In *Da'Bell* the EAT upheld an employment tribunal's finding that an employee had not been constructively dismissed when she resigned three months after her employer's fundamental breach of contract. The EAT reasoned: '[A] person who reacts to offensive conduct by an employer by writing a letter the next day will easily be adjudged to have acted by reason of it. But someone who leaves it for a year, who will not let bygones be bygones, who digs it up again, is likely to be acting for a reason which is not directly related to the breach. Those are matters of fact for an employment tribunal, to determine what the reason was.' On the facts, the claimant's delay indicated 'a detachment of that event from the reasoning of the claimant when she resigned'. The Tribunal concluded that the same can be said about Mr Forster who was unable to set out the last straw act with any certainty. .

Conclusion – applying the law to the facts.

172. With reference to the first issue, the claimant was at all relevant times, disabled under Section 6 Equality Act 2010 with Autistic Spectrum Disorder (*"autism"*). The Tribunal found as recorded in its findings of facts that the respondent did not have knowledge until late September 2022.

173. The impact of the claimant's disability is disputed by the respondent, and the Tribunal heard evidence that the claimant was engaged in work and activities contrary to the contents of his impact statement, for example, the claimant held parties, played on his X-box with friends, had worked in a pressured kitchen environment during school holidays and under his employment contract until resignation, and at no stage did the claimant mention any of the issues he now relies on in this litigation including the effect of his disability on work a requirement for fixed breaks at 6pm which the respondent and Gary Wilson were unaware until after the claimant's resignation.

Discrimination arising from a disability

174. With reference to issue 6, namely, did the respondent subject the claimant to unfavourable treatment when doing any of the things listed in paragraphs 94 to 102, and paragraph 108 of the Claimant's ET1/Statement of Case, the Tribunal found that it had not with the exception of allegation 6L,

refusing to allow the claimant to move to the housekeeping section. Taking each allegation individually the Tribunal concluded as follows on the balance of probabilities:

175. Allegation 6a: Criticising the Claimant often for slowness, and/or lack of a system in terms of the work he would do (throughout employment – GW). The respondent acknowledges that employees were shouted at and sworn at if they did not perform or carry out instructions. The claimant accepted in cross-examination that his colleagues were shouted and sworn at, and his perception was that he was shouted and sworn at more than they were. The contemporaneous documents reflect Chef Yarrow criticised the claimant's performance, particularly the way the way he left the dishes draining, stating the claimant should have a system. Gary Wilson in the transcript also refers to the claimant and his colleague lacking a system. The 18 July 2024 transcript included the following:

"Gary: I come in on a morning when Vali is on and I don't even have to touch it…because it's immaculate…I come in when you're in and Charlie is in and the place looks like a stone grenade has hit by and I get it, you're not as good as he is I get all that. I mean, it's not all rocket science, it's all about organisation and I said to you why you doing it that way because you just left everything, you washed it, fucking piled it up and what, what was there in that section on that draining board and on there I could have done in 10 minutes…but there's 2 of you, you get a system going, but alright you don't want to do that. You just plod on your own sweet way…"

176. The contemporaneous evidence before the Tribunal was that Gary Wilson attempted to guide the claimant and his colleague on the most effective way of working, he accepted they were not as good as the other team of kitchen porters and when needed, helped them out as they "plodded on."

177. Allegation b: Criticising the Claimant in an unreasonable way for taking a break (17.24 Gary Wilson;.19.7.24 Sid Yarrow). The Tribunal refers to its findings of facts above; the claimant was criticised for taking a break in a situation where the general manager was helping him out concerned that service would be affected because the claimant was behind on his work. In this situation Gary Wilson, who was unaware of any structured breaks and believed employees took breaks once the busy period had passed, took the view that he should not have been washing dishes/pans and was upset due to the claimant's attitude towards him, which he believed was disrespectful because the claimant had disappeared when Gary Wilson had started dealing with the dishes without saying anything. The criticism of the claimant was not unreasonable in these particular circumstances, and the transcript reflects Gary Wilson did not tell the claimant he could not take a break at some stage during the shift. The Tribunal notes Gary

Wilson in his dealing with people, including the claimant, was forceful and did not hold back to wait for responses or explanations. The Tribunal could hear from the transcript Gary Wilson was upset and emotional, and his methods counter-productive when dealing with more junior members of staff. The meeting may have been short, but there was an element of verbosity on the part of Gary Wilson when he was feeling upset.

178. Allegation c: By Mr Wilson jumping in to help the Claimant (throughout employment – GW). It is undisputed Gary Wilson tried to help the claimant as much as he could, and there is references to this in various transcripts. The incident on the 18 July 2024 is a case in point when Gary Wilson stepped in to help the claimant with the dishes/pans only for the claimant to disappear without telling him he was going on a break.

