EMPLOYMENT TRIBUNALS

Claimant: Mr. I Powell-Taitt

Respondent: M Power Limited

Heard at: London South, by video

On: 1, 2, 3 and 4 December 2025

Before: Employment Judge Cawthray
Ms. R Effeny
Mr. D Newlyn

Representation
Claimant: In person, not legally qualified
Respondent: Mr. Hill, Counsel

JUDGMENT

having been given orally on 4 December 2025 and written reasons having been requested on 10 December 2025 accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Background and introduction

1. A case management preliminary hearing took place with Employment Judge Wilson on 12 May 2025. The record of hearing records the issues that were being pursued and that the Claimant withdrew a complaint of victimisation.

2. On 24 June 2025 the Claimant made an application for reconsideration in relation to wanting a complaint of victimisation to be reinstated. Employment Judge Wilson subsequently refused the application for reconsideration.

3. A public preliminary hearing took place conducted by Employment Judge Evans on 27 and 28 August 2025 at which it was determined that the Claimant was disabled due to a chronic pain condition in back and legs. A complaint of wrongful dismissal was also added to the list of issues.

4. At the start of the final hearing the Employment Judge explained how the hearing would run and explained the processes of giving and challenging evidence and making submissions.

5. The parties had provided a main bundle and a supplementary bundle. The Claimant had produced a written witness statement, and the Respondent had provided written witness statements for two witnesses. All witnesses affirmed or swore an oath.

6. At the start of the final hearing the Employment Judge discussed the list of issues with the parties. They explained the importance of the list of issues and how the Tribunal would use the list of issues to determine the allegations as set out in the list. The Claimant agreed the list of issues was correct and at no point during the hearing was any application to amend the claim made.

7. The Employment Judge discussed reasonable adjustments with the parties at the start of the final hearing. The Claimant said that all that he required was regular breaks, and this was facilitated. However, on day three of the final hearing, after all the evidence had been heard and shortly before submission started the Claimant said that he had a learning disability and needed additional adjustments. The Claimant had not raised this at any time previously. The Employment Judge discussed the matter with the Claimant, and he said that he did not need anything differently to have been done during the final hearing but that during submissions he would need pauses so that he could catch up with his note taking. This was facilitated.

Credibility

8. Generally, notwithstanding the fact that the Claimant was a litigant in person, the Tribunal noted that on several occasions the Claimant's oral evidence changed from what was in set out in his witness statement and that he changed answers and appeared inconsistent in cross examination.

9. The Tribunal considered the Respondent's witnesses to be consistency, straightforward and credible.

Issues

10. The Claimant is bringing the following complaints:

    Direct race discrimination
    Failure to make reasonable adjustments
    Harassment relating to disability
    Harassment relating to religious belief
    Harassment relating to sexual orientation Wrongful dismissal/notice pay.

11. The issues as set out below use the same numbering as in the case management orders to enable ease of reference.

1. **Time limits**

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

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

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

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

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

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

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

3. **Direct race discrimination (Equality Act 2010 section 13)**

3.1 The claimant describes himself as Black Caribbean.

3.2 Did the respondent do the following things:

3.2.1 The claimant's manager informed him he had friends who had the same medication prescription as the claimant. However, his manager did not accept that the claimant had the same prescription and wanted to subject the claimant through a 'checklist' process which the claimant says white employees would not have been subjected to.

At the start of the final hearing the Claimant confirmed the manager was Mr. Barbieri and the allegation related to comments at the meeting on 28 December 2023.

3.3 Was that less favourable treatment?

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

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

The claimant has not named anyone in particular who they say was treated better than they were and relies on a hypothetical comparator.

3.4 If so, was it because of race

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

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

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

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

4.2.1 Enforcing a 7 am to 7 pm shift pattern with only one break.

4.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that because of his condition he needed rest in between and the hours were too long. He also needed to start later because of his medication.

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

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

4.5.1 He could have been allowed more rest and eating breaks in a shift.

4.5.2 He could have been allowed a later start to accommodate his medication.

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

4.7 Did the respondent fail to take those steps?

5. **Harassment related to disability, religious belief and sexual orientation (Equality Act 2010 section 26)**

6. The claimant's sexual orientation is a heterosexual male.

7. His religious belief is Christianity.

8. He states his disability is a chronic pain condition in his legs and back.

8.1 Did the respondent do the following things:

8.1.1 His manager Luigi Barbieri made comments to the claimant in or around December 2023 that the claimant could bring God to the meeting (to discuss his medication) but that he would still have to suspend the claimant. (**religious belief harassment)**

8.1.2 In or around May 2023 during a group meeting the claimant's deputy manager Funmi Abi Laji asked the claimant if he was gay and also stated it was ok to say if he was gay (**sexual orientation harassment).**

8.1.3 The claimant relies on the same comment made by Funmi Abi Laji set out above at **8.1.2** as **also being an act of harassment relating to disability** as he states the comment was made in response to the claimant standing with a slouching posture due to his chronic pain condition.

8.2 If so, was that unwanted conduct?

8.3 Did it relate to religious belief, sexual orientation, disability.

8.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. **Remedy for discrimination or victimisation**

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

9.2 What financial losses has the discrimination caused the claimant?

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

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

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

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

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

9.8 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

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

9.10 By what proportion, up to 25%?

9.11 Should interest be awarded? How much?

Wrongful dismissal / Notice pay

1.1 What was the claimant's notice period? *The parties agree that the claimant's notice period was four weeks.*

1.2 Was the claimant paid for that notice period? *The parties agree that the claimant was not paid for that notice period.*

1.3 Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

1.4 If the claimant did not do something so serious that the respondent was entitled to dismiss without notice, what damages for breach of contract should the claimant be awarded?

Findings of fact

12. The findings of fact were made on the balance of probabilities, taking into account the evidence presented during the final hearing and as far as facts were necessary to make appropriate conclusions. As far as possible, the findings of fact are in chronological order.

13. The Claimant was employed by the Respondent as a Support Worker based at Blossom House, a residential home providing care and support services for adults with learning difficulties and disabilities, from 12 December 2022.

14. On joining the Respondent, the Claimant completed a health questionnaire form. The form is dated and signed 13 October 2022. The Claimant did not tick any boxes in the form to indicate he had any health issues, and he did not disclose that he was taking any medication. He ticked the box to confirm that he was in good health and said the last time he had a physical examination was 16 December 2021.

