

against the First Respondent, his former employer, and the Second Respondent, his former manager during that employment.

2. The Claimant relies on his depression and anxiety conditions in his disability discrimination complaints. The Respondents concede that the Claimant was a disabled person at all relevant times and that they had knowledge of disability from 3 February 2022. The Claimant relies on his Spanish nationality / national origin in his race discrimination complaints.
3. The Claimant was given permission to amend his claim as set out in amended particulars of claim dated 24 July 2022. In those particulars the Claimant set out complaints of direct discrimination on the ground of race discrimination arising from disability; victimisation; harassment; indirect discrimination on the ground of disability; failure to make reasonable adjustments; and direct discrimination on the ground of disability.
4. The parties had agreed a list of issues as follows:

1. Disability and knowledge

1.1 The Respondents accept that the Claimant was disabled at the material times by reason of depression and anxiety. However the Respondents do not accept that the Claimant's disabilities affected him as set out in paragraph 11 of his Grounds of Complaint (GoCs).

1.2 If the Claimant was disabled, did the Respondents know that the Claimant was a disabled person at the material times?

The Respondents confirm they knew the Claimant was a disabled person from 3 February 2022 onwards.

1.3 If not, ought the Respondents have known that the Claimant was a disabled person at the material times?

The Respondents submit that they did not know, and could not reasonably be expected to have known, that the Claimant was disabled prior to 3 February 2022.

2. Race Discrimination

2.1 The Claimant is alleging discrimination on grounds of race, being Spanish.

2.2 The Claimant relies on the following acts / omissions:

(a) At team meetings on 23 November 2021, 30 November 2021, 7 December 2021 and 14 December 2021:

a. Freya Bridges avoiding conversation with the Claimant;

b. Ms Bridges avoiding eye contact with the Claimant;

c. Ms Bridges looking bothered when the Claimant had an idea or commented on something.

- (b) *Every single day of office environment interaction between 15 November 2021 and 10 March 2022:*
- a. *Ms Bridges avoiding conversation with the Claimant.*
 - b. *Ms Bridges avoiding eye contact with the Claimant;*
 - c. *Ms Bridges stopping suddenly conversations she would be having with Mr Collis and Mr Cliff when the Claimant came into the room.*
- (c) *Ms Bridges telling the Claimant during a training on Payments on 3 January 2022 that he had to pick up this process very quickly because she had plans to learn new responsibilities from Credit Control and she would not be able to unless the Claimant was up to speed; that this would be announced shortly; and that he would be doing Payments on his own whilst she would move to Credit control team working with Joe Collis and Cliff Noll [para 18 GoCs].*
- (d) *Ms Bridges reacting negatively and aggressively towards the Claimant during a training on or around 10 January 2022 when she told him she did not like to be interrupted, appeared annoyed and said to the Claimant it was rude to interrupt someone when they were talking; and told him that his behaviour was rude [para 19 GoCs].*
- (e) *Ms Bridges telling the Claimant off and bullying him for asking her some training questions during a training session via Teams on 25 January 2022, during which she complained that he should take notes and that if he would have taken notes he would not have needed to ask her certain questions, and that he should not have waited until 3pm to ask her questions [para 20 GoCs].*
- (f) *Ms Bridges complaining to the Second Respondent about the Claimant for not taking notes [para 20 GoCs];*
- (g) *The Second Respondent changing her behaviour drastically from 25 January 2022 and being a bully, accusing the Claimant of not taking notes and providing him with unjustified and destructive feedback [para 20 GoCs];*
- (h) *Ms Bridges making a comment on MS Teams to a colleague on 25 January 2022 saying, "Next time I'll go to Mexico and (blank) can train Sergio" [para 21 GoCs];*
- (i) *Ms Bridges sending an email to the Claimant on 3 February 2022 where she complained to the Claimant and accusing him of not responding to her messages right away [para 22 GoCs].*

2.3 In respect of each allegation:

- (a) *Did the act/omission alleged occur?*
- (b) *Was the Claimant treated less favourably than:*
 - a. *Joe Collis*
 - b. *Cliff Noll*

(c) If so, in respect of both Joe Collis and Cliff Noll, are they appropriate comparators?

(d) If so, was any such treatment afforded to the Claimant because he is Spanish?

3. Direct discrimination on grounds of disability

3.1 The Claimant is alleging that he was discriminated on grounds of disability when he was dismissed.

3.2 In respect of the dismissal:

(a) Was C treated less favourably than a hypothetical comparator?

(b) If so, was any such treatment afforded to the Claimant because he had a disability?