179. Allegation d and e: Swearing at the Claimant (throughout employment – mainly GW, lesser extent Sid Yarrow) and criticising him for taking a break (17.7.24 – GW & Sid Yarrow) and allegation e: Speaking to the Claimant in a patronising and demeaning manner and swearing at him (throughout employment – GW). The Tribunal accepts that swearing is part of the respondent's culture including the claimant who also swore. There was no satisfactory evidence that the claimant was spoken to in a patronising and demeaning manner, the covert recordings reflect otherwise as there were times when Gary Wilson provided support and encouragement, telling the claimant that he was a *"good lad"* and trying to give him guidance. It is notable that at no stage during his employment the claimant or members of his family who held management positions, complained or raised a grievance about Gary Wilson. The claimant could stand up for himself, for example, when he believed he had been underpaid for the hours worked and during his first sickness absence when Chef Yarrow expected him to return to work if a second sick note was not produced (see above). The undisputed evidence before the Tribunal was that the kitchen was noisy, people were under pressure (including the claimant) and they shouted and swore at one another. On the balance of probability the Tribunal does not accept Gary Wilson spoke to the claimant in a patronising and demeaning manner throughout his employment. Even when upset over the claimant's conduct, whilst Gary Wilson was forceful, verbose and he swore, the Tribunal (having listened to the covert recording on three occasions in addition to reading the transcript on a number of occasions) was satisfied that the claimant had not been spoken to in a patronising and demeaning way.

180. Allegation f: Speaking over the Claimant and not allowing him to make his point (throughout employment – GW), the Tribunal refers to the above. On the 18 July 2024 Gary Wilson did speak over the claimant clearly frustrated by the claimant's behaviour, and he cut across the claimant. However, in other transcripts he did not and they worked together to resolve issues, for example,

the passwords and time sheets/wages. There was no satisfactory evidence that the claimant was not allowed to make his point throughout his employment, and had that been the situation a grievance could have could have been raised at any stage by the claimant or on his behalf by his sister and sister-in-law who held managerial positions until they resigned. It is notable that the claimant's legal representative in the 19 November 2024 letter referred to the claimant being *"protected"* from Gary Wilson by his sister and sister-in-law. In the contemporaneous documents the Tribunal found no such evidence noting that when the claimant's holiday application was refused Julie Forster approached a manager with whom she was friends to try and resolve the position. The WhatsApp's exchanged on the 27 June 2024 reflected there was a close friendship where the holiday had been the subject of a discussion for some time as had the agreement that Julia Forster would take photographs of the new baby. The Tribunal did not find allegation f was well-founded.

181. Allegation g:Giving mixed communications to the Claimant in relation to his holiday request, giving him the expectation that the request would be granted (c.24-30 June 2024 - Leon Knoetzer, manager & Sid Yarrow – head chef), the Tribunal found there were no mixed messages. The claimant understood the rules and fully aware because of the document sent out by Maria Boyd that clearly stated how holidays could be taken and they could not be taken in the summer months. The claimant was aware when he booked the flight to South Africa that the holiday had not been authorised, and further, when the holiday request was refused the claimant was aware that he could not change the accommodation in the Kruger National Park for January 2024. By the 27 June 2024 at the latest, the claimant's position was either to take the holiday or cancel it in its entirety and the claimant chose to take it following his resignation in the knowledge that he (and Katie Mossop) would not be paid and disciplinary proceedings with a potential dismissal could follow Kate Mossop already having resigned earlier.

182. Allegation h**:** Failing to deal with the Claimant's holiday request in accordance with the respondent's stated policy (GW – June 2024), the respondent's stated policy could not have clearer and it was applied. The claimant did not try to make out a business case and nor did he inform the respondent that he was going to South Africa because his Mother had threatened to commit suicide when she was there. The claimant knew it was necessary for him to obtain written authorisation before booking four week's leave, and it is clear from Julia Forster's 27 June 2024 WhatsApp message to Maddie Pretorius *"we assumed Dylan's would have been approved so booked and paid for their flight. Now Gary is saying Gary can't have the days off. It's so dam frustrating."* In short, the claimant *"assumed"* leave would be granted when he was fully aware that August was the respondent's busy period (the claimant's indication in the contemporaneous documents that he was not so aware did not

align with the factual matrix) and a four week holiday would not be allowed. Finally, the claimant did not suggest to the respondent that the holiday was needed by reason of or arising from his own disability, and before the Tribunal has attempted to argue that his disability results in him worrying about his Mother. The reason the claimant gave was Julia Forster's mental health as clarified in the meeting of 6 July 2024 with Gary Wilson referenced above, and not the claimant's autism or the effects of it. Any son or daughter would be worried and fixated if their Mother informed them that she was going to commit suicide whilst on holiday. .