15. The Claimant usually worked three shifts per week, each shift of 12. 5 hours. The day shift started at 7.15 am and ended at 7.45 pm. The night shift started at 7.15 pm until 7:45am the next day. The day shift staff and night shift staff would undertake a handover meeting between shifts to pass on information about users and plan activities. The Claimant was mostly based at Blossom House but would occasionally work from other locations and would occasionally undertake overtime. Support workers working over six hours were given a 20-minute break.

16. While giving oral evidence the Claimant said that prior to Mr. Barbieri joining the Respondent, the Claimant had been permitted to start work at 10.00am for a period as he had a long commute to work. This was not related to any medical issues but was due to travel issues. The Claimant had not set this out in this claim form or witness statement. The Claimant said this was around June 2023. When questioned by the Claimant Ms. Olanigan said she did not recall the Claimant starting work late.

17. Mr. Barbieri joined the Respondent in February 2023 as the Learning Disabilities Services Manager.

18. The Claimant alleges that *"in around May 2023 during a group meeting the claimant's deputy manager Funmi Abi Laji asked the claimant if he was gay and also stated it was ok to say if he was gay".*

19. Ms. Alaji no longer works at the Respondent, she left in September 2024. The Claimant, prior to this hearing, had not provided any further detail about the meeting at which the comment was allegedly said. During cross examination he said it was an ad hoc meeting and that Ms. Adeyinka Olanigan was not present as she was not on shift but other persons, Andre, Kameel and Ade and another who the Claimant could not remember, were present. He said the comment was made when he was putting out chairs. This detail is not set out in his witness statement. The Claimant gave slightly differing accounts of what he says Ms. Alaji said to him, and also said the meeting may have been in June, July or August 2023. In his witness statement he says, "*The respondents oral comments about my posture making me look "gay" and "man up"…"* This is different to the allegation to be detemined.

20. The Claimant has not, prior to cross examination, said that there were witnesses to the alleged comments. The Claimant did not ask any of the persons that he says witnessed the comment to attend this final hearing to give evidence.

21. Ms. Olanigan is employed by the Respondent as a Senior Support Worker, and she worked with the Claimant and Ms. Ajala. In short, she says that she did not witness Ms. Alaja make the alleged comments, did not hear anyone comment or discuss such comments being made and that she could not envisage Ms. Ajala making such a

comment and that such a comment would be highly unusual and inappropriate and that she considered that if such a comment was made, she would have heard about it. The Claimant did not challenge any of Ms. Olanigan's written evidence in relation to the alleged comment in May 2023.

22. In his witness statement, Mr. Barbieri set out that:

"I managed Funmi for just over one and a half years (from February 2023 when I joined Eleanor until September 2024 when she left the organisation), during which time I consistently observed her to be conscientious, polite, and professional in her conduct. I never received any complaints about her relating to discrimination or any other inappropriate behaviour. Based on my experience working with her, I cannot envisage her making the kind of remark that has been suggested. Her approach to colleagues and service users was always respectful and inclusive."

23. The Claimant did not challenge Mr. Barbieri's evidence in this respect.

24. The Claimant did not raise any concern or complaint about the alleged comments at the time. The Claimant first raised a concern about similar matters on 17 November 2023, as dealt with below.

25. On the balance of probabilities, taking into account the above findings, in particular the Claimant changings position on what was said and when, the evidence of Ms. Olanigan and Mr. Barbieri, and that he didn't raise at the time the Tribunal found we that there was insufficient evidence for us to reach a finding that the comment was made.

26. On 8 November 2023 an informal meeting took place between Mr. Barbieri and the Claimant at which Mr. Barbieri raised some concerns about the Claimant's performance. It had been reported to Mr. Barbieri by Abeono Defo, Senior Support Worker, that the Claimant had been arriving late, took long and frequent breaks and sat down a lot during shift. Mr. Barbieri explained that the Respondent was considering whether a performance improvement plan was required.

27. Mr. Barbieri did not consider the Claimant engaged much during the discussion and did not put forward any explanation for the concerns he raised. Mr. Barbieri formed the view that the Claimant acknowledged the concerns.

28. Following the meeting, the Claimant emailed Ms. Ajala and Mr. Barbieri on 17 November 2023. Page 53. The email starts by stating*: "This is my response to our meeting on 08/11/23 and your intention/decision for a performance management review*".

29. In the body of the email he set out that he had *"an undiagnosed medical issue which is under investigation with the NHS specialists. With this condition I find it very challenging to stand for long periods (more than 30 minutes) without food or drink as this makes my symptoms worse. I appreciate having a hard work ethic and the positive outcomes it brings for me, however, once stood for more than 30 minutes in one place, I need to sit for a few minutes to avoid agitating my symptoms. I have been cautious to avoid triggers of my symptoms so that it has had a minimal impact on my ability to do the work here that I enjoy."*

30. The Claimant went on to set out things that he considered would assist him, including taking regular breaks from standing, keeping warm, eating regularly and staying hydrated and asked how much tea he could drink. The Claimant also referred to having worn a knee brace and said he thought it would assist him to do longer hours on fewer days to rest in between.

31. He then set out:

"I am uncomfortable with the language that is used in the workplace when it comes to my being 'seated too often', or 'my posture suggests I'm gay because of slouching', or being seen as 'lazy', when that is far from correct; however, I appreciate that you may not have been aware of my undiagnosed issue. I would really appreciate your understanding in the workplace, for my underlying condition, whilst I work through my undiagnosed chronic physical issues. I anticipate that this will at least be diagnosed within the next 6 months, but we all know the pressures on the NHS at the moment and I have no control over when I will be seen and get a diagnosis, with treatment options made."

32. The Claimant did not set out who he said made the comment *"my posture suggests I'm gay because of slouching*" or when.

33. The email closed with the Claimant asking for adequate notice for future meetings as he wanted his trade union representative to accompany him.

34. Mr. Barbieri was concerned about the content of the email and sought to meet the Claimant to discuss the matters he had raised.

35. Mr. Barbieri met with the Claimant on 22 November 2023. Ms. Ajala also attended as a notetaker.

36. Mr. Barbieri opened the meeting by emphasizing the importance of staff wellbeing alongside meeting business needs. He outlined a number of potential arrangements that could be considered, namely:

Flexible working patterns
Workplace adjustments
Amended duties

37. The Claimant provided a little further information about his medical condition and said that he got joint and muscle pain all over his body when he stood for more than 30 minutes or when doing certain tasks. He said he had an appointment with a consultant neurologist on 28 February 2024 and his GP had prescribed pain killers that he had been taking for two months.