4. Discrimination arising in consequence of disability

4.1 The Claimant alleges the following acts/omissions occurred:

(a) From 3 February onwards Ms Bridges provided negative feedback about the Claimant to the Second Respondent when they would engage in private conversations [para 24 GoCs];

(b) From 3 February 2022 onwards the Second Respondent supported Ms Bridges instead of the Claimant [para 24 GoCs];

(c) From 3 February 2022 onwards (every day of office environment until the Claimant's dismissal) the Second Respondent stopped talking to the Claimant like she used to previously, changed her behaviour completely towards him (just saying hello or good morning and keeping the conversation to a minimum), kept quiet during the whole day without talking to the Claimant, gave short answers to the Claimant or tried to appear busy, and ignored the Claimant [para 25 GoCs];

(d) From around 3 February 2022 onwards every day of office environment interaction until 10 March 2022, the Second Respondent would stare at the Claimant suspiciously [para 27 GoCs];

(e) On 3 February 2022 the Second Respondent escalated the matter to senior management by accusing the Claimant of being argumentative and showing support for Ms Bridges over the Claimant [para 28 GoCs];

(f) On 14 February 2022 the Second Respondent accused the Claimant of having gaps in his performance at a meeting held to discuss his probation and confirmed that she would extend it for a further month and put the Claimant on a training plan [para 29 GoCs].

(g) On or around 23 February 2022 the Second Respondent responded negatively to the Claimant when he told her that he wanted to study some music, telling him sarcastically 'you have already had your lunch break', telling him to continue working, and telling him that he was only allowed to eat breakfast at 9am like everyone else and lunch between 12.30 pm and 1.30pm, not earlier or later [para 32 GoCs].

(h) *On 25 February 2022 the Second Respondent accused and bullied the Claimant by email for not following procedures before responding to his query [para 33 GoCs].*

(i) *On 10 March 2022, the Second Respondent invited the Claimant to an in person meeting, told him to pick up his things before the meeting, and proceeded to terminate his contract at the meeting because he did not follow the procedures and processes aligned to his role, he did not meet deadlines, and he broke company rules regarding lunch breaks [para 34 GoCs].*

4.2 *If the treatment above occurred, did that treatment amount to unfavourable treatment?*

4.3 *If so, was the Claimant treated unfavourably because of something arising in consequence of his disability? The Claimant states that the following things arose from his disability:*

(a) *Difficulties in performing his role under aggressive circumstances, including difficulties in focussing, concentrating and responding to emails;*

(b) *Inability to fully follow instructions under aggressive circumstances.*

4.4 *If so, can the Respondents show that the conduct amounts to a proportionate means of achieving a legitimate aim?*

5. Victimisation

Protected Acts

5.1 *Did the Claimant make a complaint to the HR Manager and the Second Respondent on 3 February 2022 where he disclosed his mental disability impairment because he felt bullied, discriminated and unfairly treated, and forwarded the chain of correspondence between him and Ms Bridges.*

5.2 *If so, did the said act amount to a “protected act” within the meaning of s27(2) EqA?*

Treatment

5.3 *Was the Claimant subjected to the treatment set out at 4.1(a) to 4.1(i)?*

5.4 *If so, does the act or omission amount to a detriment?*

5.5 *If so, was the Claimant subjected to the detriment because he had done one or more of the protected acts identified above?*

6. Harassment

6.1 *Did the conduct set out at 4.1(a) to 4.1(h) occur?*

6.2 *If so, did it amount to unwanted conduct?*

6.3 *If so, did it have the purpose or effect of violating the Claimant's dignity or creating intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account the factors at s26(4) EA 2010 (C's perception, the other circumstances of the case and whether it was reasonable for that conduct to have that effect)?*

6.4 *If so, was the unwanted conduct related to disability or the Claimant's race?*

7. Indirect discrimination on grounds of disability

7.1 *Did the Respondents apply the following practices:*

(a) *The requirement for employee to follow procedures.*

(b) *The requirement for employees to meet deadlines.*

(c) *The requirement for employees to follow lunch break times.*

7.2 *If so, do they each amount to a PCP for the purposes of s19(1) EqA?*

7.3 *If so, in respect of each PCP: does it put those with the Claimant's disability at a particular disadvantage when compared to those who do not have his disability?*

7.4 *If so, did that PCP put the Claimant at a particular disadvantage because of his disability?*

7.5 *The disadvantage(s) relied upon is that the Claimant and others with the same disability comparable to the Claimant are put at a disadvantage because:*

(a) *The Claimant would have been much less likely to follow procedures because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.*

(b) *The Claimant would have been much less likely to meet deadlines because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.*

(c) *The Claimant would have been much less likely to observe normal lunch break times under stressful conditions, distress and exacerbation of symptoms of anxiety and depression as he felt dizzy and could have fainted otherwise when he needed to eat at an earlier time one day as set out at paragraph 32 of his GoCs.*

7.6 *If so, was the PCP a proportionate means of achieving a legitimate aim?*

8. Failure to make reasonable adjustments

8.1 *Did the Respondents apply the following practices:*

(a) *The requirement for employee to follow procedures.*

(b) *The requirement for employees to meet deadlines.*

(c) *The requirement for employees to follow lunch break times.*

8.2 *If so, do they each amount to a PCP for the purposes of s20(3) EqA?*

8.3 *If so, in respect of each PCP: does it put the Claimant at a substantial disadvantage compared to others who were not disabled?*

