Case Number: 3303070/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr G Ali

Respondent: (1) Openreach Limited
(2) Mr A Mohamed

RECORD OF A FINAL HEARING

Heard at: Bury St Edmunds **On:** 15-19; 22; 25-26 June 2026; 7-11 September 2026

Before: Employment Judge Richard Wood; Mr R Allan; Mrs S Johnstone

Appearances
For the claimant: Mr T Wheeler (Representative)
For the respondent: Ms C Nicolaou (Solicitor)

JUDGMENT

1. The ordinary unfair dismissal claim is well founded and is allowed.

2. The automatic unfair dismissal claim is not well founded and is dismissed.

3. The protected disclosure detriment claim is not well founded and is dismissed.

4. The direct disability discrimination claim is not well founded and is dismissed.

5. The indirect disability discrimination claim is not well founded and is dismissed.

6. The harassment related to disability claim is not well founded and is dismissed.

7. The discrimination arising out of disability claim is not well founded and is dismissed.

8. The unauthorised deductions from wages claim is dismissed upon withdrawal by the claimant.

9. The victimisation claim against Jane Yeomans at allegation 4 of List D1 of the list of issues is dismissed upon withdrawal by the claimant.

10. The other aspects of the victimisation claim are not well founded and are dismissed.

11. The holiday pay claim at paragraph 15.2.1 of the list of issues is well founded and is allowed in part.

12. The holiday pay claim at paragraph 15.2.3 of the list of issues is dismissed upon withdraw by the claimant.

13. The holiday pay claim at paragraph 15.2.2 of the list of issues is dismissed upon withdraw by the claimant.

FULL REASONS & DECISION

Claims and Issues

1. The Claimant, Mr Gulam Ali, commenced employment with the First Respondent on 18 September 2006. He was employed as an Innovation programme manager from 18 September 2006 until his dismissal on 8 March 2024. He was based at Adastral Park in Ipswich. The claim form was presented on 14 March 2024. Mr Gulam made an application for interim relief, which was refused by Employment Judge Palmer at a hearing on 29 April 2024.

2. The first respondent, Openreach Limited, is a wholly owned subsidiary of the BT Group. The second respondent, Mr Ahmed Mohammed, is head of open innovations at Openreach, He was a senior manager, and the claimant's direct line manager between June 2021 and April 2023, when the claimant moved to a different team.

3. Early conciliation started on 14 March 2024 for both respondents and ended on 15 March 2024 in respect of the R1 and 18 March 2024 in respect of the Second Respondent (R2).

4. In broad terms, the claim is about bullying. The claimant asserts that this arose when he made certain protected disclosures concerning regulatory compliance issues. He says that as a result he was treated badly by a succession of line managers (primarily the second respondent, Mr Mohamed), culminating in his dismissal which he says was automatically unfair on the grounds of protected disclosures. The claimant also asserts that he was discriminated against on the grounds of his disability, namely mental health conditions.

5. The respondents deny discrimination, or that any conduct on their part was motivated by disclosures of information. It is further asserted that the alleged disclosures do not satisfy the definition within section 43A of the Employment Rights Act 1996 ("1996 Act"). In broad terms, the respondents state that Mr Ali was a problematic employee, who had persistent performance related issues which eventually led to his dismissal. In essence, it was suggested that Mr Ali did not appreciate the importance of turning up at his contracted place of work, and on time, amongst other issues.

6. Claims of unauthorised deductions from wages have been withdrawn by the claimant and dismissed. The claimant also indicated that he no longer pursued allegations of victimisation against Jayne Yoemans, a member of staff within Openreach. He also withdrew the claim at paragraph 15.2.3 of the list of issues at [258].

Procedure, Documents and Evidence Heard

7. The Hearing took place on 15-19; 22; 25-26 June 2026, and then on a part heard basis on 7-11 September 2026, at the Bury St Edmonds Employment Tribunal. The claim was heard partly in person, and partly via CVP. We first of all heard testimony from the claimant, Mr Ali. From the first respondent, Openreach, we heard evidence from Mr Austin (senior regional programme manager), Mrs Hogg (senior area manager), Mr Barrett (head of safety for complex engineering), Mr Vince (senior

manager, special operations), Mrs Gibson (senior manager, high level complaints and escalations) and Mrs Kennedy (senior HR manager). We also heard from the second respondent, Mr Mohamed.

8. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 2087 pages (the main hearing bundle), and a bundle of witness statements. During the hearing and in response to queries by the Tribunal, we were provided with a bundle of Openreach policies which ran to 163 pages; and a bundle of documents from he claimant which comprises 354 pages. At the final hearing in September, we were also provided with a remedy bundle by the claimant which comprises 142 pages. We were also assisted by helpful written submissions from the parties.

9. On 11 September 2026, we handed down a summary verbal extempore decision to the parties. Having made findings in favour of Mr Ali, we adjourned the matter to 23-24 November 2026 for remedy hearing. On 12 September 2026, the claimant himself requested full written reasons, which appear below. We hope they are of assistance.

10. Page numbering referred to in square brackets in these reasons are to pages in the main hearing bundle, unless otherwise stated.

11. In coming to our decision, the Tribunal had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Findings of Fact

11. Our findings of fact in this claim were as follows.

12. In October 2018, the claimant was absent from work with Openreach on the grounds of stress and anxiety. He had experienced some problems in his personal life, not least his home being badly damages in a fire. The claimant returned to work in or around January 2019. He was under the care of his GP, but was not prescribed medication. He was however referred for some counselling. Post January 2019, there were no further consultations between the claimant and his GP or other clinicians until October 2022. Prior to 2018, the claimant had not had mental health issues, was normally a resilient person, and was at low risk of this type of ill health recurring [1773]. We find that, prior to his dismissal, Mr Ali had been prescribed medication for anxiety or depression, namely sertraline, for a period of only about one month, namely December 2022.

13. On 12 May 2020, Mr Ali was issued with a formal warning from his then line manager, Mr Petit in relation to poor attendance [1032]. We accept the evidence that this incident occurred and that he was sanctioned for it under Openreach's disciplinary procedure. Mr Ali appealed this decision but it was dismissed on 19 June 2020 by Mr Martin Fowler [1015]. We are not aware of any allegations being made about Mr Fowler personally.

14. We note that at paragraph 41 of his witness statement, Mr Ali stated that he had had a long standing and unblemished work record before making the alleged protected disclosures i.e prior to July 2021. We find that this was not correct. There was a

warning referred to above from 2020 (which had expired by that stage), as well as a management improvement plan. (See below). This demonstrates that his disciplinary history, and his work record in a broader sense, were not 'unblemished'.

15. On 22 June 2020, Mr Ali sent an email to Gillian Smith of Openreach's Human Resources department ("HR") putting her on notice that he was about to submit a grievance, stating that "….I am starting the next round of battles against management.". [1039]. The grievance was said to relate to unfair treatment, bullying and discrimination.

16. We note in passing that in 2020 Mr Petit rated Mr Ali's performance as "work to do" i.e. below what was expected of him. Mr Ali accepted this in cross examination.

17. In or about January 2021, Mr Ali was placed on an improvement plan by Mr Petit [866]. This centred around concerns about attendance, poor stakeholder management, frequent mistakes, leaving tasks unfinished, and that current plans on teams Sharepoint did not reflect the current position with regards to progress.

18. Mr Ali raised a grievance against Mr Petit in September 2021, alleging unprofessional, unfair and discriminatory conduct towards Mr Ali. The grievance was dismissed on 30 November 2021 [1051-1065]. This decision was made by a Mr Matt Madden, a senior business manager of Openreach. We are unaware of allegations made about Mr Madden's motivations. We note that when asked about his grievance in cross-examination, Mr Ali initially denied any knowledge of it. We find his lack of recollection of this issue to lack credibility.

19. It has been suggested by Mr Ali that this, along with many other of his previous disciplinarian issues with Openreach, were tainted by procedural defects on the part of the decision makers i.e. that the policies and procedures of Openreach were not adhered to. It is suggested that this rendered any subsequent sanction a "nullity". We do not accept these submissions. It has not always been easy to make findings of fact about what happened on these previous incidents so long after the event, but we have done our best with the evidence before us. However , we note that at least some of the instances of misconduct involve allegations that were at least partially admitted by the claimant at the time and/or during this claim.

20. Importantly, and whether there were procedural deficiencies or not, we are satisfied that it has been necessary and appropriate for us to come to our own view about previous allegations/sanctions because they form part of the particulars of less favourable treatment etc, and/or because they are potentially relevant to the motivation of the respondents in the context of alleged discrimination, protected disclosure dismissal and/or detriment. It has been necessary for us to make our own decision about whether misconduct occurred and whether allegations were dealt with appropriately. It has not been appropriate for us to disregard previous sanctions, as we were invited to do by the claimant, simply because there may have been procedural anomalies.

21. In June 2021, Mr Ali transferred from Mr Petit's team, to Mr Mohammed's, the second respondent.

22. On 6 July 2021, the Claimant asserts that he raised concerns concerning wireless trials and regulatory compliance. The Claimant's evidence is that these concerns were raised verbally to his line manager in a telephone call (list of issues, paragraph 2.1.1.1). We accept the evidence of Mr Mohammed that the issue of the unlicensed

trial had been a group discussion, one involving BT networks, during which it became apparent that the wireless trials at the Four Acre site were not covered by existing BT licences.

23. We note that Mr Ali also placed some reliance on a WhatsApp message at [1782]. This is not mentioned within the list of issues. However, Mr Mohammed accepted in cross-examination that the message had been sent, and that there would have been related discussions with Mr Ali both before and after the WhatsApp message was sent.