38. The Claimant made no reference to being prescribed cannabis, in any form.

39. Mr. Barbieri suggested that the Claimant got a detailed certificate from his GP that set out symptoms, possible diagnosis, recommendations and information about his consultant appointment as soon as possible so the Respondent could assess the Claimant's needs and potential adjustments. Mr. Barbieri wrote a short-handwritten checklist, as he considered it would help the Claimant get the information the Respondent needed and that flexible working and amended duties couldn't be put in place until they had medical evidence, but a brief discussion took place. Mr. Barbieri set out the following on the handwritten note to assist the Claimant in obtaining medical information:

    Symptoms
    Possible diagnosis
    Therapy suggestion – actions
    Recommendations – how long
    Consultant booking - timeframe

40. It was also suggested that the Claimant could be referred to Occupational Health.

41. In the meeting, Mr. Barbieri suggested that the Claimant consider working shorter hours, although the Claimant was not keen and had requested he work longer hours. Mr. Barbieri could not see how longer hours would assist the Claimant, in view of what he had said about his health. Mr. Barbieri suggested the Claimant also consider alternative transport to work.

42. Mr. Barbieri told Ms. Ajala to instruct the Claimant's line manager to extend his break from 30 minutes to 45 minutes to enable the Claimant to take a 20 minute lunch break and an additional three breaks of 8 minutes each.

43. The Claimant did not mention taking or being prescribed any form of cannabis.

44. The note of the discussion does not record any discussion about the alleged inappropriate comments as set out in his email dated 17 November 2023. However, Mr. Barbieri's clear written and oral evidence, which the Tribunal accept, was that some discussion did take place, namely that the Claimant did not provide any details of what was said, but that Mr. Barbieri explained that if the Claimant wished for his concerns to be considered he would need to provide further detail that could be investigated. The Claimant did not provide Mr. Barbieri with any further information.

45. Mr. Barbieri sent the Claimant the note of the meeting prepared by Ms. Ajala shortly after the meeting. Within the email it said:

"Please come back with the agreed medical action.

If you require any additional information please do not hesitate to contact me and/or your line manager Aboeno."

46. The Claimant replied the following day explaining that he had booked a GP appointment for the next day. Ms. Ajala replied shortly after and said:

"Thank you for your quick response and acting on the action points discussed in the meeting yesterday.

Please ensure you attend the appointment booked on 24.11.23 with your GP as the medical certification is important to enable us have an in-depth understanding of your health issues disclosure and put necessary and appropriate measures of support in place for you according to your doctor's guidance.

As discussed yesterday, please follow the adjustments to your break times and inform your line manager of when you want to take the breaks to ensure that you rest your bones and muscles whilst on shift."

47. The Claimant attended his GP on 24 November 2023. The Claimant's GP provided him with a Fit Note. The fit note states that the Claimant may be fit for work taking into account the following advice – the box for workplace adaptions is marked and the text entered states: *"Patient needs to be able to sit and rest every hour for 5-10 minutes before restarting work. Patient should have his normal lunch break at the right time. And needs rest before the start of the day."* The note covers the period 24 November 2023 to 23 February 2024. The condition cited is "chronic pain".

48. The Claimant emailed the fit note to Mr. Barbieri and Ms. Ajala on 29 November 2023. In his email the Claimant said:

"As discussed I have attached my doctors note.

I will be taking advice on the matter from my union rep; how to proceed.

If another meeting will need to be scheduled, please give me notice as I will want to have representation present at the time."

49. Approximately 30 minutes after receiving the Claimants email Mr. Barbieri emailed Ms. Ajala, who was based at the Claimant's place of work, and said: *"Can you please implement the recommendations as per medical certificate please?"*

50. The Claimant attended a training course on 18 and 19 December 2023. On 19 December 2023, Carly Doyle, Training Manager, considered that she had smelt cannabis on the Claimant.

51. Ms. Doyle discussed the matter with the Claimant. After discussing the situation Ms. Doyle emailed Mr. Barbieri, copied to other managers. The email states:

"This is to inform you that I have had to ask Isaac of 127 Bromley to leave the second day of training due to cannabis being smelt on his person on entering the building.

Isaac has confided that he is on a cannabis prescription however this has not been declared on his health declaration form nor a risk assessment being uploaded to his file.

Isaac is currently with Shaun our recruitment manager going through the paperwork. However this was not a vapour smell and was more of a weed joint smell.

He has also confided that he is currently off with a sick note and therefore should not have been attending training whilst on a sick note.

Once Isaac has been fully risk assessed he is welcome to come back for day two training."

52. Mr. Barbieri replied to Ms. Doyle to inform her that he would investigate. The Claimant had not disclosed any form of cannabis use to Mr. Barbieri previously.

53. Mr. Barbieri discussed the situation with Ms. Ajala, and at 13:59 on 19 December 2023 Ms. Ajala emailed the Claimant:

"Dear Isaac

Hope you are well!

I am inviting you to a meeting with Luigi and I following the incident that happened during the refresher training on 19.12.2024.

A meeting has been scheduled on Thursday, 21.12.2023 by 1200 at 127 Bromley road, Catford SE6 2NZ.

There is a need for risk assessment update and new declaration of health form to be completed therefore, please bring along to the meeting the following:

- *GP letter stating reasons for taking cannabis*
- *List of current medication on*
- *Specification of Cannabis*

Look forward to seeing you on Thursday."

54. The Claimant replied the next day acknowledging the meeting. The Claimant then emailed Ms. Alaja at 11:10am on 21 December, shortly before the meeting was due to start, stating:

"I am currently still waiting on advice from my union rep, I have not received a response as of yet regarding representation at the meeting.

I therefor would like to postpone the meeting until I can have representation present.

Any queries I will be making my way to work now for my shift, we can discuss when I arrive."

55. The meeting scheduled for 21 December 2023 was postponed.

56. On 24 December 2023 the Claimant emailed Ms. Ajala and said that he considered his medical information had been shared without his consent with colleagues, but he does not specify who and what was allegedly shared. Ms. Ajala replied on 27 December 2023 stating:

"Your medical information was only disclosed to the SSW for 127 Bromley road in order to put in place the break time and the 5 mins of resting in an hour. The sick note was not even shared with her."

57. The Claimant alleges that during a conversation on 27 December 2023 Mr. Barbieri made comments to the Claimant that he could bring God to the meeting but that he would still have to suspend the Claimant.

58. Mr. Barbieri accepted that he may have said the Claimant could bring God to the meeting, but he cannot specifically recall. Mr. Barbieri is a Christian. The Claimant is a Christian. Mr. Barbieri was not aware of the Claimant's religious belief.

