EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr P M Hoyte		Jaguar Land Rover Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 6 February to 27 February 2017

EMPLOYMENT JUDGE Lloyd **MEMBERS** Mr W A Silvester
Ms W A Stewart

For the Claimant: In person
For the Respondent: Ms S George, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1. **Liability**

a) The claimant's discrimination claims are in time.
b) The claimant was fairly dismissed by the respondent for the reason of capability. His unfair dismissal claim is dismissed. His employment was fairly ended on grounds of capability with contractual effect from 3 March 2016.
c) The claimant's dismissal was not a discriminatory one arising from the claimant's disability; or on the grounds of his race.
d) His claim of harassment because of race and disability under s.26 EqA is proven
e) His claim of disability discrimination under s.15 EqA is proven
f) His claim under s.20(3) EqA in respect of reasonable adjustments is proven

2. **Remedy**

a) We award the claimant damages for injury to feelings of £16,000.00 with interest of £3,152.01; making a total award of **£19,152.01**

REASONS

Background

1.1 The respondent is an internationally well-known automotive manufacturer with sites in the West Midlands and in Halewood, Liverpool. The claimant was employed by the respondent from 12 March 2001 until his dismissal initially on 16 October 2015; but which we now find took effect as an EDT from 3 March 2016. The reason for dismissal relied on by the respondent was capability. At all relevant times for the purposes of these proceedings the claimant was employed at the respondent's Solihull plant on the outskirts of Birmingham.

1.2 The claimant's claims to the tribunal are of unfair dismissal under the Employment Rights Act 1996 ("ERA") and discrimination under the Equality Act 2010 ("EqA).

1.3 His discrimination claims are made in relation to the protected characteristics of disability and of race. He is a black man of Afro-Caribbean descent. He claims unfair dismissal pursuant to ss.94-98 Employment Rights Act 1996 ("ERA"). That he is a disabled person within the meaning of s.6 EqA and Schedule 1 and the relevant Code of Practice and Guidance is not in dispute. The two impairments relied upon are anxiety and depression and irritable bowel syndrome (IBS).

1.4 Save for the concession that the claimant is a disabled person, the respondent denies all the claimant's substantive claims. The respondent has also raised issues of limitation; contending that many of the claimant's allegations are out of time.

1.5 These proceedings have been very carefully case managed. We have throughout the hearing and our deliberations given scrutiny to the directions of Employment Judges Dimbylow (on 16 April 2014), Perry (on 20/21 June 2016) and Broughton (on 9 December 2016).

1.6 In relation to the discrimination claims, Employment Judge Perry at page 4 of his Judgment/Order set out a claims matrix, which we adopt (with one clarification) as the starting point of our analysis. We do so in tandem with the issues arising from the claim that his dismissal (the exact EDT having also been put in contention) was unfair in s.94-98 ERA terms.

1.7 In the first instance there was a limitation issue for us to address and determine, which itself was linked in part to the EDT point.

1.8 Employment Judge Perry's matrix is reproduced below on page 3:

	Para. of List Issues		s.13	s.15	s.20	s.26	Protected Char.
1	3.1.1	Requiring the C to ask permission from and/or to notify the Respondent before every visit to the lavatory from February 2014 onwards?	Yes – Race & Disability	Yes (SAR – 5.3 LA – 5.5)	Yes (PCP – 6.1)	Yes (Race & Disability)	Race & Disability (IBS only)
2	3.4.1	Did Jason Rawlinson ("JR") use the nickname "*Abo*" in grievance investigation meeting on or around 28th August 2014, exposing widespread use by colleagues throughout C's employment?	Yes (Race Only)			Yes (Race Only)	Race
3	4.1.1	Unjustified delay in investigating the "Abo" complaint between March and September 2015 (race);	Yes (Race Only)				Race
4	3.4.2	Was the C referred to as "*black guy with big afro*" in investigation meeting in December 2014 and did JR, from the use of this term, state that this sounded like thse C?	Yes (Race Only)			Yes (Race Only)	Race
5	4.1.2	An unfair dismissal procedure from December 2014 onwards, including biased referrals, applying pressure on C to submit to medical examination, (race and/or IBS and/or depression)	Yes – Race & Disability	Yes (SAR – 5.8 LA – 5.10)			Race & Disability (IBS & Depression)
6	4.1.3	Dismissing him on 16th October 2015 (race and/or IBS and/or depression);	Yes – Race & Disability	Yes (SAR – 5.11 LA – 5.13)			Race & Disability (IBS & Depression)
7	3.4.3	Did the C's colleagues, including A7, Catherine Doody, JR, use the nickname "*Abo*" for the C throughout his employment?				Yes (Race Only)	Race
8	3.4.4	Did Frances Tobin on 21st January 2016 suggest that the blame for using "*Abo*" lay with the C?				Yes (Race Only)	Race
9	4.1.4	Failing to deal with his grievances reasonably or appropriately from 8th April 2014 onwards (race);	Yes (Race Only)				Race

1.9 Our clarification is to make specific reference to the so called "bad apple" meeting on 14 February 2014.The claimant alleges that Hayley Moss (HM), his process leader, had a conversation with the him where she referred to a poster for the respondent's whistleblowing initiative which showed a rotten apple with the caption; *"Don't let one bad apple spoil it for everyone"*. The claimant contends that HM referred to him as a negative influence on the team and accused him of being a bad apple. The claimant and his non-white colleague, Armadeep Samra (AS), who gave evidence to

this tribunal, was it is alleged accused by HM of adversely affecting the morale and attitude of the other staff on the section. Specifically, it is alleged that HM said to AS *"…have you heard about the black apple campaign?"* The claimant alleges HM targeted him and AS on the grounds of race and/or disability. Further at the same meeting with HM, Andrew Prenderville (AP), the claimant's union representative, repeatedly interrupted the claimant. The claimant's protestation in response prompted HM to accuse the claimant of being aggressive. The claimant contended that HM racially stereotyped him by accusing him, falsely, of aggression; contrary to ss.13 and 26 EqA.

1.10 Having regard to the findings and conclusions we make, the matrix in the light of our judgment is thus:

	Para. of List Issues		s.13	s.15	s.20	s.26	Protected Char.
1	3.1.1	Requiring the C to ask permission from and/or to notify the Respondent before every visit to the lavatory from February 2014 onwards?	~~Yes – Race & Disability~~	Yes (SAR – 5.3 LA – 5.5)	Yes (PCP – 6.1)	Yes ~~(Race &~~ Disability)	~~Race &~~ Disability (IBS only)
2	3.4.1	Did Jason Rawlinson ("JR") use the nickname "*Abo*" in grievance investigation meeting on or around 28th August 2014, exposing widespread use by colleagues throughout C's employment?	~~Yes (Race Only)~~			Yes (Race Only)	Race
3	4.1.1	Unjustified delay in investigating the "Abo" complaint between March and September 2015 (race);	Yes (Race Only)				Race
4	3.4.2	Was the C referred to as "*black guy with big afro*" in investigation meeting in December 2014 and did JR, from the use of this term, state that this sounded like thse C?	~~Yes (Race Only)~~			~~Yes (Race Only)~~	~~Race~~
5	4.1.2	An unfair dismissal procedure from December 2014 onwards, including biased referrals, applying pressure on C to submit to medical examination, (race and/or IBS and/or depression)	~~Yes – Race & Disability~~	~~Yes (SAR – 5.8 LA – 5.10)~~			~~Race & Disability (IBS & Depression)~~
6	4.1.3	Dismissing him on 16th October 2015 (race and/or IBS and/or depression);	~~Yes – Race & Disability~~	~~Yes (SAR – 5.11 LA – 5.13)~~			~~Race & Disability (IBS & Depression)~~
7	3.4.3	Did the C's colleagues, including A7, Catherine Doody, JR, use the nickname "*Abo*" for the C throughout his employment?				Yes (Race Only)	Race
8	3.4.4	Did Frances Tobin on 21st January 2016 suggest that the blame for using "*Abo*" lay				~~Yes (Race Only)~~	Race

		with the C?					
9	4.1.4	Failing to deal with his grievances reasonably or appropriately from 8th April 2014 onwards (race);	~~Yes (Race Only)~~			Race Only	Race
[10]		the so called "bad apple" meeting on 14 February 2014	~~Yes (Race Only)~~				~~Race~~

Claims unproven/dismissed: = [ ]

The Issues

2. We adopted an agreed list of issues prepared by Ms George and the (then) counsel for the claimant, dated 21 June 2016, which list was produced to us as part of the trial documents at the start of the hearing. We referred to the full list at hearing and in deliberations. We state the following by way of summary.

Disabilities:

2.1 The disability being relied upon is stress and depression together with irritable bowel syndrome (IBS) which is exacerbated by the said stress and depression.

2.2 There is no issue as to the claimant's disability and his entitlement to bring claims under the EqA on that basis.

Discrimination Claims:

2.3 The claimant has made the claims scheduled in the matrix set out in the preceding paragraphs. We firstly remind ourselves of the statutory burden of proof under the EqA; at s.136. In general, the burden of proof is on the claimant. This means the claimant must show that the facts required for the claim to succeed are more likely than not to be true. If the claimant makes out a *prima facie* case, the burden of proof shifts to the employer to show it did not discriminate. We have made primary findings of fact in this case which shifted the burden to the respondent. The respondent surmounted that burden in respect of some but not all of the claimant's claims.

2.4 Section 13 EqA – direct discrimination (less favourable treatment). We take the view that the direct discrimination claim is one relating to the race allegations rather than those allegations relating to the claimant's disability.

2.5 Section 15 EqA is framed on unfavourable treatment because of something arising in consequence of disability; unless such treatment is a proportionate means of achieving a legitimate aim. A comparator is not required, to bring a claim under s.15. The respondent's defence of "proportionate means" is similar to the range of reasonable responses test. We conclude that this claim was related to the so-called toilet break notification and also the decision to dismiss the claimant, in the first instance on 16 October 2015 and subsequently at the stage 2 appeal on 3 March 2016.