24. Mr Ali also suggested in cross-examination that he had attempted to raise concerns again with Mr Mohammed in 2022 i.e. about PPE, bullying and radio trials. He also explained that he had sent a follow-up email to Mr Barrett about his concerns. These matters are not pleaded, and there is no documentary corroboration for these additional disclosures. We do not accept this evidence.

25. Doing the best we can with what was confusing and technical evidence, we find that the equipment being trialled had been anticipated to transmit at a certain frequency which did not require a licence. However, the frequency of the emissions had changed at some point, making a license necessary under the applicable regulatory framework. We accept that the trial therefore ran for a period of time from April 2021 without an appropriate licence. At the point where matters came to light, the equipment was turned off. Mr Ali told us that such “light licences” would cost about £50 per annum. Mr Ali also explained that there was nothing unsafe about running the said radio equipment. Mr Mohammed told us that the matter had not been escalated to senior management because it was “no big deal”. Mr Mohammed conceded that it might have been a criminal offence under the Wireless Telegraph Act 2006 but explained that he worked closely with Ofcom and that this had to be put into its proper context i.e. that it was inadvertent and a breach of a technical nature on a very small scale.

26. We would add that it is clear that Mr Mohammed was wrong when he suggested to us that Mr Prycke (another programme manager at a similar grade to Mr Ali) had subsequently obtained a licence for the site. After further enquiry, we were told that no licence had been obtained.

27. In re-examination, Mr Ali went on to opine that this was a public safety issue and that people could be affected by radio waves impacting on their brains. He explained that the impact depended on the frequency. He referred to concerns about microwave and radio mast emissions by way of analogy. On the other side, we heard evidence that the likely frequency of the equipment used during the trial at Four Acre were a very small proportion of the frequency of an ordinary light bulb. It seems unlikely to us that this was a public safety issue. We have seen no expert evidence to that effect. What is more, Mr Ali appears not to have escalated the matter at the time, which seems inconsistent with the suggestion that the equipment presented a risk to health.

28. In September 2021, Mr Ali was issued with a verbal warning on the grounds that he had been verbally abusive to a colleague on a Teams call. We accept Mr Mohammed’s evidence that this incident occurred and that Mr Ali was subjected to a sanction in good faith by Mr Mohammed. It seems likely that this was dealt with informally by Mr Mohammed, having regard to the terms of the disciplinary policy at

[403]. As Mr Mohamed put it in cross-examination, he gave Mr Ali a warning and thought that would be the end of it.

29. Very sadly, Mr Ali's father died on 20 November 2021. Notwithstanding that it is part of the claim that Mr Mohammed offered no support to Mr Ali during the period following his father's death, we find that Mr Mohammed granted him three weeks of compassionate leave. Indeed, Mr Ali agreed that he had done so in cross-examination. Mr Mohammed also offered to attend his father's funeral, and when he was unable to do so due to illness, he sent another member of staff. We also accept Mr Mohammed's evidence that Mr Ali was offered referrals to the Employee Assistance programme (EAP) and counselling, which were turned down by Mr Ali. We accept that an occupational health (OH) referral was not considered by Mr Mohammed at this stage, as he confirmed in cross-examination.

30. On 7 January 2022, Mr Mohamed wrote an email to Mr Prycke which is a contemporaneous exploration of the difficulties that he was having in terms of his management of Mr Ali [1980]. It was consistent with Mr Mohamed's evidence to us.

31. During January and February 2022, three fact-finding meetings took place concerning the claimant's attendance and timekeeping [411–413]. It is not disputed that such meetings occurred. The parties differ as to whether the concerns were justified. Having listened carefully to all of the evidence on this point, we prefer the testimony of Mr Mohammed over that of Mr Ali, where there is conflict. We are satisfied that there were persistent issues surrounding time keeping and Mr Ali's attendance at the office at Adastral Park in Ipswich, Mr Ali's place of work accordingly to his contract of employment. We find that he was a full time employee required to start at about 9am. It was anticipated by Mr Mohammed that Mr Ali would participate in an early morning daily telephone meeting, and do so from the office. Mr Ali had cited child care issues as an an obstacle to attending the office pursuant to his contracted hours. We were told that he was required to drop his sister's children at school, before driving from Hadleigh to the office, which it was agreed was a journey of about half an hour.

32. It was not contentious that Mr Mohammed adjusted the time of the meeting over time from 9am, to 9.15 and then to 9.30am, in an attempt to accommodate Mr Ali. Mr Mohammed also indicated that he was content with Mr Ali to attend the team meetings before coming to the office. We do not accept the suggestion made by Mr Ali that he was expected to take calls whilst driving. This is not supported by the contemporaneous documents, and we accept the evidence of Mr Mohammed that he told Mr Ali that he should park up somewhere safe, if necessary, before joining the meeting.

33. It was our impression that Mr Ali wished to participate in the meeting from home. Indeed, one of the underlying themes of the claim is that, at times, Mr Ali thought it unreasonable to make him work from the office at all, as opposed to from home. We heard and accept that one of the reasons Mr Mohammed wanted Mr Ali to attend the office was so that he could work with Mr Prycke who, he thought, might steer him towards better practice. We also find that by January 2022, Mr Mohammed had at least tacitly agreed to Mr Ali getting into the office by either 10am or 10.30am, so long as he attended the team call in advance.

34. Accordingly, we are puzzled by the general proposition put on behalf of Mr Ali that Mr Mohamed's approach to attendance at work and participation in the meetings is

evidence of bullying or unreasonableness on the part of Mr Mohammed. It seems to us to indicate quite the opposite. Neither do we accept that Mr Ali was being treated less favourably than others. We accept that Mr Prycke, who was on similar terms and conditions, attended the office at 9am daily. We find that they were the only two managers to attend Ipswich under their contracts of employment.

35. As Mr Mohammed put it in the meeting of 19 January 2022, he could not let Mr Ali dictate what time he started work, or from where he worked. It has been our impression of Mr Ali that he did not see eye to eye with Mr Mohammed on this issue. It has been suggested to us on Mr Ali's behalf that this was micromanagement which was unreasonable and motivated by the first protected disclosure. It is our view that this is a view which demonstrates a certain detachment from the reality of employment. In our view, Mr Mohammed had gone to considerable lengths to accommodate Mr Ali in this scenario. Requiring an employee to come to the work place, on time, and to participate in team meetings, is basic and fundamental to the efficient running of a workplace. It is a theme of this claim that Mr Ali did not appreciate this.

36. On 25 January 2022, Mr Ali was late for a meeting which was due to take place at 8.30am. He explained that he had had to take another call which had caused him to be late. There is support for the proposition that he had made such a call, and that he had told a colleague that he would be late to the meeting. It was less clear why Mr Ali had decided to take the other call at a location on the opposite side of the site from where the meeting was to take place, making him later than would otherwise have been the case. Mr Ali had not informed his line manager, Mr Mohammed, of his potential difficulty in advance.

37. On the same day, the team agreed (including Mr Ali) that there would be a meeting on the following day, at 9am. Mr Ali did not attend that meeting on 26 January 2022 until 9.30am, stating that he had not been aware of the start time. We do not accept that Mr Ali was unaware of the start time of this meeting and neither did Mr Mohammed.

38. On 26 January 2022, we note that Mr Mohammed emailed Mr Pryke to discuss his concerns about Mr Ali's work standards, and about the possibility of placing him on a performance plan [415]. Mr Ali suggests that this email demonstrates that the incidents of lateness which preceded this date had been dealt with informally, i.e by way of the performance plan. We take the view that they are not mutually exclusive. The decision to opt for performance management does not necessarily indicate that any disciplinary process had been abandoned. It is not what was stated in the email, for instance. We accept that there were some procedural shortcomings in the way Mr Mohammed approached these matters. However, in our judgment this does not render the subsequent findings or sanctions a nullity. Neither is it evidence of some sinister and/or discriminatory motivation.

39. On 27 January 2022, Mr Mohammed was contacted by a client of Openreach, a Mr Tariq Rana. He complained that Mr Ali had been slow to respond to his queries, that he didn't engage and didn't seem to be particularly interested in the project they were working on together. It was suggested by Mr Rana that there had been a few calls cancelled and that Mr Ali's punctuality was not good. [417].

40. This incident is dealt with in Mr Wheeler's supplemental written submissions at paragraph 21. In summary, the implication made on behalf of Mr Ali is that this

complaint was manufactured by Mr Mohammed. It is alleged that Mr Rana was a friend of Mr Mohammed and that the complaint and the email supporting the nature of the complaint [417], are not genuine and were contrived. Mr Ali points towards the fact that for many months, Mr Mohammed suggested that it had been a concern raised verbally, not in writing.

41. We do not accept this aspect of Mr Ali's case. It is speculative at best. Mr Mohammed did not strike us at any time as somebody who would have had the inclination or the motivation to falsify a complaint against Mr Ali. We acknowledge that it had been Mr Mohammed's position that this was a verbal not an written complaint. He told us that this had been an error, and that the concern had been first raised with him in a telephone call whilst on holiday in Scotland, and had later been communicated by email, which was how the confusion had arisen. We accept his evidence on this issue.

42. On 8 February 2022, Mr Ali failed to attend a mandatory morning call. We are satisfied that when asked, Mr Ali explained (more then once) that he did not have an excuse for not attending, that his alarm had not gone off and he had overslept (which he confirmed in cross-examination). As Mr Mohammed put it at [413], this was a breach of basic work standards. We agree. We note that it has been Mr Ali's case before us that he slept in due to taking sleeping pills. This was an explanation he gave to Mrs Gibson at the disciplinary hearing but not to Mr Mohammed at the time. We have seen no evidence that Mr Ali was taking sleeping tablets at the time. Of course, we have seen his medical records. We therefore do not accept this aspect of Mr Ali's explanation. It is, in our judgment, an example of his evidence changing to suit the circumstances.