59. The context of the discussion is that Mr. Barbieri was seeking to meet with the Claimant as soon as possible to discuss the concerns raised on 19 December 2023 in relation to the Claimant smelling of cannabis. The meeting was an informal one, and the Claimant had been asked to attend with some documents. The meeting had already been postponed at the Claimant's request as he had said he was wanting union representation.

60. Mr. Barbieri's evidence was consistent and clear. He said he may have referred to God, in order to encourage the Claimant to attend and reassure him that there was no need for representation of any kind at the meeting as representation of any form would not make any difference to the informal meeting. He was clear he never referred to suspending the Claimant as it was not at that stage, as what he was seeking to do was obtain medical information to review the situation and risk assess.

61. On balance, taking all the evidence into account, the Tribunal accept Mr. Barbieri's clear and consistent account. The Tribunal find that it was likely that he referred to God, but that he did not make any reference to suspension.

62. On 28 December 2023 Mr. Barbieri and Ms. Ajala met with the Claimant. The meeting was informal and no note was taken. There was discussion around the concern that the Claimant had smelt of cannabis at training on 19 December 2023. The letter explains that the Claimant and can

access his prescription information on his Sapphire patient web account. The letter summarises prescriptions given on 8 November 2022,13 April 2023 and 2 August 2023.

63. The Claimant gave Mr. Barbieri a copy of a letter from Sapphire Medical dated 2 August 2023.

64. The letter shows that the Claimant attended Sapphire Clinics, a private clinic, on 2 August 2023. It refers to the Claimant being prescribed medical cannabis but sets out a review must take place every three months for the medication to be prescribed.

65. Mr. Barbieri did not consider the letter to be adequate and explained that more up to date information was needed as it appeared the prescription referenced in the letter had expired before 19 December 2023 and further that the Respondent needed to understand if the prescribed medication produced a strong odour and any potential impact on the medication impacting the Claimant's ability to undertake his role of caring for vulnerable adults.

66. During the meeting Mr. Barbieri said a new risk assessment was required but that to complete it documentation was needed to show he had a prescription for a cannabis based product to treat his medical condition. He asked the Claimant to provide a copy of this prescription to cover 18 and 19 December 2023 and a letter from his doctor to confirm that the medication could emit a strong cannabis smell and that the medication does not render the Claimant unfit for work.

67. Mr. Barbieri gave the Claimant a deadline of 2 January 2024 to provide the information requested. The Claimant now, during the final hearing, appeared to be asserting that the timeframe was not reasonable. The timescale was discussed at the meeting, and Mr. Barbieri understood that the Claimant intended to visit his GP the next morning and that the Claimant already had a copy of his prescription letter. Mr. Barbieri explained the Claimant could request an extension if he needed more time but that if the information was not received the Respondent would have no choice but to consider suspending the Claimant and/or starting disciplinary action given the Claimant's caring role.

68. Mr. Barbieri sought to assist the Claimant by providing a written checklist, which states:

1. *Current (no older than 18/19 Nov 2023) prescription of the cannabis medication*
2. *Verify the odour produced by the medication (to ascertain that although its medical it does still smell of cannabis*
3. *Declaration from the GP that this medication does not affect your work duties (supporting vulnerable people in a focused and sober way) fit to work*

2 January latest

69. The Claimant alleges that during the meeting Mr. Barbieri *"informed him he had friends who had the same medication prescription as the claimant. However, his manager did not accept that the claimant had the same prescription and wanted to subject the claimant through a 'checklist' process which the claimant says white employees would not have been subjected to."*

70. Mr. Barbieri's witness statement and oral evidence was clear and consistent. He says, which the Tribunal accept, that he believed what the Claimant had told him about having a prescription, that he was seeking to reassure the Claimant by explaining that he knew people, and he may have said friends, that used cannabis for medicinal purposes and reported positive outcomes. He is clear he made no reference to any such persons being white. He is clear that he accepted the Claimant's account, and that he did not question that the Claimant had the same prescription but that he requested medical information in order to be able to properly undertake a risk assessment in view of working with vulnerable adults.

71. On 30 December 2023 the Claimant emailed Mr. Barbieri including links to two websites with details about medication. Within the email he said:

    "Here are the links to my medication.

    Please read this in conjunction with the clinic letter I already submitted to you. It should be sufficient to address any concerns you've raised to me and to undertake the risk assessment.

    I look forward to hearing from you regarding the occupational health risk assessment I requested form you."

72. Mr. Barbieri did not consider the link information to be enough to undertake the risk assessment as it was general information and he did not have specific formal documentation about the medication which the Claimant had been prescribed and any impact of such medication. In the circumstances, he was concerned about the Respondent's duty of care to service users, and in the absence of information, determined, following discussion with HR, that it was necessary to suspend the Claimant.

73. Mr. Barbieri did not consider it necessary to refer the Claimant to Occupational Health. He believed what the Claimant had told him about being prescribed cannabis and considered the most efficient way forward in the circumstances was for the Claimant's GP to provide the information about his medication and impact.

74. The Claimant was suspended on 2 January 2024. The situation was then managed by HR.

75. On 23 January 2024 HR informed Mr. Barbieri that the Claimant had been dismissed with immediate effect.

76. The Claimant instructed a solicitor in relation to his appeal from dismissal.

Other matters

77. At page 46 of the Bundle there is a letter from Sapphire Clinics regarding an appointment on 8 November 2022. Within the letter it records: *"You told me that you are continuing to benefit from cannabis treatment for helping you to cope with chronic pain. You are not suffering from adverse effects."* It records the Claimant was prescribed treatment on 10 August 2022. This letter was disclosed during the course of the claim.

78. In oral submissions the Claimant referred to page 92 of the Bundle. He said this was given to Mr. Barbieri at the meeting on 28 December 2023 and that it shows he attended an appointment on 6 November 2023 and that Mr. Barbieri declined to accept the letter. The Claimant has not set this out in his witness statement and he made no mention of it in oral evidence. Further, he failed to ask Mr. Barbieri any questions about the document. The document appears to be an image of an appointment page and shows the Claimant's last appointment was 2 August 2023 and that he had an e-consultation on 6 November 2023.There was no evidence that this letter was given to Mr. Barbieri and the Tribunal found only the August 2023 letter was provided to Mr. Barbieri in December 2023.

Time limits

79. ACAS early conciliation started on 8 March 2024 and ended on 19 April 2024. The claim form was presented on 16 May 2024.