2.6 Section 26 EqA – harassment on the grounds of disability and/or race. The matrix is indicative of our conclusions, in terms of nature and outcome.

2.7 Where someone meets the definition of a disabled person in the EqA, employers are required to make reasonable adjustments to any elements of the job which place a disabled person at a substantial disadvantage compared to non-disabled people; s.20 and s.21 EqA; and specifically s.20(3). This claim arises in the context of the requirement that the claimant asked for permission from and/or notify his manager (HM) before every visit to the lavatory from February 2014 onwards.

2.8 Employers are only required to make adjustments that are reasonable. Factors such as the cost and practicability of making an adjustment and the resources available to the employer may be relevant in deciding what is reasonable.

Unfair dismissal:

2.9 The respondent does not have a formal managing absence policy although managers tasked with conducting a Capability Review are issued with Management Guidelines (p. 605). The following is a chronology of the steps taken to manage the claimant's absence, which we adopt from Ms George's written submissions:

17.03. 2014	C starts period of absence due to stress and anxiety. He has already been referred to OH prior to starting this period of absence (p.103 & 105)	
11.04.14	OH Review	118
17.04.14	OH Review	120
14.05.14	OH Review	127
02.06.14	OH Review	128
24.09.14	OH Review	144
12.10.14	C referred to OH for advice on whether specialist mental health advice needed	
17.12.14	OH Review. Dr Morris advises C is fit to attend meetings and that referral to mental health specialist would be beneficial.	205
28.01.15	C refuses to consent to review by mental health specialist. Dr M advises that he cannot recommend a return to work without specialist advice on how to protect C's health on return.	270
06.01.15	OH Review	210
09.01.15	C writes to NM about the draft referral	211
28.01.15	OH Review	270
05.03.15	NM mails C answering his points on the draft referral letter	298

28.04.15	R again asks C to consent to be seen by a mental health specialist, Dr Briscoe.	326
08.05.15	C response	346
11.05.15	FT urges C not to wait for the grievances to be concluded before agreeing to see Dr Briscoe	315
02.07.15	OH Review	355A
10.8. 2015	Allana Setchell (AS) writes to C inviting him to an absence review. The restricted worker process was continued (see 609).	364
13.08.15	OH Review	365
20.08.15	Absence Review meeting. C asked again to consent to see Dr Briscoe	367
03.09.15	Draft letter of referral to Dr Briscoe	378
7.09.15	Absence Review meeting. C asked again to consent to see Dr Briscoe and refuses.	400
10.09.15	C invited to Capability Review on 17.09.15	406
16.09.15	OH Review	411
17.09.15	Employment capability Review Meeting	418
24.09.15	C's company sick pay entitlement expires.	
30.09.15	C consents to be examined by Dr Briscoe but does not consent to Dr Briscoe receiving copies of all of his GP and other NHS records.	434
9.09.15	NM responds to points raised by the Claimant	412
15.10.15	OH Review – Claimant does not attend	434a
16.10.15	Reconvened capability review meeting	435
22.10.15	C's grounds of appeal	451
10.11.15	Stage 1 appeal	454
16.11.15	MB interviews Dr N Morris	468
07.01.16	MB interviews Alan Dovey	496
14.01.16	Stage 1 appeal outcome	498
18.01.16	Stage 1 appeal outcome letter	501
	C appeals the Stage 1 appeal outcome	524
27.01.16	Stage 2 appeal invitation. ("Extended Plant conference")	538
25.02.16	Stage 2 appeal against dismissal	541
3.3.16	Reconvened Stage 2 appeal	554
10.03.16	Stage 2 appeal outcome letter	567

2.10 The crucial question for the tribunal in the current case was whether the respondent acted reasonably in treating the claimant's continuing absence with no stated return date, as a sufficient reason for dismissal for capability. For all the reasons we will examine in this judgment, we conclude that the respondent did indeed act reasonably. One consequence of this conclusion, with our attendant finding that the decision to dismiss bore no traces of discrimination is that our finding of discriminatory conduct on the grounds of race and/or disability continues no further than 21 January 2016. The subsequent termination of the claimant's employment, with effect we find from 3 March 2016, brought the claimant's relationship with the respondent to an end legitimately and lawfully.

2.11 Neither have we found any deficiencies in the procedural chronology leading to the claimant's dismissal to taint the fairness of the dismissal. Moreover, alongside that we find that the claimant fails to prove his allegations of discrimination or unfairness in respect of what he has called, "biased referrals" or pressure to submit to medical examination. By that we find him to be referring to the respondent's seeking to instruct Dr Briscoe to give a report on the claimant's psychological health. Sadly, if only the claimant had co-operated with the respondent in agreeing to Dr Briscoe' access to his full medical notes and in turn his examination by Dr Briscoe, the respondent may have been assisted. In truth, however, we doubt whether that would have made a difference to the ultimate outcome. The claimant had exhausted his sick pay. There was no evidenced prospect of his fitness to return to work in any capacity. An employer is entitled to conclude that "enough is enough"; and so long as that decision is procedurally fair an employer should not be held to account by way of unfairness or less or unfavourable treatment. We are clear here; that the decision to dismiss the claimant was in no way discriminatory on either race or disability grounds.

2.12 The respondent must show the reason for dismissal; and that it is one which is potentially fair under s.98(2) ERA. The reason relied on by the respondent here is that of capability. The claimant was a long term absentee because of sickness; namely his condition (and his disability) of depression and anxiety together with IBS. It is the respondent's case that it acted reasonably and within a reasonable range of responses in concluding that no prospect of the claimant's return to work within the foreseeable future was evidenced. His lack of capability was evidenced and it was fair and reasonable to dismiss in all the circumstances, having regard to the respondent's absence review and capability review process.

2.13 The tribunal reminds itself that in the context of an unfair dismissal claim, the burden of proof as to fairness is a neutral one. Having regard to the general principles of fairness at s.98(4) ERA, the tribunal shall consider whether the decision to dismiss was one within a range of reasonable responses

Limitation issues

3.1 The tribunal finds that the relevant period for examination in these proceedings is that beginning in or about February 2014 and ending on 3 March 2016. However, we find the last discriminatory act during that period to be on 21 January 2016. There was a continuing state of affairs during that period; but we cannot find that to be the case in relation to the miscellany of events to which the claimant sought to refer before the start of that period. He has in his statement of evidence gone back as far as 2007. He cannot claim those matters to be part of the essential chain of events to which he refers while under

HM's supervision. But his assignment to HM as his process leader is the relevant timescale. However, that is not of itself a finding of culpability on HM's part. We shall explain our rationale on the timescale in the following paragraphs as part of our determination of the limitation point; and also consider the issue of what is the correct EDT.

3.2 We deal with that latter point first. The correct EDT is we find 3 March 2016.

3.3 Secondly, we conclude that the claimant's claims arising during the period February 2014 to March 2016 amount to conduct by the respondent as an "ongoing situation or continuing state of affairs". We conclude that the claimant's claims are brought within time and are therefore not barred by reason of limitation. In coming to this conclusion we have had regard to the decision of Robinson v Royal Surrey County Hospital NHS Foundation Trust & Ors UKEAT/0311/14/MC[1] on the issue of continuing acts. The EAT was asked to consider whether complaints of different types of discriminatory conduct can be considered by an Employment Tribunal when looking at whether there is an act extending over a period. The EAT's judgment *(obiter)* was that potentially it could. Applying that to the present case, we find that the combination of race and disability events over the defined period is not a bar to an act extending over the period of time in this case. It has to be said, however, that we find that the thread of allegations based on both race and disability has sufficient continuity to give rise to an ongoing state of affairs in the present case.

3.4 We will set out our reasons for that conclusion presently. But, even if we are wrong in our conclusion that his claims are in fact time, we are satisfied that this case reveals good grounds for extending time on the grounds of justice and equity. The claimant's allegations are serious and made against a large, high profile and well-resourced employer. They merit a full examination by the tribunal as a matter of justice for both parties.

3.5 It was necessary firstly for us to make a finding in relation to the effective date of termination of the claimant's employment. The claimant's case was that he was dismissed on 16 October 2015; and that this date serves as the effective date of termination (EDT). The respondent's case is that by reason of a collective agreement (p.614), the making of an appeal triggers a mutual consent to the contract of employment reviving for the duration of the appeal; despite the terms of the letter of dismissal (p.450). The appeal process did not conclude until 3 March 2016, and the second stage decision by Demos Hoursoglou DH) to uphold the dismissal of the claimant on the grounds of capability. The claimant's termination payment was calculated by reference to the later date.

3.6 We accept therefore the respondent's argument that the claimant's employment continued until 3 March 2016.

3.7 Although various of the claimant's claims of discrimination arose out of acts pre-dating 16 October 2015, there was certainly one further matter on which the claimant relies

[1] Referring in the judgment to CLFIS (UK) Ltd v Reynolds [2015] IRLR 562 CA), Ali v Office of National Statistics [2005] IRLR 201 and the guidance provided in the Judgment of Mummery LJ in the case of Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530.

which post-dates significantly the series of allegations during the period beginning on or about February 2014 until the "first decision to dismiss" in October 2016. That much later event is Frances Tobin' (FT)s suggestion to the claimant during the feedback meeting of 21 January 2016 that the term "Abo" had been used by the claimant of himself. FT gave her evidence to this hearing. She acknowledged that the claimant was genuinely shocked by her suggestion. Miss Tobin accepts that she made a mistake which caused offence to the claimant. She gave her unqualified apology as part of her evidence to this tribunal. We find that is an event which is a continuation of the extended act beginning in February 2014.