43. A disciplinary hearing took place on 6 May 2022 in relation to the matter set out in the paragraphs immediately above. A written warning was issued on 7 June 2022 [428–433]. It was chaired by Mrs Gibson. Mr Wheeler has pointed to procedural shortcomings in terms of the investigation and the hearing. In particular, it is suggested that Mrs Gibson was not adequately independent of Mr Ali to be able to conduct the process. We accept that there is evidence (see [1842]) that in February Mrs Gibson had referred a potential breach of ethics concerned with the sharing of infrastructure details. This appeared to involve Mr Ali. However, as Mrs Gibson explained, she did not refer Mr Ali, but the whole organisation. This was not a disciplinary matter, but one of broader ethical compliance. We do not agree that she was thereby disqualified from hearing Mr Ali's case.

44. It is suggested on behalf of Mr Ali that Mr Mohammed was untruthful when questioned by Mrs Gibson in preparation for the disciplinary hearing. He asserts that Mr Mohammed told Mrs Gibson that he (Mr Ali) was on a final formal written warning. This was clearly a reference to the warning issued in the previous September. We accept that there is a question mark as to Mr Mohammed's grasp of the disciplinary procedure, and his use of terminology surrounding sanctions. Whether it was 'formal' or 'final' is certainly moot. However, the core of what he said was correct in that Mr Ali had received a recent disciplinary sanction. We find insufficient evidence that this was a deliberate attempt to mislead, or that any error was motivated by bad faith or discrimination.

45. We are otherwise satisfied that this was a fair and genuine process, and that the sanction imposed was valid. We find that Mrs Gibson acted in good faith. We note in passing that Mr Ali failed to raise concerns relating to any protected disclosures

during the process. We also accept Mr Ali's observation that the sanction imposed by Mrs Gibson was for time keeping and non-attendance at meetings. It excluded the complaint made by Mr Rana [430].

46. This sanction was unsuccessfully appealed by Mr Ali. The determination of the appeal appears at [461] and was heard by a Mr Anthony. We are not aware of any direct allegations in relation to Mr Anthony personally.

47. During the hearing, it was argued by Mr Ali that the outcome document at [431] had not been created when it was suggested i.e. 16 May 2022. Mr Ali told us that he had 'meta data' which bore out this proposition. Despite being reminded about this issue, no data was forthcoming from Mr Ali.

48. The Claimant appealed the written warning on 13 June 2022. There is evidence that the appeal process was subject to delay, which was later acknowledged internally as unsatisfactory.

49. In or about October 2022, the Claimant went on sickness absence, which continued until January 2023 [636–655]. This followed Mr Ali being put on notice that he was to be subject to an investigation in respect of an alleged unauthorised absence from work [1933] on 25 October 2022, as well as being unavailable on-line. As it transpired, this matter was not followed up and he was never sanctioned for the incident.

50. The Claimant returned to work on 10 January 2023 under a phased return arrangement involving reduced days and hours [651]. Mr Mohammed also moved team meetings to 10am to accommodate Mr Ali. Mr Mohammed also offered him the opportunity to work wholly from home during the phased return. However, Mr Ali preferred to work two days in the office at Adastral Park. Mr Ali was allowed to work only on non-critical projects during this period. The phased return continued until the end of January [2002]. We are satisfied that this was adequate support in the circumstances.

51. In January 2023, it is alleged that there was a telephone conversation between Mr Ali and Spencer Barrett (Health and Safety Director for Openreach) during which it is suggested that Mr Ali made a protected disclosure relating to a number of unlicensed sites and that radiation levels had not been checked at those sites since 2019 (this is the second protected disclosure - see paragraph 2.1.1.2 of the list of issues). Having carefully considered all of the evidence about this alleged telephone call, we do not accept that it took place in the way alleged by Mr Ali. Mr Barrett did accept that Mr Ali had reached out to him in January 2023 about what was described as unreasonable conduct by Mr Mohammed. However, he had advised Mr Ali to take his concerns to HR. He did not recall any mention of unlicensed radios, for instance.

52. Where there is a dispute, we have preferred Mr Barrett's testimony over that of Mr Ali. We found Mr Barrett to be an uncomplicated, consistent and persuasive witness. Mr Ali's account of the nature of the call has differed greatly over the period of the claim. At paragraph 17-18 of his witness statement, he suggested that he had raised concerns with the health and safety leadership, including Mr Barrett, about unsafe working practices, including being expected to join calls while driving or from roadside lay-bys; and lack of appropriate PPE. Much of this is not mentioned in the list of issues. Mr Ali told us that he had raised concerns with Mr Barrett by telephone and email. This is a very different disclosure from the one set out in the list of issues.

53. On or about 30 January 2023, Mr Ali made a complaint to Ofcom [1963] in respect of the use of wireless radios by Openreach at a site in Hereford (not the Four Acre site).

54. In February 2023, Jayne Yoemans was appointed as Mr Ali's duty of care manager. This was with a view to providing him with an extra layer of support entirely separate from his line manager, which at the time was Mr Mohammed. Mr Ali conceded in cross-examination that Ms Yoemans was very supportive and that he maintained close contact with her throughout his absence, to the detriment of contact with his line manager, who he refused to correspond with.

55. In early March 2023, the Claimant raised a formal grievance concerning his line manager, Mr Mohammed [1372–1375]. The substance of the grievance appears at [1301-1369]. This document suggests that there were other PDF's embedded into the document. We heard that these additional PDF's were never seen by Openreach, in part for technical reasons. We were not shown them either. As we understand matters, we were invited to consider the grievance in so far as it appeared in the document in the bundle. In passing, we also note that at no point in the grievance (notwithstanding its considerable length) is there mention of mental health issues or of him having a disability.

56. The grievance was investigated by Susan Hogg, who concluded that the complaint should not be upheld [1391–1395]. It was an aspect of the verbal concerns raised by Mr Ali as part of the grievance that the treatment by Mr Mohammed was racially motivated in that Mr Ali is Indian Bengali, and Mr Mohammed was said to be of Pakistani heritage. However, it is now agreed by the parties that both men are of Indian origin [1383] and are both Muslim [1393]. When asked about this in cross-examination, Mr Ali blamed his union representative for raising the matter.

57. On 17 April 2023, Mr Ali was transferred to James Vince's team. There was an extended exchange between the Tribunal and Mr Ali about this issue. He was adamant that he had not moved teams even though part of his case seemed to be premised on the suggestion that he had. Indeed he had raised a grievance about being moved from Mr Mohammed's team [1461]. We did not accept his evidence on this point which we found difficult to follow.

58. A few days later on 20 April 2023, Mr Vince chaired a fact finding meeting with Mr Ali relating to his alleged late attendance at a team meeting on 18 April 2023 [493]. Mr Ali explained that he had overslept but also suggested that he had been excluded from these meetings since January. There was a similar fact finding meeting on the following day, when it was alleged Mr Ali failed to attend work or to be available to contact by his manager, Mr Vince [504]. Both were referred to the disciplinary procedure by Mr Vince. In cross-examination, Mr Ali conceded that he later applied for a half day of annual leave retrospectively in relation to 21 April incident. See [495] and [SB340]

59. In April 2023, Mr Vince assigned skip clearance work to various members of staff, including Mr Ali. We find that Mr Vince also carried out this work. We also find that this was a significant project for Openreach. The aim was to recycle larger quantities of valuable copper cable. Mr Ali was praised for his work on this project. We accept Mr Vince's evidence on this issue that it was not intended to be demeaning or demoralising work. Neither was it targeted at Mr Ali, who made no complaint about the work at the time.

60. On 22 May 2023, Openreach dismissed Mr Ali's grievance [1391]. We have some concerns about the way this was handled by Mrs Hogg. It was apparent that she had based her investigation solely on the matters raised by Mr Ali in the course of a meeting on 20 April 2023 [1378], rather than basing it on the very extensive grievance document which Mr Ali had submitted [1301]. We also find that on her own account, Mrs Gibson had limited access to source data within Openreach, such as a disciplinary record for Mr Ali. That being said, as is set out below, we have come to similar conclusions as Mrs Hogg in terms of the underlying allegation which was that Mr Ali was being bullied and discriminated against by line management.

61. On 31 May and 1 June 2023, Mr Ali had turned up late to an event at the Suffolk Show. On the first day of the event, he had arrived at 9.15 when he should have been on site at 7.30. Mr Ali suggested that he had had to go into the office to pick up his ticket, and that the traffic had been bad, causing him to be late. On the second occasion, Mr Ali stated that he had had to work on another project and had told Mr Prycke about it. It was common ground that Mr Ali had not spoken to Mr Vince in advance. These were the subject of a fact finding hearing on 6 June 2023 [521] at which Mr Vince recommended they be the subject of disciplinary proceedings [526].

62. On 23 June 2023, the Claimant commenced a further period of sickness absence, attributed in the records to stress and related conditions [661]. He never returned to work for Openreach. His absence was reviewed at [744]. Mr Ali reported that work was making him ill, particularly with Mr Mohammed and Mr Vince. He said he did not require any further support in addition to having a duty of care manager; help from his GP; and counselling sessions (which he was having through the Employee Assistance Programme (EAP). Mr Ali explained in cross-examination that he was adamant that he would not last a week if he returned to the same team.