80. The Claimant says there was continuing conduct and directed to us several documents, as summarised below.

81. ET1 claim form -

"The company management made inappropriate comments to me in reference to my "disability", both privately and in public meetings negatively impacting my relationships with colleagues and clientele."

82. The Claimant instructed a solicitor in relation to his appeal from dismissal. Within the appeal letter it states:

"3. We are of the view that AR has made the decision to dismiss our client because of the complaint of bullying that he was experiencing since May

2023 and our client informed his line manager that he was uncomfortable with the behaviour from her and from his colleagues. Specifically:"

83. The 3 April 2024 Dismissal Appeal meeting states:

"4. In regard to Isaac's complaint around bullying, Olga asked why he did not raise it as a grievance and why he did not follow up at that time. Isaac mentioned that it all happened in a matter of 2-3 weeks and he did not raise any grievance at that time."

84. In cross examination the Claimant said that the comments allegedly made by Ms. Alaja in May 2023 and the comment allegedly made by Mr. Barbieri on 27 December 2023 were one-off comments.

Law

Direct discrimination

85. Section 13 Equality Act 2010 states:

13 Direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others. (6) If the protected characteristic is sex—
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
(8) This section is subject to sections 17(6) and 18(7).

86. Section 136 of the Equality Act 2010 states:

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to—
(a) an employment tribunal;
(b) the Asylum and Immigration Tribunal;
(c) the Special Immigration Appeals Commission;
(d) the First-tier Tribunal;
(e) the Education Tribunal for Wales;
(f) the First-tier Tribunal for Scotland Health and Education Chamber.

87. Under section 13(1) of the Equality Act 2010 read with section 9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others.

88. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

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

90. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*).

91. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

92. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the claimant (*Ayodele v (1) Citylink Ltd (2)*

Napier [2018] IRLR 114, CA; Royal Mail Group Ltd v Efobi [2021] UKSC 22). This is sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

Stage 2: The respondent must then prove that it did not discriminate against the claimant.

93. In other words, where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of race, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not

commit, or as the case may be, is not to be treated as having committed, that act.

94. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board [2012] IRLR 870, SC.)*

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

96. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

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

98. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord BrowneWilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable*

employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.* It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.

99. In *Amnesty International v Ahmed UKEAT/0447/08/ZT* the EAT stated, paragraph 36, *"…the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)…".*

100. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425.*

101. The Tribunal must consider the EHRC Statutory Code of Practice.

Duty to make reasonable adjustments

102. The legislation regarding complaints of a failure to make reasonable adjustments is contained within sections 20 and 21 of the Equality Act 2010.

103. Section 20 of the Equality Act 2010 states:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2)The duty comprises the following three requirements.
(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons

who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.
(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building, (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or (d) any other physical element or quality.
(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

104. The duty to make reasonable adjustments appears in section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) – *"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison*

with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."

105. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

106. In *Environment Agency v Rowan [2008] ICR 218* it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any nondisabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

107. The words "provision, criterion or practice" ("PCP") are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In *Ishola v Transport for London [2020] EWCA Civ 112* it was said: *"all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."* It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

108. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

109. Substantial disadvantage is such disadvantage as is more than minor or trivial.

110. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the* Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the

adjustment proposed to enable it to engage with the question whether it was reasonable;

- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s);
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
    - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
    - The extent to which it is practicable to take the step;
    - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities; -The extent of its financial and other resources; The availability to it of financial or other assistance with respect to taking the step;
    - The nature of its activities and size of its undertaking;
    - If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

111. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.*

112. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

113. An important consideration is the extent to which the step will prevent the disadvantage. Although the Equality Act 2010 uses the term "avoid", this is not an absolute test. (The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to provide the auxiliary aid).

114. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law: *Romec Ltd v*

Rudham [2007] All ER(D) (206) (Jul), EAT. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions [2017] ICR 160:*

"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

115. Broadly speaking, and all other things being equal, the more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable. Effectiveness must be assessed in the light of information available at the time, not subsequently: *Brightman v TIAA Ltd UKEAT/0318/19 2 July 2021* (paragraph 42).

Harassment

Section 26 Equality Act 2010 Harassment

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of— (i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

116. Paragraph 7.7. of the ECHR Code states: *"Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour."*

117. Although harassment is similar to direct discrimination it covers actions "related to" a protected characteristic, which goes further than "because of".

118. When considering whether a claimant's dignity has been violated or an intimidating, hostile, degrading humiliating or offensive environment has been created, it must be kept in mind that it is not enough that the conduct was simply upsetting.

119. When considering effect it must be considered whether it was reasonable for the conduct to have had the effect taking in to account both a claimant's perception and the overall circumstances.

Time limits

120. Section 123 of the Equality Act 2010 sets out the time limit for bringing discrimination and victimisation claims in the Tribunal. It states:

123 Time limits

(1) Subject to section140B proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3) For the purposes of this section—

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

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

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

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

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

121. It provides that complaints of discrimination should be presented within three months of the act complained of:

(1)Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

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

b. *such other period as the Employment Tribunal thinks just and equitable."*

122. An act will be regarded as extending over a period if an employer an "ongoing situation" or a "continuing state of affairs" which can be contrasted with a "succession of unconnected or isolated specific acts": *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530 at [52]. When considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" (*Aziz v FDA* 2010 EWCA Civ 304, CA).

123. Section 123(1)(b) provides that where a discrimination claim is prima facie out of time it may still be brought *"within such other period as the Tribunal thinks is just and equitable*". This provides a broader discretion than the reasonably practicable test for other claims, such as unfair dismissal.

124. The time for presenting a claim is extended for the duration of ACAS Early Conciliation.

125. However, where the ACAS EC process was started after the primary time limit had already expired the ACAS " freezing" of the time limits does not operate to assist a Claimant (Pearce v Bank of America
EAT 0067/19).

126. Time limits should be adhered to strictly (relevant case being Robertson v Bexley Community Centre 2003 EWCA CIV 576.)

127. The burden of proof is on the Claimant.

128. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

a. *the length of and reasons for the delay;*
b. *the extent to which the cogency of the evidence is likely to be affected by the delay;* c. *the extent to which the party sued had cooperated with any request for information;*
d. *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
e. *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

129. However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.

130. In *Aberttawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194* the Court of Appeal noted that the tribunal has a wide discretion and the Tribunal was not restricted to a specified list of factors.

131. The most important part of the exercise is to consider the length and reasons for the delay and balance the respective prejudice to the parties.

132. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]* the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

133. Subsequently in *Chief Constable of Lincolnshire -v- Caston [2010] IRLR 327* the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

134. In *Department of Constitutional Affairs -v- Jones [2008] IRLR 128* the Court emphasised that the guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Other factors may be relevant too. At paragraph 50 Hill LJ said:-

"The factors which have to be taken into account depend on the facts, and the self directions which need to be given must be tailored to the facts of the case as found".

135. In *Concentrix CVG Intelligent Contact Ltd v Obi* [2022] EAT 149 the Employment Appeal Tribunal rejected the respondent's argument that the claimant's failure to provide an explanation for the delay meant that the tribunal must reach the conclusion that time could not be extended. However, the tribunal had erred in only taking into account the forensic prejudice to the respondent in the one day that the claimant had delayed in bringing her claim rather than the whole period of eight months over which the conduct extending took place.

Notice pay/wrongful dismissal

136. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provided, by a payment in lieu of notice.

137. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter

Conclusions

138. The Tribunal considered each allegation as set out in list of issues. There was no application to amend the claim made during the final hearing.

139. The submissions, both written and oral, were considered in full but have not been repeated unless necessary.

140. The conclusions were unanimous and reached by applying the law to the findings of fact.

Direct race discrimination (Equality Act 2010 section 13)

141. The claimant describes himself as Black Caribbean.

142. He alleges that on 28 December 2023 Mr. Barbieri:

"informed him he had friends who had the same medication prescription as the claimant. However, his manager did not accept that the claimant had the same prescription and wanted to subject the claimant through a 'checklist' process which the claimant says white employees would not have been subjected to."

143. As a matter of fact, the Tribunal did not consider the allegation as set out took place.

144. As set out in the findings of fact, the Tribunal found that Mr. Barbieri may have referred to knowing people or friends that used cannabis for medicinal purposes. However, it did not consider that Mr. Barbieri did not accept the Claimant had the same prescription, indeed it found that Mr. Barbieri believed that the Claimant had a prescription but in view of the fact the Claimant had attended training on 19 December 2023 and smelt of cannabis, and the context of the Respondent and the Claimant providing support and care to vulnerable adults, he requested the Claimant provide medical evidence and sought to assist him in collating what was needed by provision of what his since been referred to as a checklist.

145. It is also worth noting that Ms. Ajala, in her email dated 19 December 2023, set out a similar list of documents that the Claimant was requested to bring to a meeting.

146. During the hearing the Claimant's emphasis appeared to be on the length of time that was given to him to produce the medical evidence. This was not part of the allegation before the Tribunal.

147. The allegation was not made out factually and therefore fails.

148. However, in case the Tribunal was wrong, and the allegation as set out by the Claimant was made out, it considered whether such a finding would constitute direct race discrimination.

149. The Tribunal considered whether there were any inferences that could be drawn to infer whether there was a discriminatory attitude in the workplace, or that Mr. Barbieri had a discriminatory attitude. It did not consider there to be any such inferences.

150. The Tribunal considered whether the Claimant had discharged the burden on him to show evidence from which the Tribunal could

reasonably conclude that the comments made by Mr. Barbieri were **'because of"** race.

151. The Tribunal concluded that there was not sufficient evidence to discharge the burden on the Claimant. There was no evidence from which the Tribunal could reasonably conclude that the Claimant's race was the reason why. The Tribunal considered that the Respondent, via Mr. Barbieri was seeking to ascertain the Claimant's health situation and obtain the necessary medical information in order to undertake a risk assessment. This is in view of limited disclosure by the Claimant, him being reported as smelling of cannabis and the fact his role was to provide care to vulnerable users.

152. There is no prima facie case of race discrimination.

153. The Claimant has failed to show that the Respondent treated him less favourably than a hypothetical comparator. There is no evidence that a hypothetical comparator, a person who was a support worker, about whom concerns were raised with regards to a smell of cannabis during working hours, and who had responded to requests from management for further information in the same way the Claimant did, but was not black Caribbean would be treated any differently.

154. The Tribunal did not consider there to be something more in this case that shifted the burden of proof to the Respondent.

155. However, in case it was wrong on this, and the burden of proof shifted to the Respondent, the Tribunal considered whether there was a non-discriminatory explanation, namely that set out above, which is Respondent seeking to obtain the medical information to undertake a risk assessment and assess fitness to provide caring duties for vulnerable users.

156. Accordingly, had the Tribunal been wrong in relation to its findings of fact, it was of the view that the direct race discrimination complaint would have failed in any event.

<u>Reasonable Adjustments (Equality Act 2010 sections 20 & 21)</u>

157. Employment Judge Evans had previously made a determination that the Claimant was as at 1 April 2023 to 23 January 2024, a disabled person as defined by section 6 Equality Act 2010 because of a chronic pain condition in his legs and back.

158. The first matter that the Tribunal needed to consider was whether the Respondent knew or could it reasonably have been expected to know that the claimant had the disability? And if yes, from what date?

159. The burden is placed on the employer to establish if there was no actual or constructive knowledge.

160. Knowledge is required of the disability, and a summary of the key legal principles is set out above.

161. As set out in the findings of fact above, the Claimant provided limited information to the Respondent about his disability. He did not make any declaration on his health questionnaire, despite being prescribed medication, which appears to be used to manage his pain, in August 2022, prior to starting employment with the Respondent.

162. Prior to November 2023 the Claimant did not tell anyone about his condition, and he did not ask for any adjustments to be made. The Claimant only mentioned health issues for the first time in his email dated 17 November 2023, after the Respondent had raised performance concerns. The key parts of the email are set out in the findings of fact above, but the Tribunal note the Claimant described his condition as *"an undiagnosed medical issue",* considered he would be *"diagnosed within the next 6 months"* and he noted that the Respondent may not have been aware. He did not tell Mr. Barbieri in the meetings in November any real detail about his condition and he did not disclose he was taking any medication or treatment other than pain killers prescribed by the GP for two months.

163. In view of the above, the Tribunal concluded that Respondent, at the dates the allegations are about, namely between May and December 2023, did not have actual knowledge of the Claimant's disability. Further, it considered the Respondent did not have constructive knowledge and could not reasonably be expected to know that the Claimant was disabled at the time. It had no clear information on the condition, limited information on impact other than understanding from the Claimant he experienced pain and fatigue, and no clear information on how long it had lasted, or may last (save for knowing the Claimant had been prescribed painkillers for two months).