3.8 The last individual act relied upon was therefore that of 21 January 2016.

3.9 The claimant presented two ET1s.

3.10 The first was presented to the tribunal on 8 February 2016. (case number 1300211/2016) That complaint, accounting for early conciliation, was presented within the extended statutory time limit. The respondent's response was lodged on 15 March 2016.

3.11 The second ET1 was presented to the tribunal on 4 April 2016 (case number 1300605/2016). At box 15 of the pro forma, the claimant requested that the second claim be consolidated with the first. The accompanying (updated) particulars of claim, under the heading of "post dismissal" pleads FT's "racial insensitivity" of 21 January 2016. Along with the presentation of the its response to the second claim, on 13 April 2016, the respondent agreed that the two claims be consolidated and considered together.

3.12 It is common ground that Peter Tennant (PT) had taken responsibility for conducting an Absence Review for the claimant and had begun that process in August 2015. The claimant had been absent from work with stress and anxiety since 17 March 2017. His company sick pay was due to expire on 14 September 2015. The initial absence review meeting was held on 20 August 2015. By the time of the reconvened review meeting before PT on 7 September the respondent's decision was that it was necessary to move to an employment capability review. The claimant, having declined to be examined by Dr Briscoe the company would make a decision based on the medical and other evidence which was presently available. The claimant was aware that one outcome could be the termination of his employment.

3.13 A capability review was held on 17 September 2015. (p.438). the term "capability review" is used by the respondent for the conduct of an assessment of a long term absentee's likelihood of return to work in the foreseeable future. The latest DDR on 16 September 2015 confirmed that the claimant remained unfit for work. There was no significant change in his condition. Dr Morris could not recommend a return to work until he could receive independent advice from a mental health specialist; namely Dr Briscoe.

3.14 The final meeting of the capability review was held on 16 October 2015 (p.435). The claimant had not attended his last scheduled OH appointment. PT reviewed his last DDR from 16 September (p.436). The claimant did not want the respondent to have access to his NHS medical records. Neither did he wish Dr Briscoe to have access to them. He would

see Dr Briscoe initially, without release of his medical records. If Dr Briscoe concluded he needed to see the full medical records, the claimant would allow the request; but only then. Against that background, and in the absence of evidence of a return to work date, PT told the claimant he was being dismissed on the grounds of his lack of capability for work. Mr Tennant informed him at the meeting that his contract was terminated with immediate effect, from 16 October 2015. A letter confirming the decision was sent to the claimant on 20 October (p.450).

3.15 The claimant appealed.

3.16 The first stage appeal was assigned to Mark Barker (MB). A hearing was convened on 10 November 2015. The claimant's grounds of appeal were considered. The hearing was adjourned. It was eventually reconvened on 14 January 2016. MB upheld PT's decision to dismiss. The appeal decision and its dismissal was confirmed on 18 January 2016 (p.502).

3.17 The claimant proceeded to the second stage of appeal.

3.18 The determination of the second stage was assigned to DH, a senior manager based at the Solihull plant. An "Extended Plant Conference" (EPC) was held on 25 February 2016 (p.541). A reconvened EPC was held on 3 March 2016 (p.553), chaired by DH and supported by Mark Wilson of HR. DH's evidence to the tribunal was that the claimant had taken him back to March or April 2014, when the claimant raised his grievance against HM. Over the previous two years the claimant had raised concerns about discriminatory conduct towards him, but had been ignored. He had been disregarded, racially abused and negatively portrayed. He had been subjected to different rules to other employees.

3.19 DH upheld the decision to dismiss as fair. Discrimination in the making of the decision, whether on the grounds of race or disability, was unproven; (pp.562-565).

The grievances

4.1 It has been necessary for us to give careful consideration to the engagement of the claimant with the respondent in the grievance process during the relevant period. The claimant's grievances had proceeded through the respondent's internal procedures from 8 April 2014 and his outstanding grievances continued to progress through the respondent's procedures after his (first) dismissal of 16 October 2016.

4.2 The grievance process concludes we find on 21 January 2016, with FT's appeal feedback meeting with the claimant, chaired by Alan Gane (AG) who had heard the grievance appeal.

4.3 The following is the chronology of the progress of the claimant's grievances. Again, we have been able to adopt the chronology from Ms George's written submissions. The claimant has not challenged it.

04.03.14	C speaks to Kathryn Doody, informally	
17.03.14	C starts period of sickness absence	
8.4.14	Formal grievance against Hayley Moss (Grievance 1)	113
15.04.14	Invitation to grievance hearing on 28.04.14 (Grievance 1)	119
23.04.14	C requests postponement because he is about to undergo surgery	123
28.04.14	C says that he will contact OH when he is fit to continue the grievance procedure	125
29.04.14	C has 'flu. Invited to a hearing in June which he was too ill to attend.	KD para.21 p.244
8.5.14	Hearing which is rearranged because C is ill	
26.06.14	R invites C to a grievance hearing on 2.7.14 (Grievance 1)	130
02.07.14	Grievance hearing conducted by JR (Grievance 1)	133[2]
15.07.14	JR interviews HM	252
21.08.14 & 28.08.14	JR interviews witnesses	256 – 263
	Alex Allden takes over from KD as HR support for JR (maybe slightly later – Oct/Nov)	KD para 20
10.9.14	Minutes of 02.07.14 sent to C leading to correspondence with KD about their contents (p.141).	159
17.09.14	JR interviews Mike Farrell	264
14.11.14	JR interviews Chris Canning	265
17.11.14	C brings grievance about Personnel File Request (Grievance 2)	147
18.11.14	R acknowledges receipt of Grievance 2	147
22.12.14 & 07.01.15	JR interviews 3 further witnesses	266 - 268
05.12.14	Bernadette Hall tells C that she and John Burton will handle Grievance 2. She sets a provisional date for the hearing of 18.12.14[3]	165
15.12.14	C raises questions about the process of	167

[2] C's notes are at p.131

	Grievance 2.	
02.01.15	BH responds to C's email of 15.12.14. (She had previously advised that she/JB were on training courses or annual leave until the end of the year p.165)	168
13.01.15	Hearing in Grievance 2 (JB and BH)	215
16.01.15	JB interviews Catherine Moorhouse (Grievance 2)	221
19.01.15	Grievance 1 outcome meeting	
19.01.15	C appeals Grievance 1 outcome	229
20.1.15	BH seeks to find out what is missing from the file	178
23.1.15	Outcome letter in Grievance 1	232
10.02.15	Grievance 1 Appeal hearing set for 16.02.15	276
09.02.15 – 18.02.15	Correspondence between C and Andrew Dempsey about Grievance 1 including notification of provisional appeal hearing for 16.02.15 (p.276) which C declines due to insufficient time to meet with TU advisers (p.274).	274
09.02.15	Invitation to outcome meeting for Grievance 2	281
13.02.15	Grievance 2 Outcome Meeting	282
13.02.15	Grievance 1 Appeal hearing provisionally scheduled for 20.02.15	273
10.02.15-03.03.15	C to NS correspondence about the Appeal in Grievance 1	
18.02.15	AD invites C to say when it would be convenient to have the appeal in Grievance 1	272
03.03.15	C's detailed grounds of appeal against Grievance 1 outcome. Includes complaint about use of the word "Abo" by JR and alleged racial stereotyping in use of description "a black guy with a big afro".	290
Approx. 03.03.15	FT takes over HR function in Grievance 1	
09.03.15	C raises concerns with FT about emails from her predecessor with conduct of Grievance 1	322
27.03.15	BH mails C on return from bereavement leave to arrange a further meeting in Grievance 2.	185
Late March/early	Correspondence BH to C about obtaining CD with a copy of documents disclosed following	186-188

April 2015	C's request	
Early April 2015	FT sends C the appeal pack. (p.320 refers)	
21.04.15	Invitation to Grievance 2 outcome meeting on 23.04.15 (then rearranged to 28.04 because of availability of C's TU rep. – p.204)	325
28.04.15	Grievance 2 outcome meeting. JB offers an apology for failure to disclose C's records to him completely and within 40 days. (p.332)	328
29.04.15	C appeals Grievance 2 outcome	195 & 191
11.05.15	FT to C about Grievance 1 Appeal suggesting a hearing "this week or next week."	314
13.05.15	C to FT in response	348
13.05.15	C chases for progress re Grievance 2	194
20.05.15	BH provides C with the appeal pack for Grievance 2 and notifies of change of HR personnel.	351
21.05.15	FT mails C in relation to Grievance 1	352
28.05.15	GC takes over from BH in conduct of Grievance 2	443
10.06.15	FT to C in substantive response to 13.05.15 mail and discussing arrangements for Grievance 1 Stage 1 Appeal hearing	353
11.06.15	GC mails C to say that Wayne Killick will hear Appeal Stage 1 of Grievance 2	443
18.06.15	C to FT: he expects to be meeting with his new TU rep the following week.	352
29.06.15	FT to C offering for the grievance against JR to be considered within the scope of Grievance 1.	355
02.07.15	Email from C to FT about Grievance 1	356
23.07.15	Letter from FT to C confirming the complaint about JR would be dealt with within Grievance 1. C's TU rep has asked that the Appeal be scheduled for no earlier than the week commencing 31.08.15	360
13.08.15	C sends details of complaint against JR to FT	305 & 310 enc. 363
13.08.15	Invitation to Grievance 2 Appeal hearing	366
17.08.15	GC confirms date for Grievance 2 Appeal Stage 1 of 25.08.15 to be conducted by Dale Sawyer.	442
25.08.15	Grievance 2 Appeal Stage 1 hearing. Following	375

	this C is to provide some data.	
25.08.15	Grievance 1 Stage 1 Appeal scheduled for 04.09.15	372 & 373
04.09.15	Grievance 1 Stage 1 Appeal	380
08.09.15	C asks for more time due to Capability Review	440
09.09.15	C asks for more time to produce documents for Grievance 1 Appeal	308
11.09.15	FT extends time to 14.09.15	322A
14.09.15	FT extends time for production of documents by C in Grievance 1 to 18.09.15	409
19.10.15	C chases progress in Grievance 2. GC reminds him that some information is outstanding from him.	439
12.11.15	Grievance 2 Stage 1 Appeal outcome meeting	461
12.11.15	Grievance 2 Stage 1 Appeal confirmed in writing	466
	C raises Stage 2 appeal in Grievance 2	467
30.11.15	AG interviews JR in Grievance 1 Appeal 1	469
01.12.15	KD and Andrew Prendeville (AP) interviewed by AG in grievance 1 Appeal 1	472 & 476
08.12.15 & 17.12.15	AG interviews witnesses in Grievance 1 Stage 1 Appeal	490, 492
21.01.16	Grievance 1 Stage 1 Appeal feedback meeting	516
25.01.16	Grievance 1 Stage 1 Appeal outcome letter	523a

4.4 We cite the following particular events in the grievance chronology. This is not intended to be exhaustive of every single event of significance in the grievance process; but it is indicative of particular watershed dates.