63. An Occupational Health assessment dated 8 September 2023 recorded that the Claimant was not fit to return to work at that time [750–752]. It records that prior to his absence, Mr Ali was working 32 hours a week, 5 days a week, two days at home and three days in the office. It was noted that he was suffering with low mood and anxiety. Medication was recommended. It was observed that a return to work would be possible only when the work related issues had been resolved. A further OH assessment was recommended in two months time.

64. On 25 September 2023, Mr Mohammed provided an account of the reason why he had assessed Mr Ali's performance at work as "work to do" [2007-2010]. This is a highly detailed document which sets out those matters relied upon by Mr Mohammed. Mr Ali argues that Mr Mohammed should not have been responsible for assessing this performance given that he was, at the time, the main subject of a grievance submitted by Mr Ali. We have some sympathy for this proposition as a matter of principle. However, given the necessity of performance rating, for instance in the context of the award of bonuses, Mr Mohammed remained the person best informed to make such an assessment. Having looked at the evidence as a whole in this case, we can see why Mr Ali was assessed as underperforming. Sufficient evidence has been adduced to justify Mr Mohamed's conclusion. We also note that such an assessment of Mr Ali's performance was not an isolated occasion. As a result of the said performance rating, Mr Ali was deemed not to be entitled to an annual bonus. This was consistent with the relevant policy as we understand it.

65. During Mr Ali's ill health absence, he was was referred by Openreach for counselling support. He attended a limited number of sessions, at which point he was told he

could not attend any more due to Openreach's policy which stated that an employee was required to return to work before more sessions could be arranged. Mr Vince unsuccessfully appealed the decision to limit sessions [759]. However, the referral was renewed some time later and Mr Ali attended further sessions including one on 6 February 2024.

66. A meeting took place on 27 September 2023 between the Claimant and Tim Austin, a second-line manager, to explore the potential for a return to work [2025–2033].

67. On 17 October 2023, Openreach commenced a voluntary redundancy scheme ("the scheme") based on a policy which appears in the claimant's remedy bundle ("CRB") at page 117. Employees with formal performance improvement plans or who are being formally managed under the attendance/sickness or disciplinary procedures would not normally be authorised to join the scheme. Similarly, where an employee is an alleged offender in a grievance case or being investigated as part of a disciplinary procedure, their application would also not normally be authorised. We note in passing that at the relevant time, Mr Ali was subject to both the disciplinary procedure and the attendance/sickness procedures. The scheme closed on 6 November 2023.

68. An invitation to join the scheme was sent to staff. This is evidenced by the document at [CRB113], which suggests that it was circulated amongst "colleagues in the complex engineering team". Mr Ali accepts that he was in this team at the relevant time. It was Mr Ali's case that he did not received information relating to the scheme. However, he was questioned about this in cross-examination by Ms Nicolaou on day two of the hearing. He was asked if he had requested to leave his employment immediately upon joining Mr Vince's team. Mr Ali replied that he had not but that he had received an email about the early leaving scheme. This email has only come to the Tribunal's attention now because it appears at in the CRB.

69. Mediation between the respondents and Mr Ali took place on 30 October 2023. It is not in dispute that mediation occurred, although the content of that discussion is confidential. The claimant did not return to work following mediation and remained absent thereafter.

70. By letter dated 15 November 2023, Mr Ali was invited to a capability hearing, with dismissal identified as a potential outcome [765–766]. A meeting was held on 24 November 2023. The notes of the meeting are at [773]. A decision was taken on 6 December 2023 to dismiss Mr Ali on grounds of capability/attendance, following consideration of written submissions [771–778]. The effective date of termination is recorded as 8 March 2024.

71. Mr Ali's final fit note ended on 2 January 2024 on which date he was due to return to work.

72. Mr Ali's appeal was heard on 10 January 2024 and dismissed by letter dated 17 January 2024 [783–790]. This was chaired by Scott Topping. There is an issue about the notes of the appeal hearing at [785]. Mr Ali does not accept that he said he would only return to work if to another team. He says he was advised by his union representative to say that he was prepared to return to the same team, and did so. We do not accept that this was said. However, even if it was, we do not accept that it was an accurate summary of his attitude towards a return to work. We are satisfied that Mr Ali remained adamant that he would not return to Mr Vince's team for the

reasons he had repeatedly stated. This is again evidence which is tailored to suit the circumstances as Mr Ali perceived them.

73. In January 2024, Mr Ali made a further complaint to Ofcom relating to the use of wireless radios by Openreach.

74. Mr Ali was referred by Openreach to OH in or about December 2023. The report is dated 6 February 2024 [1960]. In summary, it suggested that Mr Ali had been diagnosed with anxiety and depression since 2022, and that this was down to work reasons mainly. It was reported that counselling had helped him considerably and that he was not on any anti-depressant medication, which he had last taken about a year earlier. His walking was reported as "ok', as were his daily living activities. His mood was stable and energy good. Mr Ali was assessed as normal on questionnaires relating to depression and anxiety.

75. As stated Mr Ali lodged his claim in the Employment Tribunal on 14 March 2024.

Decision and Reasons

76. Based on the findings of fact set out, the Tribunal has come to he following decisions. The decision reflects the structure adopted in the list of issues.

Protected Disclosures

77. The term "qualifying disclosure" is defined by section 43B Employment Rights Act 1996 ("ERA"), which provides, so far as is relevant:

> 43B.— Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— …
>
> (a) that a criminal offence has been committed, is being committed, or is likely to be committed;
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, ... or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed. [emphasis added]

77. There must be a disclosure of information. A disclosure of information may be made as a part of making an allegation. In *Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, [2018] ICR 1850*, Sales LJ held that:

> *In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)".*

78. In the reasonable belief of the worker making the disclosure, the information must tend to show one of the matters set out in sub-sections 43B(1)(a) to (f) ERA: in *Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979, [2018] ICR 731*, Lord Justice Underhill described this as "wrongdoing".

79. In the reasonable belief of the worker making the disclosure, it must be made in the public interest. The worker must believe, at the time of making it, that the disclosure is made in the public interest, and that belief must be reasonable.

80. In *Williams v Brown UKEAT/0044/19/OO*, His Honour Judge Auerbach said of the analysis of section 43B ERA:

> "*9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*
>
> *10. Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn … its reasoning and conclusions in relation to those which are in dispute. [emphasis added]"*

81. A protected disclosure can be made in a number of documents considered together, depending on the facts of the case: *Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601, [2020] ICR 236*.

82. We find that the disclosure of information set out in paragraph 2.1.1.1 i.e the first protected disclosure, did take place broadly as alleged, supported as it is by the existence of the WhatsApp message and the evidence of Mr Mohammed, who confirmed that the were discussions about the lack of licensing of radio trials at the Four Acre site.

83. In relation to the disclosure set out in paragraph 2.1.1.2, i.e. the second protected disclosure, we find that it did not take place, or at least not in the terms alleged by Mr Ali. In this regard, there was a conflict of evidence as between Mr Ali and Mr Barrett. As stated above, we find Mr Barrett to have been a consistent and credible source of information. By contrast, we did not take the same view of Mr Ali's testimony for all of the reasons set out above. In particular, we find his account of the nature of the second disclosure to have been inconsistent over time, both in terms of how it took place, and what was said.

84. We find that in relation to the first disclosure, it is a disclosure of information. This much is plain from the findings we have made above. It triggered an investigation,

of sorts, into the lack of a licence, and to the deactivation of the equipment concerned. We accept that the disclosure was part of an exchange amongst several staff. However, we are satisfied that in the circumstances of this case, that does not prevent it from constituting a disclosure for the purposes of section 43A of the 1996 Act.

85. In the circumstances, we also find that Mr Ali had a belief that the first protected disclosure was in the public interest, and that such belief was reasonable. In *Ellis v Home Office 1953 2 QB 135, CA*, it was suggested that the requirement that a worker believes that a qualifying disclosure is made in the public interest will be easy to satisfy in relation to section 43B(1)(a) given that disclosing a criminal offence will almost always be in the public interest. It was stated that '*one facet of the public interest is that justice should always be done and should be seen to be done'.* We accept Mr Mohamed's point that when looked at in context, this was a technical and minor breach. However, the fact remains that it was a potentially a breach of the criminal law, which can never be trivial for an organisation like Openreach.

86. We also find that Mr Ali had a belief that the protected disclosure tended to show a breach of a criminal offence an/or a legal obligation, i.e. under the Wireless Telegraphy Act 2006 sections 8 and 35, and that such a belief was reasonable. This was agreed by Mr Mohammed and was corroborated by documents relating to licensing matters in the bundle. As it is common ground that there was 'wrongdoing' as defined by the 2006 Act, we do not take issue about the reference to the Enterprise Act 2002 within the list of issues, which is clearly an error. It was not a point taken by Miss Nicolaou, to her credit.

87. In summary, we find that Mr Ali did make a protected disclosure as alleged at paragraph 2.1.1.1 of the list of issues, but not otherwise.

Protected Disclosure Detriment

88. In relation to protected disclosure detriment, we turn to the list of alleged detriments at [310] i.e. List A (one of the appendices to the list of issues).

89. The term 'detriment' is not defined in the Employment Rights Act 1996 but it clearly has a broad ambit. 'detriment' means simply 'putting under a disadvantage'. Put another way, detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. Detriment should be assessed from the viewpoint of the worker. The EAT have confirmed that although the test is framed by reference to 'a reasonable worker', it is not a wholly objective test. It is sufficient that a reasonable worker might take the view that the conduct in question was detrimental. An employer's motives are irrelevant.