164. On that basis, the Claimant's complaint that there had been a failure to make reasonable adjustments fails.

165. However, in case the Tribunal was wrong on that, it went on to consider the further issues in any event.

Reasonable adjustments

166. The importance of a methodical approach to reasonable adjustments complaints has been emphasised in case law.

167. As set out above, the Tribunal's primary conclusion was that the Respondent was not aware of the Claimant's disability, so this analysis is an alternative conclusion, should it be wrong. It was noted in dealing with a reasonable adjustment complaint it is important to remember to consider and address the requirement for knowledge of the substantial disadvantage as well.

PCP

168. The Claimant asserts that the Respondent had the following PCP:

Enforcing a 7 am to 7 pm shift pattern with only one break.

169. The Respondent accepts it had a shift pattern with only one break, but that the times were very slightly different as set out in the findings of fact above.

Disadvantage

170. Accordingly, the next stage, in a claim where knowledge of disability is established, is to consider if the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

he needed rest in between and the hours were too long. He also needed to start later because of his medication.

171. In this case, the Respondent accepted that the need to rest was a disadvantage. It did not accept that the need to start later put the Claimant at a substantial disadvantage.

172. The Respondent did not comment specifically on the element "the hours were too long" but the Tribunal considers this is tied in with the disadvantage of needing to rest due to the long shift pattern.

173. There were no clear submissions on knowledge of substantial disadvantage, but given the information in the email dated 17 November 2023, and that told to Mr. Barbieri on 22 November about the need for rest breaks and fatigue, the Tribunal considered the Respondent was aware that the Claimant was put to that particular disadvantage.

174. Therefore, the Tribunal went on (on an alternative basis) to consider whether the need to start work later put the Claimant at a substantial disadvantage and whether the Respondent knew or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage. It should be noted that to succeed a Respondent must also have knowledge of the substantial disadvantage.

175. The Tribunal kept in mind the specific disadvantage pleaded.

176. Substantial means more than minor or trivial. This needs to be assessed on an objective basis.

177. The disadvantage must be linked to the disability.

178. On the Claimant's own account, in cross examination he said he did not need a later start. Further, on 22 November 2023 he asked for longer hours, on fewer days.

179. On the evidence presented, when assessed on an objective basis, the Tribunal do not consider the Claimant has satisfied the Tribunal that the shift starting at 7.15am and him alleging he needed a later start time was a substantial disadvantage. Further, clearly the Respondent, in view of what the Claimant told them, could not have been aware of any such substantial disadvantage.

Steps/failure

180. The Tribunal, again on a reserved basis, then looked at the particular steps that Claimant says would have avoided the disadvantage. The Tribunal considered whether it was reasonable for the Respondent to have taken those steps and when, and whether the Respondent failed to take those steps and kept in mind the extent to which the step would have prevented the disadvantage experienced by the Claimant.

181. It is important to keep in mind that the only disadvantage being considering at this stage is the need for rest given the earlier (alternative) conclusions

182. The Equality Act 2010 uses the term avoid, but this is not an absolute test. The more effective an adjustment is likely to be, the more likely it is to be reasonable. The assessment of whether an adjustment was reasonable is an objective one. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law.

183. The legislation does not specify the factors which it is reasonable to take into account, but paragraph 6.28 of the Code assists.

184. The Claimant suggest he should have been allowed more rest and eating breaks in a shift.

185. As soon as the Claimant told the Respondent that he experienced pain and fatigue the Respondent put in place further and additional rest breaks as set out in the findings of fact. It did this immediately following the meeting on 22 November 2023, without having any medical evidence. Further steps were put in place following receipt of the fit note dated 24 November 2023.

186. The Tribunal also noted that during the hearing the Claimant accepted the steps taken by the Respondent were fair and reasonable and put in place on his shifts.

187. The Claimant's focus during the hearing appeared to drift to a complaint about adjustments not being in place for the training days on 18 and 19 December 2023. But the complaint as presented was focused on the shift, and no application to amend was made.

188. Accordingly, even though this reasonable adjustment complaint failed at the first stage, the Tribunal considered that the Respondent did put in place steps to avoid the substantial disadvantage.

Harassment related to disability, religious belief and sexual orientation (Equality Act 2010 section 26)

189. The Tribunal dealt with each allegation separately.

190. Set out above is the statutory test for harassment. In order to be successful in a harassment complaint, it must be shown that the Claimant was subjected to unwanted conduct that was related to the protected characteristic in question and that such unwanted conduct had the effect or purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

191. We have also had regard to the ECHR Code, and in particular paragraph 7.7 :

192. Paragraph 7.7. of the ECHR Code states: *"Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour."*

193. Although harassment is similar to direct discrimination it covers actions "related to" a protected characteristic, which goes further than "because of".

194. When considering whether a claimant's dignity has been violated or an intimidating, hostile, degrading humiliating or offensive environment has been created, it must be kept in mind that it is not enough that the conduct was simply upsetting.

195. When considering effect it must be considered whether it was reasonable for the conduct to have had the effect taking into account both a claimant's perception and the overall circumstances.

196. The Tribunal dealt first with the allegation of religious belief harassment that:

His manager Luigi Barbieri made comments to the claimant in or around December 2023 that the claimant could bring God to the meeting (to discuss his medication) but that he would still have to suspend the claimant.

197. As set out in the findings of fact, the Tribunal considered that part of the allegation took place, namely that it was said that he could bring God to the meeting but there was no reference to suspension. On this basis, the Tribunal considered if the part found allegation was harassment related to religious belief.

198. The Claimant is a Christian.

199. The Tribunal considered that the words along the lines of "you can bring God to the meeting" was unwanted conduct.

200. It further considered that, on plain interpretation, the words related to religion.

201. The Tribunal went on to consider whether the conduct had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

202. The Tribunal concluded that Mr. Barbieri had no such purpose. Mr. Barbieri was not aware of the Claimant's religious belief at the time the comment was made. The Tribunal considered that Mr. Barbieri was seeking to encourage the Claimant to attend an informal meeting to discuss his medication following it being reported that the Claimant smelt of cannabis on 19 December 2023 and the Claimant disclosing that he takes medicinal cannabis. The Claimant had, in an email been told what the meeting was about and what to bring, and the meeting had already been postponed as the Claimant was seeking union attendance. The Claimant worked with vulnerable users, and Mr. Barbieri was mindful that he needed to undertake a risk assessment promptly and was seeking to encourage the Claimant to attend a meeting to move the matter forward. The comment was made to explain to the Claimant that he did not need any form of representation, and should not be concerned about attending the meeting.