183. Allegation i: Making dismissive and discriminatory comments in relation to the claimant's mother's mental health (6.7.24 – GW). The evidence before the Tribunal was that the claimant is relying on the 6 July 2024 covert recording which should be interpreted in context. Context includes the claimant's resignation, the part played by the Julia Forster in it, Julia Foster's communications to Maddie Piaetorius (known to Gary Wilson), and the lack of any medical evidence or information about the health relating to Julia Forster. Against this background when Gary Wilson had so little knowledge and was unaware until told by the claimant that Julia Forster had depression and not a physical illness, the comments were not discriminatory or dismissive but reflected Gary Wilson's knowledge at the time. In any event, there is no evidence to suggest to Gary Wilson that his comment about Julia Forster appearing to physically well was by reason of or arising from the claimant's disability.

184. Allegation J: Bullying the Claimant by forcing him, and his partner Katie Mossop, to clean (end Aug 2022 – Feb 2023 – Petr Schmidt Dep Gen Manager and GW), forcing him to wear white gloves (June 2023 – Dec 2023 Petr Schmidt, Dep Gen Manager, and GW) and swearing at him for taking a break. The Tribunal has dealt with this above and in its findings of fact, concluding for example with reference to the gloves the food service, hot plates and five star rating were good reason for the claimant to wear white gloves with the sole aim of hiding his tattoo and the claimant raised no objections at the time. The Employee Handbook included a dress code, and whist tattoos were not referenced I it, it was a fact the claimant had tattoos on his hands and the respondent did not want staff to display tattoos when food was being served and to conceal them. This dress code was not aimed at the claimant exclusively and at all material times (the dates were uncertain) other staff with visible tattoos, such as bar staff serving clients, hid them. The claimant was not *"forced to do the cleaning"* as recorded above.

185. Allegation K**:** Subjecting the Claimant to unfair and unjustified criticism (throughout employment - mainly GW and to a lesser extent, Sid Yarrow), the Tribunal has dealt with this above finding it did not happen.

186. Allegation L: Refusing to allow the claimant to move to the housekeeping section March 2024 to end of employment GW & Suzanne Barlow, Head of Housekeeping). It is undisputed the claimant's application was refused. The claimant's request to move to housekeeping and work with Kate Mossop was in order that spend more time together, the claimant having worked in the kitchen for a period of approximately 19 months without any issues or transfer requests. The undisputed evidence before the Tribunal was in the past the claimant had tried his hand at cooking and as a food runner, both roles did not suit him and the respondent endeavoured to find him a role which did, namely, kitchen porter/pot boy which did until the claimant decided he wanted to spend more time with Katie Mossop.

187. With reference to the next issue, namely if so, was the unfavourable treatment because of something arising in consequence of the claimant's alleged disability, the Tribunal found it as not taking into account the list in paragraph 4 of the Claimant's ET1/Statement of Case, being that the claimant:

a. can get angry if he is not given clear instructions which result in him doing the wrong thing; Mr Menon confirmed this was not relied on and was to be deleted. The Tribunal noted that there was no evidence before it that the claimant displayed anger towards anybody at work, the reverse, and the fact that the claimant initially relied on this gives rise to a credibility issue as did b. below.

b. can struggle with group communications, not knowing when to join in, and has difficulty reading emotions and in maintaining eye contact; Mr Menon confirmed this was not relied on and was to be deleted. The Tribunal noted that the claimant was capable of engaging in conversations and discussions as reflected in the covert recordings and transcripts in addition to the contemporaneous documents in the bundle, such as WhatsApp messages.

c. prefers things to be ordered, such as packing his shopping in a specific way, and he likes to be in control of plans and finds it easier to make his own version of instructions; the claimant relies on the medical assessment referred to in the findings of facts as a basis for this. The contemporaneous evidence before the Tribunal as reflected in the covert recordings was different. For example, in the conversation between the claimant and Gary Wison on the 18 July 2024 (transcript 4) refers to the claimant's lack of organisation in the kitchen. There is no evidence before the Tribunal that the claimant preferred the work in which he was engaged to be ordered. There was no evidence that the claimant was in control of plans and/or to make or follow his own version of

instructions. The claimant was the kitchen porter responsible for cleaning dishes and required to perform the work requested of him by the Head Chef, Sidwell Yarrow and other managers including Gary Wilson, and he had no control over the manner in which work was to be done. When he was not performing work as expected management became involved and the evidence before the Tribunal was that other employees were treated the same and on occasion shouted at as was the claimant. In cross-examination the claimant accepted that Gary Wilson shouted at other staff when he felt that they were not performing their work properly.

d. likes to have a routine, preferring to do things at specific times and on specific days but he also struggles to keep to a routine and does not like to be interrupted; the Tribunal repeats its findings above. In addition, there was no satisfactory evidence before it that the claimant ever complained about the work in the kitchen environment, which was noisy and pressurised on occasion. The Tribunal listened to the background noises in the convert recordings and it was apparent that there was banging of items and people shouting over the noise. The claimant accepted in evidence the kitchen was on occasion noisy and hectic.