90. In any detriment claim, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)). It means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.In order for liability under section 47B to be established, the worker must show that the detriment arises from the act or deliberate failure to act by the employer, other

worker or agent. Only then can the worker say that he or she has been 'subjected to' the detriment in question.

91. In so far as the matters in List A amount to criticisms of Mr Mohammed and his management style (as a great many of them do) we accept Mr Mohammed's testimony and reject Mr Ali's interpretation (or perhaps his perception) of what took place. We do not accept that Mr Mohammed micro-managed Mr Ali in the pejorative sense adopted by the claimant. Neither do we accept that Mr Mohamed's approach to dealing Mr Ali can be fairly characterised as macho, aggressive malicious, bullying, or intimidating (to address the adjectives used in List A).

92. Repeatedly, Mr Mohammed is described as 'attacking' Mr Ali. We see insufficient evidence to support this allegation. In our judgment, what underpins many aspects of this claim is Mr Ali's belief that, as a Band D manager, he should not have been subject to supervision and instruction by Mr Mohammed. It is our view that, for whatever reason, Mr Ali expected too high a level of autonomy in his role.

93. The matters raised in List A relate to ordinary, daily, operational matters. Mr Ali was, in our view, a challenging member of staff to manage. He regularly railed against his terms and conditions of employment in respect of his hours and place of work. He was frequently late to, or did not attend, work related activities. Where there were shortcomings in Mr Ali's performance, and where there was criticism from Mr Mohammed, we find that this was proportionate and fair.

94. Notwithstanding, and in broad terms, we find that Mr Mohammed went to some lengths to seek to accommodate Mr Ali. This is most aptly demonstrated by Mr Mohammed's efforts to resolve the dispute in or around early 2022, concerning when Mr Ali went into the office, and when and from where he should participate in early morning team calls. Contractually, Mr Ali was obliged to be in the office by 9am, and should have taken the call there. Over a period of time, and in response to Mr Ali's failures to comply with his terms and conditions, Mr Mohammed gradually permitted Mr Ali to attend the office later and, in the end, at 10.30am. Mr Mohamed also permitted Mr Ali to take calls on the way to work, and moved the call to 9.15 and then to 9.30 to accommodate his personal difficulties. This level of latitude was in our view generous. Yet Mr Ali managed to turn this into a ground of criticism of Mr Mohammed, depicting him as a manger who was, for instance, insisting on his involvement in the team call whilst driving. We are perfectly satisfied that Mr Mohammed made it clear that he should find somewhere safe before making the call, and even suggested that he do so from the school car park where he dropped his nieces/nephews most mornings. In short, we find that there was insufficient evidence that Mr Mohammed's management approach to Mr Ali was tainted by the making of the protected disclosure. We are satisfied that, whether rightly or wrongly, Mr Mohammed viewed the question of the lack of a licence at the time as "no big deal".

95. Where List A makes reference to disciplinary matters, we are satisfied that such matters were entirely motivated by the alleged misconduct. We are satisfied that over three different managers, Mr Ali's level of performance was poor. He had been placed on performance plans by both Mr Petit and Mr Mohammed. Mr Petit, Mr Mohamed and Mr Vince had had cause to take Mr Ali to task about his poor time keeping and attendance. There was a well established pattern of behaviour on Mr Ali's part which extended either side of Mr Mohammed's tenure as his line

manager. Mr Ali saw himself as being in a constant "battle" with management. In our judgment, this arose out an erroneous understanding of the realities of day to day employment which made him almost unmanageable.

96. In short, we are satisfied that even if some of the matter listed are capable of amounting to detriments, there were legitimate reasons for the treatment which was not at all connected to the protected disclosure made by Mr Ali.

97. As with other aspects of this claim, Mr Ali's case on protected disclosure detriment is based on the premise that there is a deep rooted conspiracy against him which lasted at least from July 2021. Not only did it encompass his line managers, Mr Mohammed and Mr Vince, but also many of Openreach's other senior management, including Mrs Gibson, Mr Barrett, Mr Austin and Mr Topper. We have seen insufficient evidence that many of these would have had any interest in Mr Ali such as might motivate them to behave unlawfully against him. There was little, if any evidence, that these individuals were even aware of the alleged protected disclosure made in July 2021. The evidence simply did not address this lacuna in the claimant's case.

98. For all of these reasons, we dismiss the protected disclosure detriment claim against Openreach and Mr Mohammed.

Automatic Unfair Dismissal

99. For similar reasons, we also dismiss the protected disclosure unfair dismissal claim. As we shall say shortly, we have concerns about the way the decision to dismiss was arrived at. However, we are satisfied that it was not motivated by the protected disclosure made 18 months previously. It was not the primary reason, and so far as we can see, it was not a reason at all. We are satisfied that the the primary reason relied upon by the first respondent was capability (see below).

Unfair Dismissal

100. We then turn to the ordinary unfair dismissal claim. The relevant case law in relation to unfair dismissal is to be found in the Employment Rights Act 1996 at section 98:

> *"(1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show–*
>
> *(a) the reason (or if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed to do,*
> *(b) relates to the conduct of the employee,*

> *(c) is that the employee was redundant, or*
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*"
>
> *(3) In subsection (2)(a)—*
>
> *(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
>
> *(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
>
> *(4) [Where] 2 the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

101. Section 98 of the 1996 Act indicates how a tribunal should approach the question of whether a dismissal is fair. There are normally two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(2), and if the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

102. The reason for dismissal is the set of facts known to the employer or beliefs held by it which cause it to dismiss the employee (*Abernethy v Mott, Hay and Anderson [1974] ICR 323*), or, in other words, the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively what motivates them to do so (*Jhuti v Royal Mail Ltd [2018] IRC 982*).

103. In addition to showing a fair reason for dismissal, in order to escape liability for unfair dismissal the employer must also have acted reasonably in all the circumstances, having regard to equity and the substantial merits of the case. In other words, the employer must have acted reasonably in treating the reason as a sufficient reason for dismissal and have acted fairly and in accordance with relevant procedures.

104. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer: *Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*. Rather, the test

to be applied is whether the employer's decision to dismiss fell within the range of reasonable responses available to it.

105. The test of whether or not the employer acted reasonably is usually expressed as an objective one — i.e. tribunals must use their own collective wisdom as industrial juries to determine the way in which a reasonable employer in those circumstances, in that line of business, would have behaved. Nonetheless, there is also a subjective element involved, in that tribunals must also take account of the genuinely held beliefs of the employer at the time of the dismissal.

106. The House of Lords' decision in *Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*, firmly establishes procedural fairness as an integral part of the reasonableness test under section 94(4). As stated by Lord Bridge in that case, where an employer fails to take the appropriate procedural steps, the one question a tribunal is not permitted to ask in applying the reasonableness test is whether it would have made any difference if the right procedure had been followed. That question is simply irrelevant to the issue of reasonableness (although very relevant to the issue of compensation). Thus, if there is a failure to adopt a fair procedure at the time of the dismissal, whether set out in the Acas Code or otherwise (for example, in the employer's disciplinary rules), the dismissal will not be rendered fair simply because the unfairness did not affect the end result. However, any compensation is likely to be substantially reduced

107. We take the view the sole or principal reason for the dismissal was capability. By capability in this context, we mean Mr Ali's ling etc ill health absence, and/or his inability to return work without aggravating his conditions. This was the clear evidence of Mr Austin (who conducted the capability procedure) and for that matter, Mr Topper (who chaired the appeal). It is evident in the wealth of documentary evidence generated by both of these processes, that capability was the factor driving matters forward. It is also consistent with the time line of events, which found Mr Ali absent from work due to ill health absence from June 2023. In our judgment, there was simply insufficient evidence that these processes were further examples of bullying and/or discrimination towards Mr Ali.

108. The claimant was referred by Openreach to OH on two separate occasions, prompted by his health issues. The first assessment on 8 September 2023 recorded that the Claimant was not fit to return to work at that time and that he was suffering with low mood and anxiety. Medication was recommended. It was observed that a return to work would be possible only when the work related issues had been resolved. This was clearly a reference to the outstanding issues Mr Ali perceived to exist between him and Mr Mohammed and other managers, and to the outstanding disciplinary matters.

109. Curiously, the second referral to OH was in December 2023, after Mr Ali had been dismissed. The report, dated 6 February 2024, suggested that Mr Ali had been diagnosed with anxiety and depression since 2022, and that this was down to work reasons mainly. As a result of these assessments, Openreach had referred Mr Ali to counselling at its own expense; had conducted a return to work and a capability meeting. Mr Ali's dismissal on 15 November 2023 was expressly on the grounds of capability.

110. For all of the reasons, we are satisfied that the genuine reason for dismissal was capability i.e. that he had been absent from work for several months due to ill

health issues, and that a return to work seemed unlikely within a reasonable time frame.

111. We then turn to the matters raised in paragraph 5.4 of the list of issues, which echoes the test set out in section 98 of the Employment Rights Act 1996.

112. We are satisfied that Openreach had a genuine belief that Mr Ali was incapable of returning to his current role and/or that he was not prepared to return to work within the same team. It is clear to us that Mr Austin had concluded that returning to Mr Vince's team, would have served to aggravate Mr Ali's conditions, and that this was unacceptable to both employer and employee. Mr Austin had, in effect, accepted the assessment set out in the OH report of September 2023, that Mr Ali would be unable to return to work unless the problems within the workplace were resolved. By this we mean (and we understood the author of the OH report to have meant) those issues relating to the relationship that Mr Ali had with Mr Mohammed and Mr Vince, amongst others. In particular, this included the outstanding disciplinary matters. We take the view that in coming to that conclusion, in reliance on the OH report, and on information gathered at the the back to work, and capability, meeting, Mr Austin had come to a decision that a reasonable employer could have made in the circumstances.