4.4.1 ***8.04.14*** – the grievance against HM listing 15 points of complaint. The claimant contends that the grievance was “ignored” for three months. The claimant reported sick absent from April 2014 and remained away from work certified as unfit by reason of depression until his employment was terminated on the grounds of capability.

4.4.2 ***2.07.14*** – Jason Rawlinson (JR) is instructed by Kathryn Doody (KD) to investigate the claimant’s grievance against HM

4.4.3 ***28.08.14*** - A7 statement; reference to the word “Abo” by JR

4.4.4 ***17.11.14*** – the claimant raises a grievance regarding issues relating to his request for copies of his personal file

4.4.5 ***19.01.15*** – By his email to Alex Allden of HR (who had taken over the claimant's case from KD), the claimant appealed against JR's findings in the HM grievance (p.230). The claimant requested the documents relevant to the grievance and its investigation. A bundle of documents relevant to the claimant's appeal in the HM grievance "the appeal pack" as it has been referred to at the hearing, was sent to the claimant on 25 January 2015.

4.5 There followed a series of exchanges of email correspondence between the claimant and Andrew Dempsey (AD), a senior HR consultant based at Solihull. The claimant referred in the correspondence to "some issues" with the appeal pack, (pp.271-280). During his evidence at this hearing, the claimant was highly critical of AD's conduct. He had left the respondent's employment. The claimant had made references during his evidence to AD having been dismissed. However, the respondent's counsel was at pains to put it on record that was not the case. In relation to the claimant's exchanges with AD, we were confronted with references to the movie "The Colour Purple". The origin of this reference appeared to be a telephone conversation between the claimant and AD; one topic of which was the "Bad Apple" poster. The claimant acknowledged that (and this derives from his written submission) out of "frustration" with AD he suggested he should watch some films dealing with racism; notably "The Colour Purple" and also "To Sir with Love" and "Roots". In turn, Mr Dempsey in his email to the claimant of 10 February 2015 amongst various other points, repeats the claimant's citation of the film and requests further information about his objection to the "Bad Apple" initiative and its associated poster. In his written submission however the claimant protests that at no point did he compare the bad apple campaign to "The Colour Purple". As far as the tribunal are concerned little turns on this matter; in either the reference to the named movie or the claimant's assertion that the "Bad Apple" initiative was racist or that it was referenced to him in a racist manner.

4.6 KD said in her evidence that she was aware that the claimant had received "different" draft minutes in the appeal pack. She said she was referring to superseded copies of some of the drafts she had prepared. They appeared to have been issued to the claimant in error after she had ceased to have responsibility for the case. KD referred in evidence to two versions of A7's interview, (pp.262 and 263). Two lines at the very bottom of that record appear on p.263 but not on the copy at 262. Those two lines were:

"Has that led to concern?

For 6 of us no, and but Abo and Samra yes."

4.7 KD stated that the omission was not intentional. KD acknowledged that she had taken the note of JR's investigatory interview with A7. The two versions of the note of interview were KD's own drafts. She recorded JR as saying "Abo" in reference to the claimant. KD thought that the full-stop after the word should have been a question mark. She thought that JR was querying with A7 whether it was the claimant to whom he was making reference. Lots of employees she and JR had engaged with as part of the investigation had used different nicknames for the claimant, including "Chip" and "Chippo" or "Chipper". It was clear from the respondent's evidence that he took no exception to the name "Chippo". KD and JR concluded that no one appeared to call him by his first name. KD had not heard the word "Abo" before. Her assumption was that JR and A7 were using another of his nicknames. She was not aware of the term "Abo" at the time; and she had no idea it had any racial connotations.

4.8 KD had no further involvement in the matter until 1 December 2015 when she was interviewed by AG as part of his investigation into the claimant's appeal against the grievance outcome.

4.8.1 ***06.08.15*** – the claimant lodges a further grievance against JR over his alleged use in investigation of a derogatory racist nickname for the claimant; "Abo"

4.8.2 ***25.08.15*** – FT confirms that the respondent will deal with the "Abo" grievance against JR as part of the grievance appeal

4.8.3 ***04.09.15*** – AG meets with the claimant. The 15 points of his appeal are discussed

4.8.4 ***30.11.15*** – JR was interviewed by AG as part of the grievance appeal investigation, including the alleged racial slur by the term "Abo" and the use of the phrase "black guy with a big afro"

4.8.4 ***01.12.15*** – AG interviewed Kathryn Doody

4.8.5 ***08.12.15*** – AG interviewed Glynn Evans, a former colleague of the claimant

4.8.6 ***21.01.16*** – Appeal feedback meeting. The term "Abo" had been used but without racist intent. Black guy with a big afro was not racist, just a neutral description. FT suggests that the term "Abo" had been used by the claimant of himself

4.8.7 ***25.01.16*** – The outcome letter to the claimant We do get a sense from the evidence and draw an inference that, certainly in the early stages of the grievance process the claimant's complaints were not treated as seriously or urgently as they should have been. On the one hand, the claimant was indeed known to be a serial complainant. Also, he was known as a relatively difficult employee to manage. We acknowledge that. But it was no excuse for the lack of urgency which we think was detectable during 2014 until we think the summer of 2015. The claimant was absent from work; but he was still engaging with the respondent and making his presence felt on serious allegations to do with his race and at least by implication his disability.

4.9 We think that the failure of the respondent to get to grips with the claimant's complaints was reflective of its attitude towards him at that stage which betrayed a lack of regard for him arising in significant part form the fact he was the black man of questionable health who was a thorn in the side of HM and her team. We concluded that where the claimant had succeeded in showing s.13 direct discrimination because, it was principally on the grounds of the claimant's race; even if other factors were at play – notably, he was a difficult employee and he was off on long term sick. We found difficulty however in any finding that any direct discrimination was grounded in terms in disability.

The Hearing; Evidence

5.1 We took live evidence from the claimant and one other witness called by him; namely Armadeep Samra (AS).

5.2 For the respondent we heard from nine witnesses: -

5.3 There was a common hearing bundle of some 620 pages with some further, supplemental papers. The documents bundle was accompanied by a separate loose bundle containing the witness statements of the claimant and the four respondent witnesses.

5.4 For completeness, we list all the witnesses called, as follows;

***For the claimant*:**

The claimant himself
Armadeep Samra – production operative (associate)

***For the respondent*:**

Hayley Moss (HM) – process leader
Kathryn Doody (KD) – human resources consultant
Jason Rawlinson (JR) – lead production manager
Bernadette Hall (BH) – senior human resources consultant
Peter Tennant (PT) – engineering manager/dismissing officer
Frances Tobin (FT) – senior human resources consultant
Mark Barker (MB) – manufacturing manager/dismissal appeal officer (stage 1)
Alan Gane (AG) – facilities manager/grievance appeal officer
Demos Hoursoglou (DH) – Technology Manager (stage 2 dismissal appeal)

Findings of Material Facts

6.1 The claimant is a British man of Afro-Caribbean descent. He is 44 years of age at the date of this hearing. He began working for the respondent in 1998 on a short term contract (we think he started as an agency worker). The claimant contends he was over a lengthy period, and specifically during the two years 2014 to his dismissal on 3 March 2016, the victim of extended acts of discrimination, bullying and harassment because of his race and because of his disability. He sets out his case as one set against a background of institutional racism at the respondent's plants. He has described the culture of the respondent's workplace as a "closed shop"; an environment in which there is no advancement or even acceptance unless "you are in the gang". He has not addressed in specific terms what are the pre-requisites of being part of that allegedly favoured group; though we have addressed his claims on the basis that for him at least race and disability are the factors which he complains excluded him. The underlying theme of his case was that he was continually excluded and marginalised because of the two protected characteristics which he says define him; the fact that he is black and that he has since 2012 been designated as a "restricted worker" because of his health; and more especially the impairments which are accepted by the respondent to give rise to his disability.

6.2 The claimant joined HM's section at the beginning of 2014. We find that is the commencement of the continuing act on which these proceedings rest. He had been deployed to "Photo Feedback" for some 18 months already. There were two other black or Asian associates besides the claimant. The associate of Asian origin was AS. Approximately half of the photo feedback team were on restricted duties including the

claimant and AS. The restrictions differed; some couldn't work on a moving track and others had restrictions in relation to their medical conditions or the hours they could work. The documents bundle contain the Duty Disposition Reports (DDR) issued for the claimant. They begin at p.97 of the bundle. Since 29 February 2012 the claimant had been subject to permanent restrictions in the following contexts; he was

a) unfit for shift work – he needed a regular routine and could not work rotating shifts of nights. He could manage permanent days or permanent mornings.

b) To be allowed to visit the lavatory urgently – he would need to be provided with toilet cover urgently up to 4/5 times am and 3/4 pm. This could be for 15 minutes at a time

c) Unfit to work in time pressured situations – he would not manage production track roles or other significantly time pressured roles. He may be able to manage other track type roles e.g. CAL/quality roles.