8.4 *The substantial disadvantage(s) relied upon by the Claimant are that:*

(a) *The Claimant would have been much less likely to follow procedures because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.*

(b) *The Claimant would have been much less likely to meet deadlines because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.*

(c) *The Claimant would have been much less likely to observe normal lunch break times under stressful conditions, distress and exacerbation of symptoms of anxiety and depression as he felt dizzy and could have fainted otherwise when he needed to eat at an earlier time one day as set out at paragraph 32 of his GoCs.*

8.5 *If so, did the Respondents know, or could they reasonably have been expected to know, that the Claimant was likely to be at a substantial disadvantage in comparison to non-disabled persons?*

8.6 *If so, did the Respondents fail to take such steps as were reasonable to avoid the said substantial disadvantage to the Claimant?*

8.7 *The Claimant proposes that the following adjustments would have been reasonable:*

(a) *Providing the claimant with additional mental health support;*

(b) *Providing the claimant with a positive training environment and encourage him to ask questions rather than being penalised for it;*

(c) *Discounting the fact that the Claimant needed to eat at an earlier time one day as set out at paragraph 32 of his GoCs.*

8.8 *If so, was there a prospect that such adjustments which the Respondent failed to make would have removed the substantial disadvantage suffered by the Claimant?*

9. Jurisdiction

9.1 *Are any of the alleged acts or omission relied on by the Claimant outside the primary limitation period set out in s. 123(1)(a) EqA? The Respondents submit that any acts prior to 23 December 2021 are outside the primary limitation period.*

9.2 *Of those, did they form part of a continuity act, the last of which is inside the primary limitation period?*

9.3 *If not, would it be just and equitable to extend the limitation period?*

5. This hearing was to consider liability only. A provisional remedy hearing date was set.
6. The Tribunal heard evidence from the Claimant. The Claimant had produced a very brief witness statement, containing all most no evidence relevant to his claim. The Tribunal permitted him to rely on his amended particulars of claim as his further evidence. The Tribunal also heard evidence from: Freya Bridges, the Claimant's fellow Insurance Broking Accounts Assistant; Jane Nagelkerke, the Second Respondent and the Claimant's line manager; and Marie Templar, Human Resources Manager.
7. There was a bundle of documents. Page numbers in this Judgment refer to page numbers in the bundle.
8. The parties made written and oral submissions.

Findings of Fact

9. The First Respondent, HCC Service Company Inc ("HCC"), is a UK branch of a company incorporated in Delaware, USA. It is a member of a Group of Companies which provides insurance services to renewable energy projects around the world. The Second Respondent, Jane Nagelkerke, is employed by HCC as an Insurance Broking Accounts ("IBA") Manager and was the Claimant's line manager.
10. The Claimant was employed as an Insurance Broking Accounts ("IBA") Assistant by the First Respondent from 15 November 2021, on a 12 month fixed term contract, p187-188.
11. The "IBA Team" at HCC actually works on behalf of GCube Underwriting Limited ("GCube"), another entity in same group of Companies. The team carries out accounting, credit control, banking/cashiering, payments to markets and month end processes for GCube.
12. As an IBA Assistant, the Claimant was responsible for bordereau production (reports typically produced by insurance companies), market payments, allocation of those payments on market ledgers and reviewing claims payments.
13. Freya Bridges had been employed as an IBA Assistant in the IBA Team from August 2021, before the Claimant commenced in post. She carried out the same work as the Claimant, and had already been trained when the Claimant started.
14. Two further IBA Assistants, Joe Collis and Cliff Noll, worked in the same IBA Team. However, Mr Collis and Mr Noll carried out credit control work, while the Claimant and Ms Bridges undertook work relating to payments and bordereaux.
15. The Claimant had been interviewed for the IBA Assistant role by Ms Nagelkerke and her line manager, Alan Rand, Finance Director. The Claimant had experience of working with the London Insurance market. He was also familiar with systems similar to those used at GCube.
16. Before joining HCC, the Claimant completed a Medical Condition Form. The form asked: "Do you have any medical conditions or disabilities that you would like to

disclose to enable us to make reasonable adjustments to assist with your employment activities” and “Are you registered disabled?”. The Claimant answered ‘no’ to both, p204.