e. struggles with busy, noisy or hectic environments, which cause him to become jittery and stressed; there was no evidence of this in the 19 months or so the claimant worked in the kitchen or that he complained about the environment. The claimant had worked in the kitchen during work experience and holidays, he then tried other roles within the respondent (chef and food runner) choosing to return to work as a kitchen porter until he requested a transfer to housekeeping with the aim of spending more time with his partner. When he made the transfer request the claimant did not say that the kitchen environment was unsuitable for him and made no mention of his autism.

f. can feel claustrophobic if too many people are talking at once, does not like sudden loud noises and struggles to process lengthy written documents; there was no satisfactory evidence that this was the case with the exception of written documents, In respect of claustrophobia there was no evidence at all given by the claimant. Claustrophobia and struggling with the process of writing lengthy written documents has no relevance to the role of kitchen porter. The claimant was in a position to raise a written grievance, which he wrote with the assistance of his family on resignation, and was able to instruct his solicitor in sufficient detail for a 12 page letter before action to be written setting out numerous allegations going back to when the claimant first started his employment. The agreed bundle did not

contain any diary or notes made by the claimant during the relevant period and it appears the claimant has not struggled to prepare allegations set out in detail over a lengthy period.

g. does not like unexpected physical contact; there is no evidence of this before the Tribunal and unexpected physical contact was not an issue in this case.

188. In short. the claimant has worked in a busy noisy restaurant kitchen under pressure and he was aware from the outset his work involved a lack of routine (including set breaks), swearing, banging and general noise coupled with pressure during service.

189. With reference to the issue concerning legitimate aims, namely, what legitimate aims was the Respondent seeking to achieve when subjecting the Claimant to unfavourable treatment, the Tribunal did not accept the claimant was subjected to unfavourable treatment. However, if it wrong on this point it found that controlling who could join the housekeeping team was a legitimate business choice, and it was not discriminatory for the respondent to decide that the reasons given by the claimant for his transfer, namely, working with his partner so he could see her more, was a good enough reasons for the transfer given the pressure housekeepers were under, for example, the Tribunal was told about the state of bedrooms after parties and weddings, and the hard physical nature of the role that had to be completed within a timescale ready for the next guests. Turning to the kitchen, it is a fact that a commercial kitchen is a pressurised environment at times as recorded above and the very nature of the role of kitchen porter is in the centre especially during service, and if a kitchen porter was falling behind and causing problems with service it was legitimate to criticise and on occasion assist them in order that the respondent, a five star hotel, could maintain and increase its standards (for example, by employees hiding tattoos when serving food to the guests).

190. With reference to the issue, namely, was the treatment of the Claimant a proportionate means of achieving those aims, the Tribunal found that refusing the claimant's request was a proportionate means of achieving a legitimate aim, and given the nature of the respondent's industry it was proportionate for managers to tell kitchen porters what to do, and the shouting and swearing by staff (including the claimant swearing) and managers reflected the pressure they were under to perform their roles to a high standard. Turning to Gary Wilson, the Tribunal was satisfied on the balance of probabilities that his treatment of occasionally shouting and swearing when their work was not being done or there were performance issues (which fell way short of any disciplinary procedure or performance management) was proportionate in the context of the respondent's business. However, the Tribunal repeats its criticism made above about Gary Wilson's verbosity and failure to listen/let staff have their say on occasion as

recorded above.

Failure to make reasonable adjustments

PCP 1

191. The respondent accepts the provision, criterion or practice submitted by the claimant in paragraph 105 of their ET1/Statement of Case (*"PCP 1"*), namely the ability for staff members to request a move to another job role, and the respondent's obligation to consider such requests meaningfully and appropriately (including engaging with staff members to ascertain the reason for any request), and to give reasons for a refusal to allow a move.

192. Did the application of PCP 1 put the claimant at a substantial disadvantage because of his alleged disability, the Tribunal found that the respondent did not know, and nor could it have reasonably ought to have known, that it would put the claimant to a substantial disadvantage. As recorded in the findings of facts the respondent knew the claimant had worked in the kitchen for 19 months with no issues and at no stage during that period did he indicate that he needed to work with his partner. When he made the request for a transfer the respondent was told that the claimant wanted to transfer in order to spend more time with his girlfriend. The request was refused by Suzanne Barlow initially with Gary Wilson's authority (there was some confusion as to who made the final decision) on the basis that (a) it was not a good enough reason for a transfer and working in housekeeping would not result in the claimant seeing more of his partner due to the shift and holiday pattern, and (b) she went ahead and recruited other housekeepers, Suzanne Barlow's preferred outcome.

193. With reference to the issue, namely, did the application of PCP 1 put the claimant at a substantial disadvantage in relation to a relevant matter (claimant's request to transfer to housekeeping) in comparison with persons who are not disabled, the claimant was not. The claimant has not discharged the burden of proving that that PCP1 put him at a substantial disadvantage taking into account the factual matrix and Suzanne Barlow's evidence concerning the high pressure housekeeping role.