113. However, it is our view that the dismissal in November 2023, which took effect in March 2024, was precipitous, and not based on a reasonable investigation. Not least is the problem that Mr Austin was not aware that Mr Ali's conditions amounted to a disability at the time. Neither did he investigate this possibility sufficiently. Indeed, he conceded in cross-examination that he had not considered the possibility at all. This is particularly regrettable given that the first respondent now concedes that Mr Ali's mental health conditions did amount to a disability from July 2023 onwards.

114. It therefore follows that if Mr Austin had made enquiries, then it is likely that he would have appreciated that Mr Ali did have a disability. The first OH report had recommended that a second report be obtained in or around November 2023 i.e. prior to the time when Mr Ali was dismissed. However, Mr Austin did not procure a second report. Neither did he carry out sufficient enquiries into Mr Ali's medical situation by some other means. He was not privy to his occupational history of anxiety and depression going back to 2018-19. Mr Austin told us that he was not aware of Mr Ali's absence for ill health reasons in 2019. Neither did he obtain the claimant's medical records. He could not even say whether he was aware of the history of fit notes submitted by Mr Ali in 2023. We saw this 'bunkerisation' of decision making in other areas of this case, where decision makers were not aware of Mr Ali's relevant history with Openreach because they did not have access to HR related information, or decisions made by other managers. Openreach seemed too preoccupied with confidentiality rather than ensuring that managers could make joined up, consistent, decisions.

115. We note that Mr Ali's views about the circumstances in which he might have been prepared to return to work seemed to evolve during the process, and indeed during the course of this claim. We are in no doubt that Ali's view at the time of his dismissal was that he would not return to the same team, or to work under either Mr Mohammed or Mr Vince. Mr Ali's stance on this issue seemed to ostensibly soften either at the appeal meeting, or shortly thereafter in correspondence about the minutes of the appeal meeting. We have come to our own view as to the

genuineness of this change of heart. However, we take the view that it was incumbent on a reasonable employer to have hesitated at that stage in order to make further enquiries of the claimant. We have seen insufficient evidence that Openreach properly investigated this apparent change of heart.

116. Neither are we satisfied that Openreach carried out a sufficient and reasonable investigation into alternatives to dismissal, such as redeployment. There is a clear obligation on the employer to investigation such alternatives. In our judgment, Openreach effectively hamstrung itself by adopting too inflexible (and as it turned out, incorrect) approach to its own policies on redeployment. It had been Mr Austin's view that someone undergoing disciplinary proceedings could not be considered for a move to another team. However, if one looks at the disciplinary policy [384] it talks about those subject to sanctions and not to staff who are the subject of a disciplinary process. Mr Ali was therefore not excluded, strictly speaking, by the policy. We also note that Mr Austin conceded to not having checked the advice he had been given by HR on this point. We have not see documentary evidence of this advice. However, it is apparent that Mr Austin he was unfamiliar with Openreach's relevant HR policies, and had maybe followed erroneous advice from a third party. This is clearly not an approach which falls within a band of reasonable decision making.

117. Even if this was not the case, then it is our view that more consideration should nonetheless have been given to redeployment, especially as Mr Ali was disabled under the Equality Act 2010. We have had regard to the Statutory Code of Practice issued by the Equality and Human Rights Commission on these issues (paras 6.22 to 6.35). We take the view that it was incumbent on a reasonable employer to have at least considered adjusting that part of the disciplinary procedure which appeared to exclude consideration of redeployment in this case, as a reasonable adjustment to address the substantial disadvantage that was being caused to Mr Ali, as someone who was absent due to ill health and/or as someone with a disability.

118. Further, we had concerns about the invitation to the meeting on 24 November 2023, as a result of which the claimant was dismissed. The letter appears at [765]. It is our judgement that the letter does not sufficiently highlight that Mr Ali was at risk of dismissal at the hearing. It is suggested that "one of the considerations following the meeting could be termination of your employment….". This is not the same as labelling the meeting as one in which a decision to dismiss could be made. In our view, Mr Austin moved from a "back to work" process to a disciplinary process without making it sufficiently clear to Mr Ali that a change of emphasis/purpose had occurred. We were not satisfied that Mr Austin made a distinction between the two processes in his own mind.

119. As we have stated, Mr Ali appealed the decision to dismiss. The matter which we have addressed as to the disciplinary hearing and decision were not, in our view, adequately addressed during the appeal by Mr Topping. There was insufficient critical analysis of the initial decision to dismiss, and too little attention to Mr Ali's grounds of appeal.

120. In summary, we find that given the size and resources of Openreach, the process was deficient, and that the decision to dismiss did not fall within a band of decisions that a reasonable employer could have taken in the circumstances. We therefore find that this dismissal was unfair. There will be a need for a remedy hearing to

consider reinstatement/reengagement (if Mr Ali still seeks such a remedy); compensation; as well as 'Polkey' and fault based deductions.

Disability

121. Disability and knowledge of disability have been admitted by the respondents from July 2023 onwards. We make the observation that we may not have come to the same finding had we been required to do so. However, the parties and the Tribunal are bound by the admission.

122. We would note that there was an application made by the respondents part way through the final hearing to the effect that they should be able to resile from the admission in relation to the existence of a disability and their knowledge of it. In fairness to Ms Nicolaou, this was an issue which was first raised by the Tribunal itself on the first day of the hearing. However, having given further thought to the question, and having had the benefit of helpful written and verbal submissions from both parties, we were in no doubt that the balance of fairness did not favour permitting the respondents to resile from their admission.

123. Firstly, it was our considered view that the evidence relating to disability was stronger that had appeared at the start of the case. Secondly, the admission had been made by the respondents when they were legally represented. Thirdly, it had been made when the respondents had been in receipt of all of the relevant medical evidence. The suggestion that they had not had the claimant's medical records at the relevant time appeared to be incorrect. Fourthly, there was the timing of the application. If we had allowed the application, it was likely that an adjournment would be necessary to allow Mr Ali to call further evidence in support of the proposition that he had a disability. Both parties agreed that this was highly undesirable, given the likely wait for another final hearing.

124. What remains in issue for the Tribunal is therefore the question of whether Mr Ali had a disability prior to July '23 and if so, whether the respondents had knowledge of it.

125. Section 6(1) of the Equality Act 2010 provides that a person has a disability if they have:

> (a) a physical or mental impairment;
>
> (b) that impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities; and
>
> (c) the effect is long-term.

126. "Substantial" means "more than minor or trivial" (section 212 of the Act). The threshold is not onerous, as confirmed in *Goodwin v Patent Office [1999] ICR 302 (EAT)*.

127. When determining substantiality, the Tribunal must consider how the impairment would affect the claimant without medical treatment or coping strategies, pursuant to Schedule 1, paragraph 5 of the Act. This was emphasised in *McDougall v Richmond Adult Community College [2008] EWCA Civ 4*, which held that tribunals

must examine the underlying effect of the impairment, not its mitigated presentation.

128. An impairment is long-term if it has lasted for 12 months, is likely to last 12 months, or is likely to recur (Schedule 1 of the Act). In *SCA Packaging Ltd v Boyle [2009] UKHL 37*, the House of Lords held that "likely" in this context means "could well happen", a relatively low threshold.

129. The Tribunal must determine disability at the material time, namely January–May 2025 in this case. This principle derives from *Hay v HMRC [2018] ICR 1011 (EAT)*, confirming that the existence of disability is assessed at the time of the alleged discriminatory acts.

130. It is our view that Mr Ali was not disabled prior to July 2023. We take this view because there is an absence of medical evidence suggesting a condition during this period, or that one was likely to reoccur. There is corroboration for mental health conditions in 2018-19. However, these seem to have been isolated and situational i.e. caused by discrete events in Mr Ali's private life. There is nothing further in his medical records until some reference to issues in late 2022, and then finally (and definitively as it turned out) in June/July 2023. We also have regard to the fact that at no point until July 2023 is there a suggestion from Mr Ali that he had a disability, or a serious mental health problem which was likely, on a long term basis, to have a substantial impairment on his ability to carry out normal day to day activities.

131. The disability related claims are therefore restricted to matters from July 2023 onwards. As it turns out, this excludes a large proportion of the events relied upon by Mr Ali.

Direct Disability discrimination

132. Direct discrimination is defined in section 13(1) of the Act as "*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*". The application of the principles can be distilled from cases decided by the Employment Appeal Tribunal such as *Madarassy v Nomura International plc [2007] ICR 867; Igen v Wong [2005] 3 All ER 812; and* London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08. Those principles are as follows:

(a) In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(b) If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

(c) Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test. The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

The crucial question in every case will be the reason why the complainant was treated as he/she was. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that will be sufficient – it need not be the only reason, provided it is significant, in the sense of being more than trivial.

133. The appropriate comparator for the purposes of this aspect of the claim is an Asian male programme manager with the same performance and conduct history as Mr Ali, but who did not suffer from anxiety and depression i.e. did not have a disability.

134. The alleged acts of less favourable treatment are set out in List B of the list of issues [295]. Those occurring on or after July 2023 are limited to numbers 21-25. In our judgment, applying the relevant law which requires a claimant to establish a prima facie case of discrimination, we find that none of these matters constitute less favourable treatment on the grounds of disability. In any event, there is a clear non-discriminatory explanation for the alleged acts.

135. In each case, it is clear that the conduct alleged is born out of reasonable management and/or the result of Mr Ali's performance issues. By way of example, the restriction on the number of counselling sessions was dictated by policy, which incidentally Mr Vince challenged on Mr Ali's behalf. It is the panel's collective experience that this sort of restriction is not uncommon.