17. The Claimant told the Tribunal that his depression and anxiety symptoms fluctuated and that, when he started work for the First Respondent, he was not experiencing any symptoms of anxiety or depression.
18. By Clause 2 of the Claimant’s contract of employment, he had a 13-week probation period, during which either party was entitled to terminate the employment on 1 week’s written notice, p187. The contract further provided that HCC was entitled to extend the probationary period by 13 weeks, p188. The contract stated that the Claimant was entitled to a 1- hour lunch break, p189.
19. At the start of his employment in November 2021, the Claimant was given 2 weeks’ training by the First Respondent’s Mumbai Team, along with a training pack which set out GCube’s main processes and procedures, p212 - 293. His training included cash process, claims payments, bank reconciliation, bureau signing messages, and bureau submission process, bordereaux production and Xchanging (“XIS”) which are Lloyds, Irma and other market signing processes.
20. At the end of November 2021, Ms Nagelkerke asked Ms Bridges to continue to train the Claimant.
21. The Claimant and Ms Bridges both undertook bordereau binder work, which was the mainstay of their work. Joe Collis and Cliff Noll also prepared a weekly rota for payment allocations and/or the daily payment checklist. Sometimes Ms Nagelkerke would email the Claimant and Ms Bridges, asking them to pick up a query, or additional piece of work.
22. The Tribunal accepted the Claimant’s evidence that, on 7 December 2021, in a team meeting, Mr Rand congratulated the Claimant for having picked up the bordereau payment process so quickly.
23. Ms Nagelkerke thanked the whole IBA team on 16 December 2021, including the Claimant, saying, “Thank you for your help and support throughout the 1st year of transition and also picking up training and work from Mumbai team to London. It has been challenging at times but we continued our #collaboration with each other and strived to #deliveroncommitments. Thank you for a sterling team effort and here's to even better year ahead. Well done and keep up the good work!” p306.
24. The Tribunal accepted the Claimant’s evidence that, on 22 December 2021, in a 121 meeting via MS Teams, Mrs Nagelkerke praised the Claimant for his work and said that she had found the right team, as they were working well together and had made good progress.
25. The Claimant took on some additional work for 2016 binder payments in early January 2022 and Ms Nagelkerke praised him again, saying, “Good work Sergio thank you for your help” p338.

26. The Claimant told the Tribunal that, at team meetings on 23 November 2021, 30 November 2021, 7 December 2021 and 14 December 2021, Ms Bridges avoided conversations with him, avoided eye contact with him, and looked bothered when he had an idea or commented on something.
27. The Claimant accepted in evidence that he was trained for the first 2 weeks of his employment by the First Respondent's Mumbai team, so Ms Bridges had little interaction with him then.
28. Ms Bridges accepted, in evidence, that she may not have made eye contact with the Claimant during meetings, but denied that this was because of his race or ethnicity. The Tribunal accepted her evidence that, in the meetings of 23 and 30 November 2021, she sat next to the Claimant, so that it would have been difficult for her to make eye contact with him when he was directly alongside her. She would have had to turn her head through 90 degrees to do so.
29. The Claimant accepted, in evidence, that Ms Bridges may have been off work on 7 December 2021 and did not, in fact, attend a meeting that day. He also accepted that the meeting of 14 December was held remotely, due to lockdown restrictions and that Ms Bridges had her camera off throughout these meetings. The Tribunal accepted Ms Bridges' evidence that she is quite reserved as a personality and that she doesn't tend to keep her camera on at such meetings.
30. The Tribunal accepted Ms Bridges' evidence that she did not avoid conversation with the Claimant during these meetings, but that she is not particularly talkative at work, in general. This was entirely consistent with the manner in which Ms Bridges' gave evidence at the Tribunal. She gave her evidence quietly and answered questions directly, but did not deviate or expand. She made little eye contact with anyone throughout her evidence. She appeared to have a comparatively introverted, but assured, personality.
31. The Claimant, as he described himself in evidence, has, by contrast, an outgoing and talkative personality. He makes direct and prolonged eye contact with those he is addressing.
32. The Claimant and Ms Bridge have very different personalities.
33. The Tribunal accepted that the Claimant perceived that Ms Bridges did not make eye contact with him in meetings, but found that this was consistent with her personality and was not directed at him personally.
34. Ms Bridges told the Tribunal that she has been told that she has an "annoyed" expression when she is concentrating or thinking without realising it; her partner frequently comments on this. She accepted that the Claimant may have taken that personally, but told the Tribunal that this wasn't directed at him.
35. Again, this appeared to the Tribunal to be consistent with the way in which Ms Bridges presented as a witness. She did not smile, but looked away, when she was responding to questions.