194. If the Tribunal is wrong on this point, it would have found with reference to the next issue, namely, could the respondent have avoided the above disadvantage by allowing the claimant to transfer to the housekeeping team, that it could not and further, it was not reasonable for the respondent to have taken these steps to avoid the disadvantage given how the claimant puts his case in respect of the effects of his disability as set out in paragraph 4 of the Statement of Case.

PCP 2

195. The Respondent accepts the provision, criterion or practice submitted by the Claimant in paragraph 110 of their ET1/Statement of Case (*"PCP 2"*), namely dealing with perceived poor performance by allowing management to speak to staff members in front of other staff.

196. With reference to the issue, namely, did the application of PCP 2 put the Claimant at a substantial disadvantage because of his alleged disability, the Tribunal found that had the claimant been spoken about his poor performance in front of staff, for example, as part of a formal performance review or criticism, he could be placed at a substantial disadvantage. However, remarks about the claimant and his colleague not using a system, leaving pans and dishes draining and not keeping up with his work to such an extent that the general manager needs to step in and take on the role of pot boy/kitchen porter followed by the claimant immediately taking a break does not fall into PCP2 because it is individual to the claimant only. The claimant was never performance managed, and there is a difference between telling an employee how to improve and performance management. In a commercial kitchen it is unrealistic to expect an manager to take an employee aside, including the claimant, every time they want to comment on their work especially in a busy kitchen where people are under pressure.

197. With reference to the next issue, namely, when applying PCP 2 to the claimant did the respondent know, or should the respondent reasonably ought to have known, that the application of PCP 2 would put the claimant to a substantial disadvantage, the Tribunal found that the respondent did not know and nor could it reasonably have known given the claimant did not display the symptoms or behaviours relating to his autism during the 19 months he worked in the kitchen.

198. With reference to the next issue, namely, did the application of PCP 2 put the Claimant at a substantial disadvantage in relation to a relevant matter (being dealt with for perceived poor performance in front of other staff) in comparison with persons who are not disabled, the Tribunal found that there could be circumstances in which the claimant could be put at a substantial disadvantage, for example, if there was a performance management meeting or a performance improvement plan discussed with the claimant in front of other staff, but this did not happen. The comments made to the claimant in front of other staff were around the claimant needing to speed up, working in a more structured fashion and so on, which often also included the claimant's colleague as they worked in teams of two. The 18 July 2024 incident was a one-off situation caused by the claimant leaving Gary Wilson carrying out the claimant's duties without saying anything in order that he could go out of the kitchen and

take a break, a matter of possible misconduct rather than poor performance, although the Tribunal recognised it was open to the respondent to go down either route. Had the claimant been disciplined or performance managed (which he was not) the Tribunal would have expected that meeting to have taken place in private.

199. With reference to the issue, namely, could the respondent have avoided the above substantial disadvantage by doing either of the following, the Tribunal found the following:

a) Talking to him in private – the Tribunal found this was unrealistic unless there is a more formal procedure, given the industrial context of working in the kitchen referred to above.

b) Allowing the Claimant to take more breaks at a set time; the Tribunal found the claimant cannot and did not take a break at a set time due to the nature of the work.

c) Allowing him more leeway in relation to his methods of work. Gary Wilson did give the claimant leeway as evidenced by the comment made to the claimant concerning his work methods referred to above. Gary Wilson tried the claimant as a chef and food runner in other parts of the business and he was not successful, ending up as pot boy/kitchen porter where he stayed until resignation.

200. With reference to the next issue, namely, if so, was it reasonable for the Respondent to have taken these steps to avoid the substantial disadvantage, the Tribunal found it was not, given the nature of the claimant's duties and the business he was working in where people were informally told if they had to improve and/or speed up and/or carry out their duties in a certain way within the context of the work performance at speed and pressure in an industrial kitchen.

<u>PCP 3</u>

201. The respondent accepts the provision, criterion or practice submitted by the claimant in paragraph 111 of their ET1/Statement of Case (*"PCP 3"*), namely that the respondent operated a holiday policy that prevented employee's taking more than 1 week's holiday during the summer months, namely July, August and September. The policy went on to provide that for additional time off a business case must be submitted in writing to the Group Operations Director for consideration.

202. With reference to the issue, namely, did the application of PCP 3 put the claimant at a substantial disadvantage because of his alleged disability, the Tribunal does not accept it put the claimant at a substantial disadvantage. There was no reliable evidence before the Tribunal that the claimant's request for leave was connected to his disability. The claimant appears to argue that as a result of his disability he was worried about his Mother committing suicide, and he was fixated and obsessed with this, but it was not

part of any business case and there is nothing in the contemporaneous documents to this effect. The information before the respondent was that the claimant's Mother was taking a *"long deserved holiday"* from her accountancy job, she was looking forward to it and was helping the claimant and his partner with passports ready for the family holiday.