136. Moreover, the failure to consider ill health retirement was not discriminatory. We are satisfied that the comparator would have been treated in the same way. There was little evidence that it was ever considered. It was not recommended in the OH report of September 2023. It would not have been for managers to have taken this type of decision, without clear advice. We also note that Mr Ali himself was positively suggesting that he was fit to work.

137. Further, that to consider redeployment was unfair not discriminatory. We are satisfied, as we have already stated, that this was an error and not a decision born out of discriminatory motivation. We were presented with insufficient evidence that either Mr Austin or Mr Topper was so motivated, even on a prima facie basis. We would also add that the non-award of the annual bonus was the result of Mr Ali performance assessment as "work to do" which excluded him from the bonus scheme. We acknowledge that Mr Ali does not accept that the assessment was fair. However, that is a different allegation, which in any even we do not accept.

138. Accordingly, we dismiss the direct discrimination claim.

Discrimination arising out of disability

139. Under section 15(1) of the Equality Act 2010, a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) goes on to state that '[section 15(1)] does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability'.

140. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that it means that the disabled person 'must have been put at a disadvantage'.For a section 15 claim to succeed, the unfavourable treatment must be shown by the claimant to be 'because of something arising in consequence of [his or her] disability'. In other words, the discriminatory treatment must be a result of something arising in consequence of the claimant's disability, not the claimant's disability itself.

141. In *Pnaiser v NHS England and anor 2016 IRLR 170, EAT*, Mrs Justice Simler summarised a number of key points that govern the correct approach to a section 15 claim. The tribunal must first identify whether there was unfavourable treatment and by whom. It must then determine what caused the impugned treatment, or what was the reason for it, focusing on the conscious or unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the impugned treatment and, as in a direct discrimination case, the 'something' need not be the main or sole reason for the unfavourable treatment but must have at least a significant (or more than trivial) influence so as to amount to an effective reason for or cause of it. The tribunal will then have to determine whether the reason or cause is 'something arising in consequence of' the claimant's disability.

142. All that is required is a loose connection between the claimant's unfavourable treatment and the 'something' that arises in consequence of the disability. This element of the test can be satisfied by a range of causal links: there may be more than one link between the 'something' that causes unfavourable treatment and the disability.

143. It is a defence for the employer to show that the unfavourable treatment can be justified as 'a proportionate means of achieving a legitimate aim' .A legitimate aim for the purposes of section 15 should not be discriminatory in itself and should represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the EHRC Employment Code states that an employer simply trying to reduce costs cannot expect to satisfy the test.

144. 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 (see para 4.31). An employment tribunal hearing a section 15 claim will be expected to undertake a critical evaluation on the question of objective justification, weighing the needs of the employer against the discriminatory impact on the employee. The tribunal must carry out its own

assessment on this matter, as opposed to simply asking whether the employer acted reasonably.

145. It was suggested by the Court of Appeal in *O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA*, that, where the unfavourable treatment complained of is dismissal (such as for long-term sickness absence consequent on disability), the test of reasonableness in an unfair dismissal claim and the proportionality assessment under section 15 will generally lead to the same result. However, it is not the case that a dismissal found to fall within the range of reasonable responses will inevitably be found to be proportionate for the purposes of a section 15 claim, nor vice versa.

146. An employer has a defence to a claim of discrimination arising from disability if it did not know and could not reasonably have been expected to know that the claimant had a disability. However, the employer cannot simply ignore evidence of disability.

147. We accept that the matters set out in paragraph 9.1 can properly characterised as unfavourable treatment. However, some of the are vague in that it is not clear when the treatment is said to have taken place. In relation to paragraph 9.1.2, Mr Ali conceded that his wages had never been reduced and so withdrew this aspect of his claim. Of course, unfavourable treatment occurring prior to July 2023 cannot be the basis of a successful claim in the circumstances, give that we have found that Mr Ali did not have a disability at that time. Of course, clearly some (including dismissal) do fall into the relevant period i.e. from July 2023 onwards. However, we have no evidence that he was given formal warnings in this period, although remained subject to disciplinary proceedings. In summary, the we dismiss paragraphs 9.1.2 and 9.1.3 for the reasons set out.

148. We are also prepared to accept that the matters in paragraph 9.2.1 (difficulty sleeping) do arise from Mr Ali's disability. Similarly, we accept that oversleeping is likely to be an issue (paragraph 9.2.2). However, we have seen insufficient evidence that Mr Ali missed meetings after July 2023 because of his disability or that he had failed to take his prescribed medication during that period.

149. In any event, for reasons that we have already covered, we are satisfied that there is no causal connection between the matters of 9.1 and those found to apply in 9.2. None of the unfavourable treated was meted out to Mr Ali's because of his sleeping problems. They were to do variously with his absence from work (which was not pleaded in the list of issues); his performance in general terms; and his disciplinary record prior to July 2023.

150. For the sake of completeness, we also consider the question of whether any of the treatment was a proportionate means of achieving a legitimate aim. The respondents argue that it was, and cited at paragraph 9.4 of the list of issues that the aims were: ensuring staff met the requirements to provide the required level of service to its customers; enabling proper, reasonable, fair and effective management of the workplace and/or Openreach's staff; and enabling Openreach to effectively manage its business and meet it commercial requirements, objectives and compliance obligations.

151. For all of the reason we have already cited, we were satisfied that much the treatment received by Mr Ali was ordinary operational matters, which were

necessary and proportionate, including, disciplinary action, formal warnings, non-inclusion in the voluntary redundancy process, and non-payment of a bonus. These were all to do with his behaviour and performance, which were are satisfied was justified on the grounds reed upon by Openreach i.e. the importance of ensuring that staff turn up for work at the time and place required, and attend meetings as expected, are clearly pivotal to the efficiency management of the workplace. Significantly in this case, Mr Ali never argued his section 15 on the basis that he had been dismissed as a result of being off work due to ill health absence.

152. We therefore dismiss this aspect of the claim under section 15 of the Equality act 2010.

Indirect Disability Discrimination

153. Section 19 of the Equality Act 2010 states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. A PCP has this effect if the following four criteria are met: A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic; the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic; the PCP puts, or would put, B at that disadvantage, and A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

154. According to Baroness Hale in *Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704, SC*, this purpose is to 'level the playing field' by requiring the employer to justify 'requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic'. She went on to explain that, whereas the prohibition on direct discrimination is intended to ensure equality of treatment regardless of an individual's protected characteristic, the prohibition on indirect discrimination is intended to equalise outcomes for those with different protected characteristics.

155. We are satisfied that the matters set out in paragraph 10.1 amount to PCP's in this context save for 10.1.4 which we find makes little, if any sense, in the context of the evidence we have heard; and save that we have found that it was never a PCP in this case that employees attend online meetings from lay-bys. What was required was that staff attended those meetings from the office or on the way to work, or in the field (if working away from the office). We find that the PCP's were applied to the claimant as well as to those who did not share Mr Ali's disability.

156. We accept group disadvantage for those with anxiety and depression arising from these PCP's relating to attendance, and that Mr Ali would have shared this disadvantage. However, we are again satisfied that the PCP's were all proportionate means of achieve a legitimate aim of ensuring staff meet the requirements to provide the required level of service to customers, enabling proper and effective management of the workplace and staff, and enabling Openreach to effectively manage its business and meet its commercial requirements, objectives and compliance obligations. The requirement to meet attendance targets and perform full duties is a fundamental and universal requirement of employment.

Openreach operates a large and complex technical workforce and requires its managers to be available, to attend meetings, and to engage with customers and colleagues.

157. Accordingly, we dismissed the indirect discrimination claim. His attendance difficulties had not previously been caused by disability but by other matters that he raised such as childcare, traffic, and not setting his alarm. We also find that Mr Ali simply had a lack of regard for the virtues of punctuality and attendance. Further, when offered to work from home 100% of the time during his phased reintroduction to work in January 2023, he refused preferring to continue to work at the office for two days a week.

Failure to make Reasonable Adjustments

158. The duty to make adjustments appears at section 20 of the Equality Act 2010:

> "(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."

159. There are therefore the three component parts:

    a. There was a PCP

    b. That PCP puts a disabled person at a substantial disadvantage to a relevant matter in comparison with persons who are not disabled.

    c. Reasonable steps which could be taken to avoid the disadvantage.

160. In respect of identification of PCPs Simler LJ in *Ishola v Transport for London [2020] EWCA Civ 112* stated:

> 'In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.'

161. *Nottingham City Transport Ltd v Harvey [2013] EqLR 4* states that 'practice connotes something which occurs more than on a one-off occasion and which has an

element of repetition about it.' See also *Carphone Warehouse v Martin [2013] EqLR 481* in which Shanks J held that 'the lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view, amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer'.

162. In relation to para.11.2.1 it is plan that Mr Ali never worked in Mr Mohammed's team in the relevant period from July 2023 onwards. We therefore dismiss this aspect of the claim.

163. In relation to para.11.2.2, we accept that Mr Ali was required to work at the office albeit that we find that he was likely working 2 days a week from home and 3 days a week in the office (see the OH report at [750]).