36. The Tribunal accepted that she may have appeared to be being unfriendly towards the Claimant's interventions, but found that this is how Ms Bridges interacts with other people.
37. The First Respondent implemented a "3-day in the office" policy from late January 2022, without set days of work. In some weeks, the Claimant and Ms Bridges would only see each occasionally.
38. Ms Bridges also told the Tribunal that, in work, she puts in her ear phones and gets on with her work and does not chat. The Tribunal accepted this evidence. From its workplace experience, it is not unusual in the modern workplace for individuals to wear earphones and not to interact with others.
39. The Claimant described himself as wanting to be friendly in the workplace and enjoying having discussions in the kitchen. Ms Bridges described herself as a quiet person, who tends to want to get on with her work where possible.
40. The Tribunal accepted Ms Bridges' evidence that, on the days they were in the office together, she spent considerable time training the Claimant in person, and answering his questions. It accepted her evidence that she would not speak socially with the Claimant, but that she did not do that with anyone, as she tended to want to focus on work.
41. The Tribunal found that Ms Bridges did not exclude the Claimant. On 23 November 2021, in response to him apologising for asking something twice, she sent him a message saying that he was welcome to ask whatever he needed to, with a smiley face emoji, p 294. On 1 December 2021 Ms Bridges told the Claimant that she was working from home, but to call her when he needed to, p664. She also suggested that he might pick up certain tasks to get more experience of them p301. In her electronic messages to the Claimant in December 2021, Ms Bridges politely said that she hoped he had had a good weekend, before going on to address work matters, p664.
42. In January 2022 the IBA team was encouraged to post positive feedback to one another on its internal platform. The Claimant sent Ms Bridges a "Thanks" message saying, "Freya, Thank you for helping me #empower our people and supporting me with Payments training and all your patience answering my queries", p318.
43. The Claimant told the Tribunal that he saw Ms Bridges talking to Joe Collis and Cliff Noll. He did not give any evidence about the content, or length, of the conversations which Ms Bridges had with Messrs Collis and Noll. The Tribunal found that these conversations could have been about work. Ms Bridges clearly also spoke to the Claimant about work and answered many of his questions.
44. On all the evidence, the Tribunal found that, from the outset of his employment, Ms Bridges treated the Claimant in the same way as she treated her other work colleagues. She did not make eye contact with her colleagues, generally, and she wore earphones in work, so that she could concentrate on work and not engage in social interaction with anyone.
45. However, the Tribunal also accepted Ms Bridges' evidence that she found the Claimant challenging to train, and increasingly so, as time went on. The Tribunal found

Ms Bridges to be a thoroughly credible witness. She gave evidence in a frank and dispassionate manner and had excellent recall of detail and of documents. When challenged, she was able to point to documents which corroborated her assertions.

46. It accepted her evidence that the Claimant appeared not to listen while she was explaining processes to him, asked her questions before she had finished her explanations and proposed shortcuts before he had understood how the whole process operated. The Tribunal will set this out in more detail below.
47. The Tribunal also accepted Ms Bridges' evidence that, later in the Claimant's employment, she would occasionally be talking about the Claimant to Mr Noll. If the Claimant appeared during such conversations, Ms Bridges and Mr Noll would stop talking. Again, the Tribunal will return to this below.
48. At the end of December 2021, the Claimant submitted a work package to XIS using the wrong Unique Market Reference ("UMR"), p309-314. XIS queried the work and Ms Nagelkerke explained the Claimant's error to him.
49. On 7 January 2022 Ms Nagelkerke became aware that the Claimant had submitted two bordereaux to XIS for the same amount. As a result, client contacted Ms Nagelkerke and asked whether they should make a refund payment to GCube, p328 – 331.
50. On 3 January 2022, Ms Bridges gave the Claimant some additional training on Payments. The Claimant told the Tribunal that Ms Bridges warned him that he would have to pick up this process very quickly because she would be moving to Credit control team, working with Joe Collis and Cliff Noll, and the Claimant would be doing payments on his own. Ms Bridges told the Tribunal that she heartily disliked Credit Control and had had no intention of moving there. She explained that the Claimant had called her to ask her a question regarding the payment process for submitting claims payments and for journaling payments from escrow accounts. She told the Tribunal that she had already gone through the payment process with the Claimant more than once in December, and that most of the calls in December on the call log between them related to the payments checklist, p685. As a result, when he contacted her on 3 January, she expected that only a 5 minute refresher training session would be required. She did tell the Claimant that this would be a quick call to revise the payment process, before continuing with her work.
51. The Tribunal accepted that Ms Bridges told the Claimant that she would give him a quick 5 minute refresher call on payments. She did so because she believed that he should already be familiar with the process and she had other work to do.
52. On about 10 January 2022, the Claimant asked Ms Bridges for further help on the Swiss Re payment process. This process involves creating separate spreadsheets for each individual currency, with all "GCIS" (US payments) and "GCUL" (UK payments) amounts being split. The separate spreadsheets are then attached to an email with the individual bordereau transactions. The process was included in the First Respondent's manual given to the Claimant at the start of his employment, p272 – 273.