6.3 HM acknowledged in her evidence that she had, informally been told that the claimant could be difficult to manage. That was a generally held view. We believe that led managers and co-workers of the claimant to be defensive rather than co-operative.As a consequence, we think that the attitude towards the claimant at all levels of authority was potentially dismissive and sceptical. In turn, as a black disabled worker especially he was at greater risk of being marginalised. That revealed itself we think in the grievance process especially. We think that his grievances were handled by the respondent with a level of frustration but also delay. There appeared to be no urgency in tackling his complaints. Managers could be forgiven for concluding he was a serial complainer who readily made accusations of discrimination.

6.4 The claimant was assigned to a stationary work area. His job was to recognise the fault issues with any particular vehicle, take relevant photographs of the vehicle and then feed the data into the computer. His work station was purposely close to the toilets. We examined the schematic diagram of the work space produced by the respondent. A toilet facility was located within a couple of minutes' walk from the claimant's area. There was another toilet positioned more remotely; which would have taken appreciably more time to visit and return from back to his workplace.

6.5 HM's evidence was that she needed to know all of her team members' movements when they were working, whether or not they had restrictions. We think it correct, as HM states, that he did not have to ask permission to go to the toilet, which was likely to be quite frequent because of his IBS condition. He was however required to notify Dan Gerrard (DG) or HM by a telephone call to their office if he wanted to leave his work station use the toilet. HM was aware that there may be occasions when it was not possible for the claimant to ring in advance as he may need to rush to the toilet urgently. In those circumstances he should tell another team member or someone from the local area, whom he felt comfortable with. HM said that she just needed to know where he was if not at his work station. Further, her evidence was that all of the team including those on restriction, respected the rule except for the claimant and AS. The statement from A7 (485) noted that the only person

who did not have to follow the telephone notification rule was the pregnant worker (Kelly). We doubt it is correct that only the claimant and AS ignored the toilet break rule; although we do not say HM is blatantly lying. Looking at the totality of the evidence, we infer that the rule was probably breached by all the team members more often than it was honoured. Workers did leave the work area for the toilet without calling DG or HM. The claimant's special circumstances put him in a position of course to take liberties if he chose to; in terms of time spent on toilet breaks and also their frequency. Frankly, we think that HM had more reason generally to monitor him than others in the team; but we do not believe that the manner of it was legitimate. As a consequence, we think it is probable that the "phone first" rule was sought to be enforced more rigidly against the claimant than other fellow workers who would not need the toilet anywhere nearly as frequently or have the same "excuse" to leave their work. The liberty to take more frequent and longer toilet breaks was indeed an adjustment to address the claimant's disability, but its method of implementation we find was less than reasonable in all the circumstances and resulted in a breach of ss.20 and 21 EqA on the respondent's part.

6.6 When the claimant laid his grievance against HM, JR was invited to undertake the investigation. We think he went about his task in a broadly professional manner, but at the same time we do not think that the claimant's complaints (and there were various of them to address) were high on JR's list of priorities. We infer that the claimant's reputation as a serial complainant was known to JR even if he had not met him in person before that time. We do not dispute that JR first met the claimant on 2 July 2014 for the investigation interview. However, JR would have known the background of the complaint (as he should have) but also the claimant's own history. JR knew this was part of the claimant's fraught history with the respondent. He viewed his brief we think as one of fire-fighting rather than the claimant's protection and support. JR did not pursue his brief with the urgency it merited. We believe that was in large part because the claimant was known as a serial complainer. The workplace gossip attached to the claimant became known to JR; his history, his previous complaints, his difficulties with other colleagues; and also names by which he was known. One of those we think was the word "Abo". We think that word had probably been used sporadically of the claimant for some time during his employment by associate and management staff. Ironically we do not think it was meant to be gratuitously offensive. But we cannot avoid the conclusion that it was bound to be very racially offensive to a black man like the claimant. JR used that term to prompt A7. We do not say that JR himself had habitually used that word. But his use of it to A7 as a prompt betrayed the fact that others who knew him and worked with him used that term. A7 clearly knew it was a name used for the claimant. Every witness has acknowledged that it is a racially offensive term. We accept that the claimant was affronted by it when he subsequently received the investigation notes. His further grievance against JR about the use of that particular word makes that plain. Let us make it clear however that we do not find JR to be racist. On the relevant occasion he displayed some impropriety and sensitivity in using the term "Abo". However unthinking and unintended though it was, it does put the respondent at odds with the duty the EqA imposes on an employer. We believe this was part of harassing conduct towards the claimant, which impugned his dignity significantly; even if it was not an intended as a deliberate racial slur.

6.7 Regretfully, the offence caused by the use of the word “Abo” was further compounded by an unjustified delay, we feel, in investigating that complaint during 2015. In the event the matter was not formally adjudicated upon until January 2016; and unfortunately the appeal feedback meeting caused further offence to the claimant

6.8 Of a much lower level of offence we think was the reference to a “black guy with a big afro” by A8. A little blunt perhaps; but we cannot lose sight of the fact that the day to day industrial workplace is not necessarily a haven of refined politeness. The real question is whether such a remark is discriminatory and therefore unlawful. We think that “black guy with a big afro” is not racially discriminatory of the claimant. A blunt description perhaps but not one offending the EqA.

6.9 From a company perspective it is evident that he was known not to be an easy employee to manage. We draw that conclusion from the evidence we have taken both from the manufacturing managers and process leaders and also the HR consultants who had engaged with his grievances and sickness absence record. However, we did not find the respondent and its managers had automatically taken against him; as a matter of principle or bitter experience. However, his reputation as a potentially difficult colleague and team member did go before him we think and that influenced if only subconsciously the way in which he was engaged by management and co-workers alike. The claimant was not without justification however, in finding all this demeaning and insulting; and his race and disability were clear factors in this.

6.10 We do not find, moreover, that there was any conscious discrimination directed to him for either race or disability; of the institutionalised character which the claimant has suggested in his evidence and submissions or of any other sort.

6.11 He was put on a restricted workers programme after seeing the respondent’s occupational health doctor, Dr Morris, initially in 2012.We had the DDRs from 20 January 2014. The claimant was declared unfit for shift work, he was permitted to visit the lavatory as needed and he was deemed unfit to work in time pressured situations.

6.13 He was deployed on the photo finish team from about 2013 as a continuing morning shift with no rotation pattern (92/93). That was initially refused by the claimant because it did not carry entitlement to shift allowance. He says shift pay was paid to others in the team who were working morning shift only without rotation to other shift patterns.

6.14 He was he says allocated the job on a temporary basis. He says that while he was working on that job other workers who were agency workers were made permanent.

6.15 The claimant claims he was harassed for going to the toilet. He claims he was singled out and was made subject to a rule that he must contact his line manager prior to leaving his place of work. He says fellow workers were instructed by Hayley Moss to follow him to the toilet and time his visit (p.103). We think what was meant to be a discreet eye was kept on him at HM’s instruction. We think that discretion was not always fully attained.

6.16 The claimant contends that there was no obvious rationale for the toilet telephone procedure. There was a DDR in place which provided that the claimant may need urgently to use the toilet and may need to absent himself for that purpose for up to 15 minutes each visit. For the first two weeks of the rule only the claimant was formally required to give the telephone notice. He says there was no reasonable justification for these requirements and they made his working environment uncomfortable and humiliating on the grounds of his disability. We acknowledged the importance of health and safety in the working environment, but we nevertheless find that the procedure which the claimant was mandated to follow was intrusive to his reasonable privacy and dignity.

6.17 Moreover, though the claimant complained about his treatment as being discriminatory, the respondent seemingly took a lengthy period even to get to grips with the substance of his complaints and the issues they presented. That in large part we think arose from the respondent's perception of the claimant as a difficult employee. And, that in turn may have arisen from his history of complaints and grievances about his disability and the claimant's repeatedly expressed view of himself as a racially abused employee.

Relevant Law

7.1 The tribunal has been presented with a catalogue of case authorities by Ms George for the respondent. We have given those materials consideration during our deliberations. Slavishly to repeat all the individual references would not in our view be proportionate in the judgment writing process. However, we draw upon the core elements of the relevant law; statutory and case authority.

7.2 The EqA burden of proof has been upper most in our mind during our deliberations. We remind ourselves of the statutory position regarding burden of proof at s.136 of the Act.

7.3 Section 26: Harassment on grounds of disability and/or race:

It is unlawful for an employer to harass an employee (see section 40(1) of the EqA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> *"(1) A person (A) harasses another (B) if—*
> *(a)A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b)the conduct has the purpose or effect of—*
> *(i)violating B's dignity, or*
> *(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *....*
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a)the perception of B;*
> *(b)the other circumstances of the case;*
> *(c)whether it is reasonable for the conduct to have that effect."*

7.4 What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> *"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory,*

particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

7.5 The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him, was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

7.6 There was an affront to the claimant's dignity by the requirement that he place on record his frequent and sometimes urgent visits to the toilet. Albeit his compliance was short lived the claimant's embarrassment and indignance about it weighed heave on his mind for many more months. The notes of the interview with A7 dealt a further blow to his self-esteem in January 2015. JR's insistence that he had no reason to connect it with a racial slur at the time has been difficult to accept. We acknowledge that his usage of it was not intended to be offensive; as a received "nickname" from the shop floor. But that does not excuse it or lessen the offence caused to the claimant, when he realised how he was known. The best evidence about where it came from is KD's suggestion that A7 might have asked something to the effect "is this about Abo" as he entered the room and JR had reflected the term used by him.