203. With reference to the next issue, the Tribunal found when applying PCP 3 to the claimant the respondent did not know, and nor could it reasonably ought to have known, that the application of PCP 3 would put the claimant to a substantial disadvantage based on the information before the respondent, which was the claimant wanted to go on a four week holiday in the Kruger National Park with his partner and Mother who had health issues. The claimant did not put in a business case which he was capable of doing with the assistance of his family,, and had he done so it could have been considered.

204. With reference to the next issue, namely, did the application of PCP 3 put the claimant at a substantial disadvantage in relation to a relevant matter (authorising his holiday application) in comparison with persons who are not disabled, the Tribunal found that it had not. The claimant with the assistance of his family was capable of complying with the respondent's holiday policy, details of which he and his family were aware and had been reminded of. The claimant gave evidence on cross-examination that he had not read the policies and was not comfortable with reading them and did not read them. The Tribunal was satisfied that the claimant was aware of the policies and understood them, the restrictions on the number of weeks that could be taken in August and September, the peak season, and the process which needed to be followed as reflected in the factual matrix above.

205. With reference to the issue, namely, could the respondent have avoided the above substantial disadvantage by allowing the Claimant to take his holiday, the Tribunal accepts the claimant was not happy his holiday had been refused, and there was a discussion about resigning and obtaining alternative employment. Kate Mossop did resign when her holiday request was refused, and the claimant followed with his resignation when it became apparent that the holiday could not be put back to January the next year due to the lack of availability of accommodation at Kruger National Park and Gary Wilson was not going to change its mind. There was no substantial disadvantage to the claimant because of his alleged disability, and if the Tribunal is wrong on this point it would have found in the alternative that it was not reasonable bearing in mind the business pressure on the respondent losing two employees during the peak season for 4 weeks against a backdrop of the claimant giving no indication that the leave he required in any way related to his own medical condition and nor could this possibility have been inferred by the respondent whose understanding was that he wanted to accompany his Mother for whom he

had concerns, and holiday with his partner.

206. With reference to the final issue, namely, if so, was it reasonable for the respondent to have taken these steps to avoid the substantial disadvantage, taking into account the claimant's reasons given to the respondent and the business pressure on the respondent losing two employees in peak season, it was not reasonable to make the adjustment. It is apparent from the contemporary documents that Gary Wilson proposed other dates after the peak season for the claimant to take holidays and the problem for the claimant was that he had booked the holiday before authority had been granted in the knowledge of the respondent's holiday policy and he was unable to book for January 2025.

207. The claimant's claims brought under section 20 to 21 of the EQA are not well-founded and are dismissed.

Harassment

208. With reference to the issue, namely, did the respondent engage in unwanted conduct by doing any of the things listed in paragraph 11 of the Claimant's ET1/Statement of Case, the Tribunal found that it had not on the balance of probabilities and applying the reverse burden of proof set out in section 136 of the EQA and *Igen* above. Taking the individual harassment allegations in order the Tribunal found as follows:

a. Forcing the Claimant to clean the staff accommodation (end Aug 2022 – Feb 2023 – Petr Schmidt Dep Gen Manager and GW); This did not happen.

b. Forcing the Claimant to wear white gloves when other staff were not ((June 2023 – Dec 2023 Petr Schmidt, Dep Gen Manager, and GW); the claimant was required to wear white gloves as were other employees and the respondent had a policy that included a specific dress code.

c. Shouting at and swearing at the claimant frequently (throughout employment – mainly GW and to a lesser extent, Sid Yarrow); the Tribunal found there was no satisfactory evidence the claimant was shouted at frequently as alleged. It is apparent from the transcripts there were raised voices, especially by Gary Wilson as referenced above but the Tribunal would not describe it as *"shouting"* having listened to the recording a number of times. The Tribunal repeats its observations above on the use of language within the business.

d. Invading the claimant's privacy (end Oct 2022 – GW); the Tribunal found the claimant was working and his privacy was not invaded for the reasons

given above, including the less than reliable evidence given by Kate Mossop concerning Gary Wilson being under the influence of alcohol at the time knocking on doors but not her door before letting himself into the room.

e. Verbally abusing the claimant (throughout employment – GW and to a lesser extent Sid Yarrow); there was no satisfactory evidence the claimant was verbally abused throughout his employment, and the Tribunal repeats its observations about the part played by the claimant's sister and sister-in-law, both managers, and the lack of any grievance or indication whatsoever that this was happening as alleged. The claimant's evidence and that given by his witnesses was exaggerated for the purpose of this litigation and so the Tribunal found, recognising the anomaly between the claimant's written grievance and the 12-page letter before action, both written after the event. Part of the claimant's case was that Gary Wilson *"stepped in"* to help him. The undisputed evidence that Gary Wilson had helped the claimant when he needed assistance undermined the allegations that the claimant had been verbally abused and treated badly. In transcript 6 the claimant approached Sid Yarrow in the knowledge that he was covertly recording, saying *"Am I okay"* and Sid Yarrow's response was measured and constructive, making the point that the claimant was *"chitty chatty"* going out for smokes and he, being Sid Yarrwo, was not upset with anyone. Secondly, the claimant referred to Gary Wilson making a serious racist comment when none had been made, again pointing to the claimant's exaggerated case and evidence.