53. The Claimant wanted to apply a shortcut to the process, by extracting all currencies for Swiss Re from all accounts and summarising them into one spreadsheet, removing information on each currency. Ms Bridges told him that this was not the process which QCube followed.
54. There was a dispute of fact as to whether the Claimant ignored Ms Bridges, talking over her, and proceeded to amalgamate all the payments onto one spreadsheet. There was a dispute of fact about whether the Claimant then discovered that his method would not work, and had to repeat the task, without acknowledging to Ms Bridges that she had been correct. The Claimant told the Tribunal that he had simply asked the question, but had not pressed ahead with the wrong method.
55. The Tribunal preferred Ms Bridge's evidence about this. She had a detailed recall of the exchange and the sequence of events. The Claimant simply denied that he had ignored her advice. The Tribunal found that Ms Bridges took time with the Claimant to explain the Swiss Re process to him on 10 January, but that he had disregarded her guidance and wasted both their time by pursuing his preferred method which did not work.
56. Ms Bridges agreed with the Claimant's evidence that she had told him, at the time, that it was rude to interrupt people and that she felt disrespected when he continued to speak over her. She agreed that he had responded was that this was how Spanish people spoke. Ms Bridges told the Tribunal, "I replied that that's fine, but that I was trying to train him on a new process and I found it rude as I was trying my best to train him, and by him interrupting me, he was only confusing the process."
57. On 11 January, the Claimant emailed Ms Bridges, asking a question on a Swiss Re spreadsheet, p343. After looking at the spreadsheet, Ms Bridges noticed that he had forgotten to split the GCIS and GCUL divisions onto the spreadsheets, p346, as she had already explained to him, and was the process in the handbook, p298-300. Ms Bridges told the Tribunal that this was an example of the Claimant not listening to advice and training. The Tribunal accepted her evidence.
58. On 13 January 2022, Ms Nagelkerke had a catch up telephone with Ms Bridges, who became upset during the call. Ms Bridges then sent a message to Ms Nagelkerke saying, " Sergio is dealing with most of the bordereaux so all i'm doing is 2020 and when he has questions he only half listens to me and half interrupts/ tries to argue with me and if he doesn't trust something i tell him he asks you anyway." P679.
59. Ms Nagelkerke held weekly catch up meetings with the Claimant. There was a dispute of fact about the contents of her catch up meeting with the Claimant on 14 January 2022. In her brief note of the meeting, Ms Nagelkerke recorded that the topics covered were, "Discussion on duties; Gaps in role understanding; Process; Queries." P351. The Tribunal accepted that these were topics covered, albeit that the Claimant had not seen any written note of this at the time.
60. On 19 January Nagawa Kabanda (HR Assistant) sent Ms Nagelkerke a probationary review form for the Claimant, p805. The two options on the form were either: "Do you wish to confirm employment?" or, "Extend probation / take further action?" p806.

61. On 19 January 2022, Ms Nagelkerke sent a message to Ms Bridges to see how she was doing. She asked whether the Claimant was still being “interruptive”? Ms Bridges said that the Claimant was being “okay” but had forgotten to carry out the payment allocations the day before, and that Ms Bridges had resolved the issue.
62. Ms Nagelkerke told Ms Bridges not to do the Claimant’s work for him and to let her know. Ms Nagelkerke said of the Claimant, “That is the only way he will learn and understand he is working with a team and needs to co-operate. I will raise issues when his probation comes up. It's just he needs to work as a team and calm down and collaborate rather than argue. It is his way to argue unfortunately.” P680. Ms Bridges agreed and responded that the Claimant had argued with her about Ms Bridges doing the allocations again that day, when she was already in the middle of doing them.
63. On 25 January 2022 the Claimant was responsible for completing the payment checklist by 15.30. Ms Bridges emailed Ms Nagelkerke at 15.30, saying that the Claimant had called her at 15.00 for help on the checklist. She said, “When he called he said he hadn’t done any of the transfers as he couldn’t remember how to do them – I asked if he had written notes from the numerous previous times I’d shown him and he said he had some notes but he didn’t have anything on transfers or allocations. Quite annoying as I remember stopping to check he was making notes when showing him in the past.” P371. Ms Bridges agreed, in evidence, that she had told the Claimant that he should have consulted her sooner, so that the checklist could be completed in time. The Claimant had been working on the checklist since 10.00 that day but had not completed the work. The task was expected to take about 1.5 hours to complete.
64. Ms Bridges made a comment on MS Teams to a colleague on 25 January 2022 saying, “Next time I’ll go to Mexico and (blank) can train Sergio”, p372. The Claimant agreed in evidence that Joe Collis had gone on holiday to Mexico and that Ms Bridges had meant that she would rather be on holiday herself, rather than training the Claimant.
65. 26 January 2022 Cliff Noll sent a message to Ms Bridges asking who was doing the checklist that day, p378. Ms Bridges replied that the Claimant would be responsible for the checklist that day and the following day, to get more practice. She said, “ Me and Jane went through some more payments with him this morning to make sure he knew what he was doing.” Mr Noll replied further saying, “I bet it is painful showing him!” Ms Bridges said, “... i stayed quiet through most of it, he was arguing with jane though which was hard to watch.”
66. The conversation continued,
- “ Noll, Cliff 26/01/2022 15:51: I bet Jane didn't like that. I don't think he will stay for very long or jane won't keep him on.
- 26/01/2022 15:57: Yeah she's already said something about his probation but i didn't ask anymore about it
- Noll, Cliff 26/01/2022 15:58: oh dear”.
67. The Tribunal noted that this was a contemporaneous record, on 26 January 2022, of the IBA team’s perceptions of the Claimant and his interactions with others. Mr Noll considered that training the Claimant would be “painful”. Ms Bridges considered that

the Claimant had been arguing with his manager. Mr Noll thought that Ms Nagelkerke would not keep the Claimant on.