7.7 FT mistakenly thought from her reading of the papers that the claimant had participated in the use of the term as a nickname but when, during the Grievance 1 appeal hearing on 21st January 2016, the claimant's shock was palpable she realised her error and retracted her comment. (See FT para 22 & 23 and AG on this point)

7.8 She mistakenly thought that it was a nickname which had been used by both the claimant and his colleagues. AG retracted the comment that the name was used by the claimant himself. In her witness statement and in oral evidence, FT apologizes for causing the claimant offence and AG also gave evidence that he apologized at the time.

7.9 The crux of Section 15 goes to unfavourable treatment because of something arising in consequence of disability. Such conduct is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim.

7.10 We referenced the EAT's decision in IPC Media Ltd v. Millar UKEAT/0395/12, [2013] IRLR 707:

"the starting point in a claim of discrimination arising from disability which depends on the thought processes, conscious or unconscious, of the putative discriminator, is to identify the individual responsible for the act or omission in question"

7.11 Further, when comparing direct disability discrimination and discrimination under s.15; *"in a claim of direct…the claimant asserts that the matter complained of was motivated by his or her disability as such. In a claim of …arising from…the allegation is that the matter complained*

Such "consequence may include absences from work.

7.12 It was held in HM Prison Service v. Johnson [2007] IRLR 951 (paragraph 14) that it was an error of law for a tribunal to take the incompetence and failure of the employer to manage the disability from which the claimant suffered; as a reason for rejecting a justification defence.

7.13 Reasonable adjustment: Environment Agency v. Rowan [2008] IRLR 20 states that an employment tribunal considering a claim for discrimination by failing to make reasonable adjustments must identify; *"the provision criterion or practice (PCP) applied by or on behalf of the employer; or…the physical feature of premises occupied by the employer…the identity of the non-disabled comparators (where appropriate); and the nature and extent of the substantial disadvantage suffered by the claimant."*

7.14 The essence is the enabling of a return or retention of work with the employer [consider, Salford v NHS Primary Care Trust v. Smith UKEAT/0507/10/JOJ]. Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage are not reasonable adjustments within the meaning of the Act. Home Office v Collins [2005] EWCA Civ 598 and Doran v. DWP UKEAT 0017/2014 are authorities for the proposition that the duty to make reasonable adjustments is not triggered in circumstances where the employee remains off sick. The duty is only triggered once the claimant becomes fit to work under reasonable adjustments.

7.15 We also referred to London Clubs Management Ltd v Hood [2001] IRLR 719 in the context of sick pay issues. Mr Hood suffered from severe headaches and was disabled within the meaning of the relevant Act. His employer operated a discretionary sick pay scheme. On his taking time off work due to his headaches, they decided that in the light of financial difficulties they would stop paying him sick pay. His Tribunal claim was presented as one of a failure to pay sick pay and a failure to adjust; a comparison being made with other people who were not disabled but whom were paid sick pay. The Tribunal upheld his claim, finding that following Clark v Novacold [1999] IRLR 318 the treatment he was complaining of was a failure to pay ordinary wages, so that the appropriate comparison was with people who continued to work and receive pay. The EAT approached the matter differently, drawing a distinction between a failure to pay ordinary pay, and a failure to pay sick pay and said that the Tribunal had conflated the two. Mr Hood's case was a failure to pay sick pay. But this failure to pay sick pay was not related to Mr Hood's disability, but rather to a policy of not paying sick pay resulting from financial difficulties. So the less favourable treatment claim failed. The second issue, of a failure to adjust, was referred back to the Tribunal.

7.16 The case illustrates the care with which the less favourable treatment has to be identified, and the need to tie the less favourable treatment to the disability. A claim for non-payment of sick pay may still amount to less favourable treatment under the Act, but it must be decided whether the case is one of a failure to pay ordinary wages due to absence, which is likely to be disability related, or a failure to pay sick pay, which may or may not be.

7.17 Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14/DM; and the judgment of Langstaff J at paragraphs 27 – 29, as follows:
"

'*Unfavourably*'

*27. …the meaning of the word "unfavourably" cannot, in my view, be equated with the concept of "detriment" used elsewhere in the **Equality Act 2010**. The word "unfavourably" is deliberately chosen. So, too, the choice not to use the word "detriment" must be assumed to be deliberate: the draftsman would have been well aware of the use of the word "detriment" elsewhere within the **Equality Act**, and avoided it. Nor, as the parties were agreed, does the word "unfavourably" require a comparison with an identifiable comparator, whether actual or hypothetical, as would the description "less favourable". "Less" invites evidence to be provided in proof of "less than whom?"; "un.." is by contrast to be measured against an objective sense of that which is adverse as compared with that which is beneficial.*

*28. Section 15 as such was introduced into the **Equality Act 2010** for the first time. The word "unfavourably" is used elsewhere in the Act in respect of provisions which have a longer pedigree. Thus in Section 18, a person is held to discriminate against a woman if in a protected period in relation to a pregnancy of hers that person treats her unfavourably because of the pregnancy or because of illness suffered by her as a result of it (Section 18(2): see also Sections 18(3) and (4)). In this use it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. Since the word "unfavourable" is the same word in section 15 as it is in section 18, in the same part of the same Act, it is likely that the draftsman had in mind that it would mean much the same in both.*

*29. I accept Mr O'Dair's submission that it is for a Tribunal to recognise when an individual has been treated unfavourably. It is impossible to be prescriptive of every circumstance in which that might occur. But it is, I think, not only possible but necessary to identify sufficiently those features which will be relevant in the assessment which this recognition necessarily involves. In my judgment, treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous. The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be. Sometimes this may be obvious: as for example, where a person may suffer a life event which would generally be regarded as adverse – taking the **Malcolm** case as an example, eviction; or being surcharged; being required to work harder, longer, or for less. A person who is asked, on pain of discipline, to perform at a rate which he cannot achieve because of his disability would be treated unfavourably if he were then to be subjected to that discipline, or threatened with it: this would not be directly because of his disability, but because of that which arose from it – his inability to perform work at the same speed or with the same efficiency. In a case such as this the contrast with the **Malcolm** approach is clear – for in **Malcolm**, the question would be whether an able bodied worker in the same position without the disability, who did not complete work at the rate or to the standard required would be subject to discipline. This approach is both consistent with and reflective of the sense in which "unfavourably" is applied in a case coming within section 18."*

7.18 Also, the tribunal has read Pnaiser v NHS England & Another [2016] IRLR 170; which judgment was handed down by Mrs Justice Simler in December 2015.

7.19 At paragraph 31;

"…the proper approach [to determine section 15 claims] can be summarised as follows:

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

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one

reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see ***Nagarajan v London Regional Transport*** *[1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).*

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in ***Hall****), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

(e) For example, in ***Land Registry v Houghton*** *UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of ***Weerasinghe*** *as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.*

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in ***Weerasinghe****, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."*

7.20 PCPs: The Equality Act 2010 Code of Practice, paragraph 6.10, provides:

"The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions"

The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

"The provision, criterion or practice must be applied to everyone in the relevant group, whether or not they have the protected characteristic in question. On the face of it, the provision, criterion or practice must be neutral. If it is not neutral in this way, but expressly applies to people with a specific protected characteristic, it is likely to amount to direct discrimination."

7.21 In the context of an absence related capability case the guidance as to reasonableness was set out in BS v Dundee City Council [2014] IRLR 131 CS.

7.22 In Newbound v Thames Water Utilities Ltd (2015) EWCA Civ 677 the Court of Appeal considered the application of the band of reasonable responses available to an employee.

Application of Law to the Facts; Conclusions

8.1 We have concluded that the starting point of the relevant extended period in our consideration in these proceedings is the beginning of February 2014 when the claimant was assigned to Hayley Moss's team and specifically to the role in photo feedback. The claimant has sought to refer to a miscellany of event long prior to that date. However, in our finding they are not part of the events extending over a period relevant to these claims before us. The relevant story in this case starts with the deployment of the claimant to photo finish. The story ran from February 2014 until 21 January 2016 and the feedback with FT. The environment during that period was one in which the claimant perceived reasonably we think, that he was treated differently because of his race and because of his disability; his IBS particularly, but also his mental health.

8.2 We have begun by giving our overall assessment of the evidence we have taken from the live witnesses called by both sides. AS, called by the claimant, was not a very confident witness. He was not comfortable. We do not consider that he advanced the claimant's claim a great deal. We think he is susceptible to strong opinions which he feels he should support for cultural and racial solidarity. He is influenced by the claimant's strong views about the respondent's management and some of its workers. We do not find that AS is an untruthful witness *per se*. He probably believes that he and the claimant were treated poorly for reasons of race. That is what he wants to believe. However, we do not lose sight of the fact that this is not Mr Samra's claim.

8.3 As for the claimant's claim itself, some of what Mr Samra said about it was hearsay. He also told us of the "bad apple" controversy of HM allegedly calling him a "black apple". If she used that term at all we believe is was a slip of the tongue as opposed to a racial slur. Also, there is no evidential support for the allegation that HM singled out the claimant and Mr Samra as "bad apples" because they were black and Asian.