164. We find that there is insufficient evidence of substantial disadvantage. The disadvantage must arise out of the applicable PCP, which required work from the office. We find that working from the office did not actually cause Mr Ali substantial disadvantage arising from him having a disability in the form of mental health issues. As we have already observed, the real difficulty was the claimant's relationship with consecutive line managers. None of the said managers worked at Adastral Park in Ipswich, or visited very much. Therefore working in the office was never likely to cause Mr Ali to be unwell. There was insufficient evidence to suggest that travelling or driving tended to aggravate Mr Ali's symptoms. We note that when asked in early 2023 by Mr Mohammed whether he wanted to work full time from home (at least on a temporary basis as part of a phased return to work), he refrained from doing so. He had already been permitted to work two days per week from home. From July 2023, Mr Ali was absent due to illness not because he was required to work at the office but due to the nature of his relationships with his colleagues, which as we have found, arose mostly from his poor performance.

165. If we are wrong about substantial disadvantage, then we further take the view that there were no further steps which could have been adopted by Openreach which were likely to reduce any disadvantage, and which were reasonable in the circumstances.

166. Looking at the proposals in paragraph 11.5 of the list of issues, mostly they do not address the identified substantial disadvantage, namely that coming to work. Paragraphs 11.5.2, 11.5.6 and 11.5.7 are the only suggested steps which address the relevant issue.

167. Paragraph 11.5.2 suggests that Mr Ali be permitted to work from home and/or allowing hybrid working. As we have already stated, we find that Mr Ali already had a hybrid working pattern. Further that he had previously declined to work 100% from home. There was no evidence that Mr Ali's view about this has altered post July 2023. We find that it was reasonable to require Mr Ali to work some of the time from the office. It was a term and condition of his contract of employment. We accept Mr Mohammed's evidence that in the circumstances it was desirable to have Mr Ali work at least some of the time with Mr Prycke so as to improve Mr Ali's performance.

168. Dealing with paragraphs 11.5.6 and 11.5.7 together, we accept that in principle a phased return was a reasonable step. However, in terms of the PCP relied upon,

they add nothing to paragraph 11.5.2 i.e. dealing with the issue of working from the office.

169. We also note that Mr Ali had very recently changed teams and line managers, and that it had not appeared to improve the situation, which had resumed a familiar pattern (paragraph 11.5.3). In relation to paragraph 11.5.4, he had been allocated a wellbeing manager in the shape of Ms Yoemans, who he spoke highly off during the hearing. He had also been referred for counselling through the EAP (paragraph 11.5.5).

170. We therefore dismissed the reasonable adjustments claim.

Harassment

171. In this context, a person (A) harasses another (B) if—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.

173. The general definition of harassment set out in section 26(1) applies to all protected characteristics except marriage and civil partnership and pregnancy and maternity. It states that a person (A) harasses another (B) if:

- A engages in unwanted conduct related to a relevant protected characteristic — section 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 — section 26(1)(b).

174. The EAT has held that the word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited'. This is confirmed by the EHRC Employment Code (see para 7.8). The EAT in *Thomas Sanderson Blinds Ltd v English EAT 0316/10* pointed out that *unwanted conduct* means conduct that is unwanted *by the employee*. The necessary implication is that whether conduct is 'unwanted' should largely be assessed subjectively, i.e. from the employee's point of view.

175. The conduct does not have to be directed specifically at the complainant for it to be unwanted by the complainant. Indeed, the employee does not even have to be present when the words/actions occur. It is clear that a claimant does not have to share the protected characteristic in question for the conduct to be 'unwanted' by him or her. The EHRC Employment Code envisages that a white worker who is offended by a black colleague being subjected to racially abusive language can bring a racial harassment claim. If the claimant has made it clear, through words or conduct, that he or she personally has no objection to the conduct, that conduct will not be unwanted.

176. There are few cases examining precisely what is meant by violating a person's dignity. In *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT*, Mr Justice Underhill, then President of the EAT, said: 'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'.

177. The matters relied upon in this respect are set out in List C of the list of issues. They are similar to the matter set out in List A (see above). As a rest of our fundings about when disability commenced, we were only required to consider the last two allegations in List C. These relate to failure to award a bonus, and to include Mr Ali in the voluntary redundancy scheme.

178. As we have already stated, as a matter of fact, we accept that the claimant was not the subject of a bonus in 2023. The evidence was quite clear that this was the result of the assessment of Mr Ali's performance as "work to do" which was in essence to say that he was performing below expectations. It was common ground between the parties that this grading excluded a member of staff from the bonus scheme. Mr Ali makes criticism of this assessment and the fairness of it. In our judgment, the evidence overwhelming supports the proportion that Mr Ali's performance art work was problematic. Mr Mohammed was entirely justified in arriving at that conclusion, notwithstanding that he was the subject of a grievance by Mr Ali at the time. The fact is that reason for not received a bonus was unrelated to his disability. We are satisfied that he does not satisfy the definition the definition of harassment for the purposes of the Act, or that it was related to disability.

179. We turn then to the other allegation, namely that Mr Ali had been excluded from the voluntary redundancy scheme. As a matter of fact, we accept that Mr Ali was not included in this scheme. For all of the reasons we set out above, we reject the suggestion that this was related to disability. The scheme was launched in or around October 2023. The policy document at [CRB117] makes clear that employees with formal performance improvement plans or who are being formally managed under the attendance/sickness or disciplinary procedures would not normally be authorised to join the scheme. Similarly, where an employee is the subject of a disciplinary process. Mr Ali was subject to both the disciplinary procedure and the attendance/sickness procedures. He would therefore not have been eligible.

180. In any event, we are satisfied that Mr Ali was aware of the scheme, having been sent an invitation to join the scheme [CRB113]. As such we find that Mr Ali made a decision not to apply to the scheme, one suspects because he appreciated that he was not eligible. In this sense, he was not excluded at all. We therefore dismiss this aspect of the claim.

Victimisation

181. Section 27 of the Equality Act 2010 provides that: 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'. It follows from that a claimant seeking to establish victimisation must show two things: first, that he or she has been subjected to a *detriment*; and, secondly, that he or she was subjected to that detriment *because* of a protected act.

182. The following are 'protected acts' for the purposes of section 27(1):

- bringing proceedings under the Equality Act;
- giving evidence or information in connection with proceedings under the Equality Act;
- doing any other thing for the purposes of or in connection with the Equality Act, and
- making an allegation (whether or not express) that A (the alleged victimiser) or another person has contravened the Equality Act.

183. Tribunals should give a brand interpretation to the meaning of 'detriment' for the purposes of section 27. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment.

184. A person claiming victimisation need not show that less favourable treatment was meted out *solely* by reason of the protected act. As Lord Nicholls indicated in *Nagarajan v London Regional Transport 1999 ICR 877, HL* (a race discrimination claim), if protected acts have a 'significant influence' on the employer's decision-making, discrimination will be made out. *Nagarajan* was considered by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA*, a sex discrimination case, where Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is, rather, 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.'

185. The alleged protected acts are set out in List D1 of the list of issues. We find that the protected acts are vaguely pleaded. We did not hear a lot of evidence about this aspect of the claim. As described, it is out judgement that they do not amount to protected acts as defined by section 27. Firstly, they seem to describe conduct/comments by third parties and not Mr Ali. In this sense, that seem to amount to a fundamental (though not unusual in our experience) misunderstanding about what victimisation is in this context.

186. In general terms, the matter raised may be capable of amounting to bullying or inappropriate conduct, but we find insufficient evidence that the matters give rise to Equality Act related issues, as is required. We note that for whatever reason, the March grievance appears not to have been pleaded in this context.

187. It is also indicative of certain aspect of this claim that Act 4 of this part of the claim is against Ms Yoeman's. We are at a loss to understand how this might have found it way into the claim since it is Mr Ali's current position that she was someone who

supported him as his duty of care manager. It demonstrates to us that some of the claim has been rather indiscriminate and poorly thought through. Act 4 was only withdrawn some way into the final hearing. Ms Yoeman's witness statement, which had been drafted to defend herself from allegations of victimisation (a serious allegation) was not challenged in the end, and she was not required to give evidence.

188. Accordingly, we dismiss this aspect of the claim.

Unauthorised Deductions

189. This aspect of the claim has been withdrawn and is dismissed.

Holiday Pay

190. Paragraph 15.2.3 of the list of issues has been paid by Openreach. It is therefore dismissed upon withdrawal,

191. Paragraph 15.2.2 is dismissed. We are satisfied that the bank holidays were paid at the relevant time, and at the relevant rate of pay, which would have depended on whether Mr Ali was at work, on sick leave and in receipt of contractual sick pay or SSP. Mr Ali confirmed that he had been paid for these 4 days. To be permitted to claim a day in lieu for those days (as he was seeking to do), when he had already been paid, would in effect be to be paid twice for the same day.

192. In relation to paragraph 15.2.1, this was a claim for pay relating to days of annual leave which Mr Ali asserts should have been carried over from year ending April 2023, into year ending 2024. The terms of the annul leave policy in this regard obliged Openreach to carry over 5 days of holiday entitlement. We therefore allow the claim to the extent of 5 days of accrued holiday entitlement which should have been carried over pursuant to policy. Mr Ali should have been permitted to take these holidays at any time in his leave year. These remained accrued and unpaid at the point this dismissal from Openreach.

193. In relation to the other 8.4 days, the carrying over was on a discretionary basis i.e. over 5 days. We are satisfied that Mr Ali would have had explained to him that he must take this holiday in April/May 2023, beyond which his entitled ended. We find that Openreach was within its rights to adopt that approach. We therefore dismiss this aspect of the claim.

Remedy

170. A remedy hearing has been listed on 23-24 November 2026. This hearing will be to decide to what remedy the claimant is entitled, including a consideration of appropriate damages.

Approved by:
Employment Judge Wood

Date: 30 October 2026

Case Number: 3303070/2024

Sent to the parties on:
4 November 2026

For the Tribunal Office

Note
All judgments (apart from judgments under Rule 51) and any full 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 here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/