f. Subjecting the Claimant to unwarranted criticism and negative comments regularly from October 2023 to termination (mainly GW; to a lesser extent Sid Yarrow); the Tribunal has dealt with this above rejecting the claimant's case.

g. Accusing the claimant of not being genuinely ill and openly commenting to staff when he was legitimately signed off due to a hand injury (Sid Yarrow, Head Chef & several kitchen and bar staff 12.6.23); the Tribunal on the balance of probabilities found this allegation did not happen as described by the claimant for the reasons set out above.

h. Harassing the Claimant to return to work before his sick note expired (12.6.23 - Sid Yarrow); the Tribunal on the balance of probabilities found this allegation did not happen as described by the claimant for the reasons set out above. The claimant attended a meeting with Sid Yarrow about his return to work following which he did not return to work relying on the second sick note and that was the end oof the matter.

i. Refusal to properly consider and/or grant the Claimant's holiday request

(GW – June 2024); the Tribunal repeats its findings above. The claimant failed to submit a business case, his holiday request was properly considered and refused according to the respondent's procedure known to the claimant and understood by him. There were good reasons for the refusal untainted by disability discrimination.

j. Subjecting the Claimant to derogatory and insulting language (throughout employment – GW and to a lesser extent, Sid Yarrow). For the reasons set out above the Tribunal found this did not happen.

k. Speaking to the Claimant in a derogatory and abusive manner, including swearing at him (throughout employment – mainly GW and to a lesser extent Sid Yarrow); for the reasons set out above the Tribunal found this did not happen. The claimant was sworn at and he also swore but not to the same extend as Gary Wilson. Swearing was part of the culture in the kitchen and at no stage during his employment did the claimant (or his family) ever raise a complaint about people swearing in the context of his autism or at all.

209. With reference to the issue, namely, if so, did the respondent's conduct relate to the claimant's disability, the Tribunal found the conduct established by the claimant in allegation 29 b, c, l and k (relating to the swearing only and not speaking to the claimant in a derogatory and abusive manner throughout employment which did not happen)) that it did not relate to the claimant's disability.

210. With reference to the issue, namely, did the respondent's unwanted conduct have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, the Tribunal considered the mental processes of Gary Wilson and concluded that it did not have this purpose and Gary Wilson did not have in his mind the fact that the claimant was autistic and/or any autistic behaviours during the relevant period.

211. If any unwanted conduct did not have that purpose, did it nevertheless have that effect, the Tribunal found that it had not objectively assessed given the industry the claimant was working in where swearing was the norm, handling hot plates and being required to wear gloves to cover tattoos did not have the proscribed effect and refusing a 2 week holiday in peak time leaving the respondent understaffed by two employees in accordance with a known long-standing holiday policy set out in clause 6.6 and 6.7 of the claimant's contract of employment and the 15 April 2024 holiday booking update..

212. Had the claimant satisfied of proving that the allegations made met the proscribed test, which he did not, the Tribunal would have gone on to find in relation to the final issue under the section 26 claim that it not reasonable for

such conduct to have that effect given the industry in which the claimant worked for a substantial period of time including periods as work experience and in holidays.

213. In conclusion, the claim brought under section 26 of the EQA was not well-founded and is dismissed.

Constructive Dismissal

214. It is denied that the Claimant's resignation amounts to a dismissal within the meaning of section 95(1)(c) Employment Rights Act 1996. The Respondent contends that the Claimant resigned so he could go on holiday. Based on the contemporaneous evidence before it the Tribunal agreed, concluding that there was one reason only for the claimant's resignation, which was that his holiday had been refused and he intended to take it.

215. It is notable that the claimant relies on two completely different final straws. In the letter before action dated 19 November 2024 the final straw was *"being accused of lying by Chef Sidwell…this accusation went to the heart of his honesty and integrity and came to the view that he could not continue to work in an environment where he felt that people did not trust him."* The alleged incident (which the Tribunal found did not happen as described by the claimant) was said to have taken place on 12 June 2024 (and not 12 June 2023 date in the list of issues) weeks before the claimant started to covertly record conversations from the 18 July 2024 onwards. The Grounds of Complaint and agreed list of issues refers to the following *"final straw is the respondent's failure to deal reasonably and sympathetically with the claimant's holiday request…"* The discrepancy in the claimant's case casts doubt over the claimant's credibility and taking into account the contemporaneous documents, including the transcripts highlighted above when the claimant confirmed he and Kate Mossop had or were thinking about resigning. The Tribunal was satisfied that the respondent's actions in refusing the holiday requests made by the claimant and Kate Mossop was the only reason for the resignation, and there was no cumulative breach of contract amounting to repudiatory conduct by the respondent leading to that, objectively assessed; *Buckland* above.