8.4 As for the claimant's evidence; put simply, it is good in parts. In others, his evidence of discrimination is given with a good deal of speculation and hasty perception. He was certainly subjected to greater scrutiny as a disabled employee because of the reporting procedure for leaving his workplace for the lavatory. Given the nature of his medical condition, that rule was both embarrassing and demeaning in a way that a non-disabled colleague would not be subjected to. The adjustment for toilet breaks was a reasonable one in principle but the method and procedure for its implementation was unreasonable and discriminatory under s.15 EqA. The special arrangement for him to make multiple visits to the toilet though accommodating in intent was divisive in practice. He was required to telephone his line managers (HM and DG). In so doing he was being required to subject himself in truth to a higher level of scrutiny and suspicion than his non-disabled colleagues. His perception, rightly held we think, was that he was being monitored. We infer that, although the rule was meant to apply to the claimant's co-workers as well, it was not strictly observed or enforced. The claimant was justified in feeling a level of unfavourable treatment. The respondent cannot show that the means of implementation of the claimant's toilet breaks was a proportionate means of achieving a legitimate aim. The procedure was overly intrusive to the claimant's dignity as a disabled person with a condition that was likely to cause him embarrassment. It did give rise to harassment we feel in s.26 EqA terms. He should have been permitted to deal with his bowel problem in a more discreet way; not one which drew more attention to him. The truth of the matter of course was that HM did not trust the claimant in absenting himself from the workplace. The answer to that mistrust was, we say, not to impose a classroom-like regime. We think that with proper planning there were other ways of observing health and safety or timekeeping requirements; without the indignity putting his toilet habits on record. A more thoughtful implementation of the adjustment might have been to require the claimant to notify his absence for any reason other than to use the toilet. And, he might have been required to use one nominated toilet only on all occasions so that his location away from the workplace would be known. We regret to say that the respondent did not take the claimant's IBS condition quite as seriously or as empathetically and it could have. The rigour with which the adjustment was implemented is in part illustrated by the disciplinary meeting records at pages 105 to 106 of the bundle. We infer that the claimant was, relative to his co-workers, being dealt with rather more strictly because of his opportunity to take frequent toilet absences and the perception by the respondent's managers, including HM, that in turn he had opportunity to abuse his privilege.

8.5 We considered also three other matters raised by the claimant as allegations of discrimination on the grounds of his race or disability; namely the payment of shift allowance, the allocation of overtime and designation as of permanent or temporary deployment in his role in photo feedback. All those complaints by the claimant are allegations too far, in our conclusion.

8.6 In relation to shift allowance, the evidence is clear and it is consistent with the policy of the claimant's trade union. The shift allowance is not payable to an employee who is deployed to permanent day shift and is not subject to a rotational shift pattern. That a shift allowance payment may initially have been made to him, was an error on the part of the respondent; and it was an error which was corrected.

8.7 We considered the allocation of overtime. It was allocated according to criteria which had no relationship to race or disability. Two of the factors in the equation were the skills-

set and experience of a worker and their availability for shifts offered. We do not accept that the claimant was allocated no overtime at all. His complaint that he was treated unfairly in the allocation of overtime rests on no evidence of discriminatory conduct by the respondent, its process leaders or managers. It was no more that the perception of the claimant borne of speculation; and not evidence that either his race or disability tainted the allocation process. We do not accept that the claimant can contend that restricted workers were not allowed to do overtime or were limited in overtime allocation. On the claimant's own evidence his union representative had confirmed with management, namely PT, that restricted workers were eligible for overtime. Restricted availability of extra shifts because of budgetary or operational constraints should not be confused with discriminatory issues; which is what the claimant seemingly has done.

8.8 We then turned to consider the claimant's designation; whether as permanent or temporary deployment in his role. HM was a little ambiguous on whether and if so how, the claimant's deployment to photo feedback changed from permanent deployment to temporary deployment. We do not see a change in deployment designation to have any discriminatory overtones. Throughout the relevant period the claimant continued to be deployed in accordance with his duty disposition report (DDR), current at the relevant time. We find no controversy in the claimant being deployed according to his physical and mental condition and needs, which may well have been liable to variation from time to time. Had the claimant remained in work after March 2014 we can see that there may well have been grounds for re-deploying him to another role.

8.9 His evidence about the "bad apple" initiative is another example of evidence which the claimant has failed to corroborate. He wandered into ill-judged comparisons with the novel and film "The Colour Purple". We do not accept his claim that the bad apple campaign and references to it by HM was in any respect discriminatory to him because of his race.

8.10 We acknowledge though that there is a central core of credibility in his evidence that he has been the victim of discrimination and harassment; that is, during the period we have identified in our findings of material facts from about February 2014 to January 2016. Notable during that period is the indignity the claimant had to endure because of the "toilet rule". Also, the use by co-workers and we think by some managers of the racially derogatory term "Abo" behind his back. And further, we found the delay in investigating his complaints could not be separated from the fact of the claimant being a black, disabled man who was outspoken in trying to protect his position. But, as for his dismissal itself on the grounds of capability and also the process leading to that decision, he was, we find, treated as any reasonable employer would treat any employee. His treatment has no relationship with his protected characteristic of race or disability. The stark reality of the evidence was that he had been off sick for almost two years, he had exhausted his sick pay and he could show no evidenced prospect of return to work. The respondent was entitled to conclude that "enough was enough" and that his employment could not practicably continue.

8.11 The respondent's witnesses gave their evidence as responsible officers of a large corporate employer. We were not always impressed by the overall quality of the evidence on certain matters. For example, we did discern weaknesses in the respondent's evidence of the implementation of the toilet adjustments and in the explanations of how the word "Abo" had come to be introduced into the investigation process; and whether it had been used of the claimant on the shop floor. AG and DH were confident witnesses who

impressed the tribunal. PT in handling the capability process did everything he reasonably could to treat the claimant fairly, but by that stage the evidence of the claimant's incapacity to return to work was overwhelming and PT had no other reasonable step open to him but the ending of the claimant's employment. MB fairly and competently handled the claimant's appeal against the incapacity dismissal.

8.12 JR was handed a difficult brief in being tasked to carry out an investigation into the claimant's grievance against HM. We accept his evidence that he undertook the process to the best of his ability. He was not inexperienced in workplace investigative and disciplinary processes. Unwittingly perhaps, he committed some errors in the way he approached the brief in the claimant's case. Probably he did not fully realise the sensitivity of the issues surrounding the claimant's grievance against HM; in particular, the racial sensitivities that underlay the tension that had been generated in the photo feedback workplace. Those circumstances led, to controversy and sadly discriminatory failings connected with the inadvertent use of the word "Abo"; a seriously discriminatory act, even if not a purposeful one.

8.13 We do not believe that the respondent is an institutionally racist employer. Or, that the working environment is one in which racism flourishes at all; and let alone unchecked. We do however believe that there was a relative failure on the respondent's part to acknowledge the proper sensitivities a worker like the claimant who with good reason felt vulnerable to less favourable treatment or unfavourable treatment. The respondent's failure – and that of its managers and associates – to acknowledge that the conduct of some of its employees of management and associate status, crossed the threshold of unlawful discrimination under the EqA is evident to us from what we have heard. That conduct marginalised the claimant from the time he joined the photo feedback team until the beginning of 2016; when FT and AG gave their feedback and regretfully (but again unintentionally) caused him further offence.

8.14 However, that is where the respondent's wrongdoing ends. We are unequivocal in our finding that the process of the claimant's absence review followed by the capability procedure; and the decision to dismiss for capability is untainted. It was a fair decision which any reasonable employer would have been entitled to take, regardless of race, disability or any other of the protected characteristics covered by the EqA.

Conclusion and summary; liability

8.14.1 This is on one level something of a case of two halves. The first half relates to an extended act of discrimination and harassment of the claimant, in part because of his racial and ethnic background. The second half presents a somewhat different scenario; factually and legally. That is to say, it is a case of a long-term absentee, who is acknowledged to be disabled. One of his impairments particularly, gave rise to an ill-considered and embarrassing imposition, before he went sick. He continued to be assessed as unfit to return to work by his GP. There is no indication as to his return to work and he has exhausted his generous 2-year sick pay entitlement. He will not properly engage with the respondent to commission further evidence of his psychological condition which probably could have cast some light on his future fitness to return to work and the nature of work he might best and most usefully undertake.

8.14.2 The tribunal's decision reflects this division. We conclude that the respondent acted fairly and without discrimination either for race or disability in deciding to dismiss the claimant on the grounds of capability. However, in relation to, as we have described it, "the first half" of his claim we find that discrimination and harassment is proven in relation to the claimant's race and ethnic origin and by way of discrimination arising from his disability; namely depression and anxiety and IBS.

8.14.3 We think there is no conspiracy here to marginalise the claimant for discriminatory reasons. Discriminated against he was; but it arose from carelessness and insensitivity to his protected characteristics rather than a climate of institutionalised hostility.

Remedy

Issues and arguments

9.1 We noted Al Jumard v Clwyd Leisure Centre & Others [2008] IRLR 345 and Thaine v London School of Economics [2010] ICR 1422, and Ms George's analysis of those decisions in the context of the present case.

9.2 The Vento guidelines need to be looked at with reference also to Da'Bell. Moreover, Simmons v. Castle and the 10% uplift of general damages. That now generally accepted principle should be referenced when looking at comparable injury to feelings cases and more especially the dates of such awards. All this, against a background of injury to feelings awards being by no means an exact science. An injury to feelings case which is comparable to the present case but which predates Simmons v Castle needed to be assessed with reference not only to inflation but also the Simmons v Castle principles.

9.3 The award shall be purely compensatory but the respondent must take the victim as it finds him. The claimant is entitled to be compensated for the loss of damage which arises naturally and directly from the wrongful act. The test for causation where more than one event has caused harm is whether the respondent's breach of duty materially contributed to it; the extent of the respondent's liability is limited to that contribution.

9.4 Ms George submitted there were four matters that the tribunal should avoid compensating for. Firstly, hurt from other matters subject of the claimant's HM grievance (p.113), which the tribunal had not found to be unlawful acts. Secondly, hurt from matters which were subject to complaints prior to 2014. Thirdly, hurt caused by perceived targeting and abuse from February 2014 onwards unless it is the subject specific finding by the tribunal. Fourthly, the tribunal's finding of delay in dealing with the claimant's complaints; the respondent didn't get to grips with the claimant's complaint.

9.5 We did not regard the procedure leading to dismissal as discriminatory as was not the dismissal itself.

9.6 Ms George also invited us to the view that Al Jumard was authority for looking differently at disability discrimination and race discrimination. In short, the tribunal might look at the evidence of the claimant and seek to make a finding of fact about the level of hurt that was caused by his having to notify DG and HM before going to the toilet and then, look at the effect of receiving the interview notes and discovering the use of the word "Abo". That is the approach we have sought to take in assessing the compensation for injury to feelings overall.