68. The Tribunal accepted Ms Bridges' evidence that she found it increasingly difficult to work with the Claimant and that Ms Bridges would sometimes become upset about how he spoke to her. As a result, she would sometimes speak to Cliff Noll and Joe Collis about this in the mornings before the Claimant arrived. Given the conversation was about him, Ms Bridges ended those conversations when he arrived. Ms Bridges acknowledged, in evidence, that the Claimant must have noticed this and found it uncomfortable. Ms Bridges told the Tribunal that stopping these conversations were nothing to do with his ethnicity or race, but about his conduct towards her.
69. On 27 January 2022, the Claimant raised a query with Ms Nagelkerke on an allocation. She noted that the money from the client had not yet been received in order to allocate it to the markets and that the Claimant had not converted the sums to the correct currency, p398.
70. Both Ms Nagelkerke and Marie Templar, HR Manager, told the Tribunal that, at the end of January 2022, Ms Nagelkerke encountered Ms Templar in the office and discussed the Claimant's probation with her. Ms Nagelkerke explained that she had some concerns about his work and interaction with the team.
71. The Claimant did not challenge Ms Templar's evidence that Ms Nagelkerke reported to her that she was concerned about, "the fact that other team members tried to help him but he preferred to do things his own way."
72. On 3 February 2022, Ms Bridges emailed the Claimant and asked that he check his Teams messages, p678. That appeared to be an innocuous request. The Claimant responded unhelpfully, asking why she believed he was not checking them. Ms Bridges replied that she had sent him two messages that morning which required quick confirmation and that she had had to chase him in the past for responses on Teams, p440.
73. The Claimant responded in forceful terms, saying, "These are strong accusations you are making. I would appreciate you stop bullying me please. This is not the first time you are accusing me of wrong doing and complaining to me just because I am asking you questions." He said that there had been issues with his computer and with Teams, which is why he had not seen the messages, p439 – 440. He copied Ms Nagelkerke into his response.
74. The Tribunal considered that the Claimant's response to Ms Bridges was disproportionate, given that she had simply asked him to check his messages, in the circumstances that he had, in fact, failed to respond to her. A brief apology and explanation for missing the messages would have been a reasonable response.
75. Ms Nagelkerke replied to both the Claimant and Ms Bridges shortly afterwards, proposing that they all meet and saying, "I don't want any arguments, talking down to each other not respecting each other. Listening is key, what is being said, collaborate and be kind.." p443.

76. On Teams messages that day, Ms Nagelkerke and Ms Bridges also discussed the Claimant's email. Ms Bridges reported that she felt "disheartened and disrespected" when she had to speak to the Claimant and said that it might be best for her to look for another job, p681.
77. The Claimant replied to Ms Nagelkerke on 3 February 2022, copying in Angela Baker (Chief People Officer), saying, "... I have a history of mental health issues anxiety and depression because I have suffered bullying and discrimination all my life because of my sexual orientation. ... Bullying is something I have learnt to recognize in others and I would not tolerate no one bullying me in this life. I hope we can resolve things positively and amicably." p445.
78. Ms Baker replied to the Claimant, saying that Ms Nagelkerke would arrange a meeting with him, p459. She said, "Please don't hesitate to contact me or, Marie Templar, if you feel you need any additional support at this time." The Claimant acknowledged Ms Baker's email, p821.
79. The Claimant did not contact Ms Baker or Ms Templar asking for support.
80. On 3 February 2022, Ms Nagelkerke forwarded the Claimant's email to Ms Templar, HR manager, p451. She explained, "I have a situation where two new members of my team are not getting on and there seems to be some friction. Sergio newest member who is currently on probation has accused Freya of bullying." She said she wanted to avoid matters escalating.
81. Also on 3 February 2022 Ms Nagelkerke also emailed Alan Rand, her manager, p448. She said, "Just to let you know there seems to be friction between Sergio and Freya. Sergio not listening to Freya, actually bit argumentative, he has been like that with me from time to time to when I have been explaining/training to him how to do payments etc.. Not always taking down notes and keeps asking the same questions, bit annoying. He has accused Freya of bullying. Freya also does not seem to enjoy the job, she is frustrated. I have scheduled meeting with them to go through the issues, separately then together, looks like they are not getting on. Below is Freya's views. Looks like she does not like the job!! Sergio has now send an e-mail CC: Angela Baker. See attached."
82. Ms Nagelkerke met with the Claimant for a one-to-one meeting on 4 February 2022. Ms Nagelkerke advised him that it was important to communicate with others kindly and respectfully and that she would tell Ms Bridges the same thing. She emailed Ms Templar recording the conversation and saying, We have completed all the training with him and If there is any further gaps in training , I advised him to come to me. He said Freya has been very aggressive to him on e-mails and when speaking to him. However I noticed he is very disruptive during conversations and speaks as soon as something comes to his mind. Albeit that could have been annoying. I advised him he needs to wait till person has finished speaking. This will help liaise better with each other." P463.
83. Ms Nagelkerke then met Ms Bridges on 7 February 2022. Ms Bridges explained that she found the Claimant disrespectful and that he would call her often to discuss work, but when she explained the relevant process, he would not listen and insisted that his way would work better.