203. The Tribunal then went on to consider if the conduct has the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

204. The Tribunal understands that the Claimant may have been upset by the comment referring to God. The Claimant's perception, but

also context and manner in which it was said are also relevant considerations.

205. However, it notes that the Claimant did not raise any informal concern with Mr. Barbiero or formal complaint about it at the time it was said, further, as set out in the findings of fact, the Claimant has not set out any evidence on this allegation in his witness statement at all. It is not referenced in his ET1 claim form either. There is no written evidence that the comment had the effect of violating the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offence environment for the Claimant, but in response to cross examination the Claimant said the use of the word God was offensive to him.

206. The conclusions set out above in relation to purpose are also relevant to the consideration of circumstances, but they are not repeated here for brevity.

207. The Tribunal has not been able to conclude that the conduct reasonably had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offence environment for the Claimant.

208. The allegation fails.

Harassment – allegation May 2023

209. As set out in the findings of fact, on the balance of probabilities the Tribunal did not find that the comments alleged to have been said by Ms. Alaja were said, and therefore the harassment complaints set out at 8.1.2 and 8.1.3 fail.

210. However, for completeness, it considered the jurisdictional time point in any event.

211. The Respondent's position is that the allegations set out at 8.1.2 and
8.1.3 are out of time.

212. The Claimant had not addressed time limits or jurisdictional matters but after confirming his witness statement he set out that he considered the complaints to be in time as he said that, as reflected in his appeal against dismissal, there was an ongoing issue from May 2023 such as comments made in relation to his perceived sexual orientation and that discriminatory comments continued following the meeting in November 2023 and that he considered this to be part of the same discrimination that continued to April 2024 as the Respondent did not believe the Claimant was disabled

and that they said to him he should consider stepping down from his role.

213. In relation to the Tribunal's ability to make a just and equitable extension to the time limit, the Claimant said it was close to a year that he had an ongoing issue with the same subject to it was equitable to extend time.

214. In submissions, the Claimant also referred to his ET1.

215. The Tribunal considered first whether the two complaints in question were made to the Tribunal within three months (plus early conciliation extension). In determining this we noted the allegation is set out as being May 2023.

216. The Claimant contacted ACAS for the purpose of Early Conciliation on 8 March 2024 and it ended on 19 April 2024. The claim form was presented on 16 May 2024.

217. A Claimant does not have the benefit of any Early Conciliation extension where it has started after the expiration of the ordinary time limit, which is plainly the case here.

218. Accordingly, the complaints are out time, taking the last day in May 2023 as 31 May 2023 the ordinary time limit would have expired on 30 August 2023.

219. As the complaints are out of time the Tribunal went on to consider if there was conduct extending over a period that brought the complaints in time.

220. As set out in the list of issues, the Claimant also brings an in time allegation of direct race discrimination relating to events on 28 December 2023 and allegation of religious belief discrimination on 27 December 2023.

221. The Tribunal noted that Claimant directed it to several documents in support of what he says shows conduct extending over a period, namely his ET1 and the appeal against dismissal letter, the pertinent extracts are set out in the findings of fact.

222. However, he has not provided any clear detail on who he alleges to have been discriminated against since May 2023 and what incidences he relies on.

223. The allegations against Ms. Alaji relate to one meeting, and further as the Claimant appears to have stated this appeal meeting (the reference to bullying being understood as relating to the May 2023 events) that it all happened in a matter of 2-3 weeks, thus indicating that the Claimant himself did not consider there to be ongoing bullying or discrimination. In cross examination the Claimant said the comments made by Ms. Alaja and that made by Mr. Barbieri in relation to God were a one off comments.

224. The Claimant only raised concerns about bullying in his letter on 17 November 2023, following concerns about his performance being raised, and even then he did not set out any clear detail and did not pursue any internal complaint.

225. On the Claimant's own account the Tribunal were not clear on what events he says formed part of conduct extending over a period.

226. Accordingly, the Tribunal did not consider the Claimant had established that there was conduct extending over a period that brought the complaints relating to May 2023 in time.

227. The Tribunal went on to consider whether it was just and equitable in all the circumstance to extend the time limit in relation to allegations 8.1.2 and 8.1.3

228. The Claimant has not provided any clear evidence on why he was not able to bring the complaints in time. In any event, the Tribunal considered the circumstances and the key factors in exercising discretion.

Lenth of delay

229. The allegations took place in May 2023 and the claim was submitted 16 May 2024, which would have been approximately nine months after the primary time limit. In view of the ordinary three month time limit the length of delay is very significant.

Reasons for delay

230. On the Claimant's case he was aware of the facts that gave rise to the allegations in May 2023. He provided no account of why he did not submit a claim about those events sooner.

231. Further, he did not offer any explanation as to why he did not submit a claim before May 2024, in particular around November 2023 when he raised the matter in his email dated 17 November 2023.

232. It is noted that he sought legal advice and had solicitors assisting him in January 2024.

Prejudice to parties – cogency of evidence - impact on delay

233. Further, the alleged perpetrator, left the Respondent's employ in September 2024.

234. The ET1 did not reference Ms. Ajala and did not specify the events in May 2023 relied on. It was only at a case management preliminary hearing in June 2025 that the allegation was clearly set out. Further, it was only during this final hearing that the Claimant said there were witness to the comments.

235. The Tribunal considered both the delay and lack of clarity to be matters which clearly negatively impact the cogency of the evidence and the Respondent's ability to defend the complaints.

Merits of case

236. The strength of a claim may be a relevant factor in deciding whether is it just and equitable to extend time, but even where a case is strong, time may not be extended.

237. The Tribunal determined that the comments were, on the balance of probabilities, not made. Thus, the complaints were not at all likely to succeed.

238. Putting matters together overall, and taking into account all these factors, and applying the test set out in the legislation, the Tribuanls judgment is that the Claimant would have failed to show it would be just and equitable to extend the time limit for allegations 8.1.2 and 8.1.3, had the allegations not failed substantively at the first hurdle.

239. As the Tribunal concluded the complaints were both out of time and the comments were not found to have been said, the Tribunal did not consider it proportionate in these circumstances to consider the complaints further.

Wrongful dismissal / Notice pay

240. The Respondent accepted that the Claimant was wrongfully dismissed and was due payment for his four week notice period. The Respondent shall pay directly to the Claimant **£1,383.63** as damages for breach of contract. This figure has been calculated using net pay and includes net salary of £1,333.48 and £53.15 for pension contributions. The Respondent is responsible for the payment of any tax or National Insurance to HMRC.

Approved by:

Employment Judge Cawthray

6 January 2026