9.7 We have found HM's imposition of the toilet rule to be disability related harassment. However, HM has not been found to have committed any act of race discrimination or racial harassment.

9.8 The underlying racial act itself is one which emerges only from Mr Rawlinson's investigation of the claimant's grievance of 8 April against HM, namely his reference to the term "Abo".

9.9 There was more than one criticism of JR not just in terms of the racism allegations but also in terms of conduct of the grievance generally. In our findings, we have tried to avoid gratuitous criticism of JR. He had been given quite a difficult investigative role. He did not fail in that role. However, he did make some errors of judgment in his conduct of the investigations and their relative lack of pace. He fell into an unconscious treatment of the claimant which amount to discrimination for the reasons we identified in our liability findings.

9.10 AG and FT's conduct in the January 2016 was an unfortunate event. It should not reflect badly upon them as individual professionals, but there can be no doubt that the suggestion of "Abo" being a self-description impacted greatly on the claimant and caused him great hurt of lengthy duration.

9.11 The claimant has argued that each individual act should be compensated at the very highest level, of the Vento banding. We do not accept that level of compensation is warranted for this claim. The compensation must be significant we feel, but it must also be realistic and fair on the evidence before us. He is a litigant in person, but he has had the benefit of legal advice at an earlier stage.

9.12 We now know that his schedule of loss at an earlier stage suggested injury to feelings for the entirety of the claim at £20,000. He also refers now to aggravated damages. However, we conclude that this is not a case where a separate award is necessary for aggravated damages. In coming to that conclusion, we have referred to the helpful, though older authority of Alexander v Home Office [1988] ICR 685, CA. The respondent's errors, though significant did not have any malicious or exceptional motivation in our finding.

9.13 It is accepted by the Employment Tribunal that some of the witnesses were unsure of the actual meaning of the term. That they thought the term to be a wholly innocent one is however improbable in our view. AG and JR we think checked the definition to be sure of its meaning; but we believe they had more than an inkling that it was a derogatory word which had some racial connotations. We do not think that purposely they would have used it themselves but they went along with its usage as part of the workplace lexicon. We think they truly realised that the term was inappropriate once they researched the meaning.

9.14 The claimant found out on sick leave, that there had been at least one usage of the word at JR's investigation interview. Not unreasonably, that caused him to suspect that it had been used more widely. Notably, however, AS said he was unaware of the nickname. And HM was not asked about whether it was a term that had been used.

9.15 Ms George cited the Court of Appeal decision of Kemeh v Ministry of Defence [2014] EWCA Civ 91. That was an example of a case, like the present one, where the claimant

had suffered two separate incidents; but here only one of which the respondent was responsible for. The ET had awarded the claimant £12,000 for injury to feelings which the EAT reduced to £6,000. The claimant appealed both EAT decisions. Elias LJ, in assessing injury to feelings compensation, considered that,

"…the EAT was right to say that the award given by the Tribunal was manifestly excessive. It is important that awards should not be too low, thereby trivialising the harm; but it is equally important that they should not be too high, since that risks creating the impression that victims of discrimination are over-compensated and being given unfairly generous treatment when compared with victims of personal injury, for example."

9.16 Ms George suggested in the present case a "fairly modest" sum for disability discrimination towards the bottom of the bottom (Vento) bracket and an award for race discrimination of perhaps the very top of the bottom bracket or the very bottom of the middle bracket.

9.17 For total completeness and fairness we reminded ourselves also, however, of MOD v Meredith [1995] IRLR 539. Where the respondent has behaved in a particularly high handed, malicious, insulting or oppressive manner in committing the discriminatory act, the employment tribunal can make an additional award for injured feelings.

9.18 Moreover, in cases of unlawful race discrimination damages for injury to feelings should be assessed with regard to the impact of the discrimination and not reduced on the basis that the victim has been vindicated by a finding in his favour.

This Tribunal's Award

10.1 Having regard to all the matters we have discussed, above we award the claimant compensation as follows.

10.2 We award a figure of £10,000 for injury to feelings in respect of race discrimination. We award £6,000 in respect of the disability discrimination we have found. That makes a total of £16,000; the total sum being towards the top of the middle band of Vento. That, we find, fairly reflects the overall injury to feelings; notably the serious compromise of his dignity as a black man and as a disabled person. In both contexts, the claimant was at all relevant times a very vulnerable person with a long term mental illness.

10.3 We have taken as our starting point the matrix prepared by Employment Judge Perry in his Order of 21 June 2016. We made it clear at the outset of our judgment that the dismissal and its procedure were fair but neither were those events tainted by discrimination, whether for race or disability.

10.4 We have found an extended period of combined discriminatory conduct; engaging the protected characteristics of race and disability. The race discrimination and its impact was, we find, corrosive of the peace of mind and dignity of the claimant; and impacted on his already disturbed mental state. The harassment because of disability was rather

shorter lived; it was the ill-conceived "adjustment" affecting the claimant for only for a relatively short period; he reported sick in or about the end of March 2014. The disability issue dragged on, however, with his engagement with the grievance process. We say, however, that it did not have the same intrusive and corrosive impact that the racial slurs had over time.

Interest on damages

11.1 We have calculated interest by taking the starting point for race discrimination as January 2015. In relation to disability the starting point is February 2014. The rate of interest is the prescribed 8%. We calculate the total interest on the combined injury to feelings award of £16,000 is £3152.01[4]. The total award including interest is £19,152.01.

Application for costs

12.1 Ms George for the respondent made an application for costs in the light of our award. The basis for the application was the claimant's alleged unreasonable conduct in his taking the proceedings to the full hearing of 16 days.

12.2 Counsel informed the tribunal that a Judicial Mediation ("JM") was held in October 2016. At that point an offer of £30,000 was put forward in an attempt by the respondent to settle the proceedings. The offer was refused by the claimant at the date of the mediation. The respondent served on the claimant a "without prejudice save as to costs" letter, dated 18 January 2017, repeating the settlement offer of £30,000. The said letter has been produced to the tribunal. The repeated offer was not accepted.

12.3 The respondent in its letter had set out in detail why the company argued that the dismissal related claims were unlikely to succeed; the expiry of the sick pay entitlement and the length of time the claimant had been absent being principal among the reasons. The offer of £30,000 was left open to the date on which the first tranche of counsel's fees was incurred; on Monday 23 January 2017. The respondent reserved the right to produce the letter to the tribunal and to claim costs limited to counsel's fees; estimated in the region of £31,500.00.

12.4 Ms George submitted that the claimant was still legally represented at the time of the JM. For the claimant to continue to pursue his claims in the face of the offer was unreasonable conduct.

12.5 The claimant made no formal response before this tribunal on the costs application, except to say that his claim had never been about money. It was about his legal rights and the importance of his mental health, his dignity and self-respect, he stated.

We refused the respondent's application for costs.

13.1 In considering the application for costs, we first must address the question of whether the claimant acted in an unreasonable, abusive or otherwise vexatious manner. We find that even if there was an element of naïve misjudgement in the claimant's refusal of the offer of £30,000.00, we are firmly of the view that he had good grounds for pursuing the complaint; and that he was the victim of discrimination over an extended period.

[4] The detail of the interest calculation is set out in the Appendix.

13.2 Now, with the benefit of hindsight, the claimant himself is likely to realise his misjudgement. At the same time, we do not lose sight of the fact that the claimant has long term mental health issues. His life has been affected by mental health problems for some time and his balance of mind will have been affected. At critical times, we believe that he has made decisions which in retrospect are patently bad decisions. It is clear to us on the evidence that the claimant was profoundly caused offence by the discriminatory events we have found; and not least by what he discovered in the appeal pack in January 2015. Neither do we minimise the offence to him of the discrimination because of his disability. The claimant pressed on with his litigation against the respondent. His conduct in doing so was not unreasonable nor vexatious. This is not a case where we think that an award of costs is appropriate or proportionate in all the circumstances.

13.3 It is also relevant for us to say this in the broad context of the costs application and its refusal by this tribunal. Although we make no formal recommendation, we have concluded that there were aspects of the respondent's internal procedures which were deficient. They could and should as a matter of priority be looked at and refined. The policies and procedures governing complaints of discriminatory conduct, especially race we think, are prime examples of what the respondent can beneficially tighten up.

13.4 There is a need also for a deal of education and re-education of the respondent's management grades in the handling of workplace issues giving rise to allegations of racial offence. Such education is essential in the modern plant environment; which in social as well as technical terms is very far removed from the industrial working environment of the 1960s and 1970s. In the modern working environment, modern attitudes of equality, and appropriate and lawful conduct must prevail.

13.5 We perceived a deficit in the importance attached to such attitudes by the respondent when considering the chronology of this case and making our findings. The usage of the term "Abo" which came to the claimant's notice in January 2015 was inexcusable in a modern workplace. The respondent needs to consider carefully the factors surrounding that.

13.6 Though not a formal recommendation, we trust that the respondent will take these observations on board for the future.

Appendix 1

Interest Calculation

(See p.36 overleaf)

Appendix 1

Interest Calculation

Injury to feelings compensation:

Disability discrimination

Award: £6,000.00

Interest @ 8% from 01/02/14 – 27/02/17 = 1122 days @ £1.32 per day = **£1481.04**

Race discrimination

Award: £10,000.00

Interest @ 8% from 26/01/15 – 27/02/17 = 763 days @ £2.19 per day = **£1670.97**

Cases No. 1300211/2016 & 1300605/2016
Mr P M Hoyte v Jaguar Land Rover
Judgment on liability and remedy

Employment Judge Lloyd
20 March 2017

Judgment sent to the parties on

20 April 2017

For employment tribunals

C CAMPBELL