216. Is it part of the Claimant's pleaded case that his dismissal was discriminatory in that it was caused in more than a trivial way by a pleaded breach of Equality Act 2010. The Tribunal found for the reasons set out above that the respondent' treatment of the claimant, as summarised in paragraph 116 and 121 of the claimant's ET1/Statement of Case, did not amount to a series of breaches of the implied term of trust and confidence. It refers to its earlier findings which it does not intend to duplicate including its finding that the claimant was not subjected to unlawful discrimination on the grounds of his disability. For the avoidance of doubt the Tribunal did not find the general

allegation of bullying and harassment brought under section 26 of the EQA was well-founded and the respondent had not refused to properly consider/grant the Claimant's holiday request. The claimant's holiday request was properly considered and refused in accordance with the claimant's contract of employment. The refusal did not breach the implied term of trust and confidence looking at the respondent's conduct as a whole objectively assessed. Given the information before the claimant provided to him by the respondent on holiday entitlement, the claimant could not have properly concluded the respondent was repudiating his contract and the 27 June 2024 WhatsApp message from Julie Forster confirms that the claimant "assumed" Gary Wilson would have approved.

217. Refusing the claimant's holiday request in the circumstances of this case did not and could not have contributed *"however slightly, to the breach of the implied term of trust and confidence."* It was *"an entirely innocuous act on the part of the employer [and] cannot be a final last straw" Omilaju* above. In conclusion, the refusal of the claimant's holiday request did not amount to the *"final straw"* had there been a series of breaches by the respondent, which the Tribunal found there was not, satisfied that to respondent had determined it in accordance with the terms of the contractual relationship.

218. With reference to the final issue, namely, if so, did the claimant resign in consequence of those breaches, had the Tribunal found the respondent to have been in breach of contract (which it did not) the sole reason for the claimant's resignation was because his holiday request was refused after he had booked the flights and accommodation, the national park was not available for January 2025 and the claimant decided to go on holiday with his Mother and partner, having made a conscious decision that he would resign in order to do so as opposed to the alternative; forging pay for 4 weeks (totalling a loss of 8 weeks' pay) and facing possible disciplinary proceedings and dismissal. Instead the claimant resigned and issued these proceedings.

Time Point

219. Taking Early Conciliation into account, has any alleged breach of the Equality Act 2010 relied upon by the Claimant been brought within the time-limit in s.123(1)(a) of the Act, the Tribunal agreed with Mr Menon's submission and found that the claim for constructive unfair dismissal was brought within time, however, the discrimination claims were not.

220. With reference to the issue, namely, if not, in respect of any allegation, does that allegation form part of a series of acts / omissions, within the meaning of s.123(3), the last of which was within time, the Tribunal found as recorded in the factual matrix above and its conclusions that there was no series of acts or omissions within the meaning of section 123 of the EQA. In the claimant's own case the last straw took place on 26 June 2024 when his holiday request was

refused, five months later the claimant took part in ACAS early conciliation between the 6 November 2024 (day A) and 16 December 2024 (day B) and the claim form was presented on the 14 January 2025 just short of 7 months from the refusal. It is apparent that a number of the earlier allegations of discrimination have prejudiced the respondent as a result of the passage of time and effect on people's memories including the claimant, for example, the dates of the alleged glove incident and claimant's mix up over dates in 2023 and 2024. This prejudice was exacerbated by the fact that at no stage during his employment did the claimant (or his family) raise any complaints, and by staff such as Thomas Batty and Sid Yarrow leaving the business. .

221. With reference to the issue, namely, to the extent that the answer is no, would it be just and equitable to extend time to allow that allegation to proceed as part of this claim, the Tribunal concluded it would not be just and equitable to extend the time limit given the claimant was in receipt of legal advice, he was preparing for this litigation (the hidden recordings and leading questions) months before ACAS early conciliation took place, and the balance of prejudice falls firmly with the respondent including the effect of the passage of time on memory recollection and the weakness in the claimant's case that he had been unlawfully discriminated against.

222. In conclusion, the claim of disability discrimination was not presented within the applicable time limit. There was no course of conduct over a period and it is not just and equitable to extend the time limit. The claim of disability discrimination is therefore dismissed. In the alternative, the complaint of disability discrimination are not well founded and are dismissed. The complaint of constructive unfair dismissal is not well founded and is dismissed.

Approved by:

Employment Judge Shotter

29 September 2026

Judgment sent to the parties on:

28 October 2026

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For the Tribunal:

Notes

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

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/