84. Having spoken to both individually, Ms Nagelkerke then met with the Claimant and Ms Bridges together, p465. She updated Ms Templar after the meeting, saying, “After listening to both sides I advised them it is little childish behaviour and we have more important issues to deal. We don’t have to be best friends but we’re paid to do a job and we must be amicable and work as a team.”
85. Ms Nagelkerke also commented to Ms Templar, “It appears Sergio is a slow burner and takes a while to grasp the concept of the job. All training had been finished but continues to ask questions which he should know by now – he has been with us for almost been 3 months. Since Freya was helping him she has become frustrated with his manners and he has been talking over her and not listening. He has been pushy wanting to do things his way and then made several errors . . .”.p465.
86. On about 9 February 2022, Ms Nagelkerke, Mr Rand and Ms Templar discussed extending the Claimant’s probation, p809.
87. On 14 February 2022, Ms Nagelkerke held a probation review meeting at the end of the Claimant’s probationary period, p688. The Claimant told the Tribunal that he expected the meeting to address his complaint about bullying, but the Tribunal noted that the invitation to the meeting was entitled, “Probation Review”. As Ms Nagelkerke had already met, individually, with the Claimant and jointly, with Ms Bridges and him, the Tribunal concluded that he must have known that this would be a probation review meeting only.
88. Ms Nagelkerke had already prepared an “Action Plan”, p507, setting out a list of “performance objectives” and the “actions” required of the Claimant in relation to them.
89. She told the Claimant what he was doing well, what he needed to improve upon and where there were gaps in his knowledge. She also told him that she would meet weekly with him, to go through any areas in which he had difficulty. She showed him the Action plan, p481.
90. Ms Nagelkerke told the Tribunal that she had extended the Claimant’s probation because his knowledge was not at the level it ought to have reached by the end of his standard probation period and to give him additional time to develop his skills.
91. When Ms Nagelkerke told the Claimant that she had decided to extend his probation by 4 weeks, the Claimant became very distressed and said that the probation extension was discriminatory and was because of his email. He declined to sign the probation form and left the office. He was absent from work the following day because of his continued distress.
92. After the Claimant returned to work on 16 February 2022, he signed both probation extension form and the action plan.
93. The same day, Ms Nagelkerke sent a message to Amber Suckling saying, “I have extended Sergio’s probation by a month. Going through the motion now with weekly updates 😞.” Ms Suckling advised her to keep everything documented when each task was completed, p509.

94. The Claimant told the Tribunal that, after 3 February, Ms Nagelkerke stopped talking to him like she had done previously, gave him short answers or tried to appear busy, kept quiet without speaking to him, and would stare at him suspiciously. Ms Nagelkerke conceded in evidence that she was potentially more cautious about what she said to the Claimant because she did not want to upset him. She also told the Tribunal that it was a very busy time of the year, when she was working on the First Respondent's "year-end", audit, and was also helping with systems development.
95. On about 21 February 2022, the Claimant felt hungry in work during the morning and began to heat his lunch at 11.00. He left the office to buy some bread for about 15 minutes, returning to eat his lunch. At 13.30, he told Ms Nagelkerke that he was going to practise his music in the meeting room during his lunch hour.
96. Ms Nagelkerke considered that the Claimant had already had his lunch break, but the Claimant thought that he had not, because he had eaten his lunch at his desk while he worked.
97. Ms Nagelkerke advised the Claimant quietly that he only had one hour for lunch. The Claimant became very upset. There was a dispute about who was rude to whom during this interaction. The Claimant told the Tribunal that he considered that Ms Nagelkerke had been "very harsh." He said, " I was maybe emotional. Everyone was quiet. She was putting pressure on me. I was querying. I said I was working while eating."
98. Ms Bridges corroborated Ms Nagelkerke's evidence that it was the Claimant who was rude and argumentative. Ms Bridges told the Tribunal, "Sergio reacted really angrily and began arguing and shouting at Jane. It was incredibly awkward and difficult to watch an employee shout at his line manager in that way and other teams in the office had also observed this. ... Jane was being very patient and calm with him the whole time, repeating the same thing about having an hour window between 12:30 – 2:30 to take his lunch, and Sergio kept being argumentative. Sergio eventually walked off."
99. It was not in dispute that the Claimant took his lunch hour in any event and went to a room to practise his music.
100. The Tribunal noted that the Claimant did take his lunch hour anyway, which suggested that he disregarded Ms Nagelkerke's view that he only had one hour for lunch and had already taken it. The Tribunal considered that it was likely that the Claimant was being argumentative and insistent during the exchange, rather than Ms Nagelkerke. It accepted Ms Bridges' description of his behaviour.
101. The Claimant told the Tribunal that he had felt dizzy at about 11.00 due to his irregular eating patterns caused by his anxiety and depression, so that he needed to eat something to feel better. The Claimant had not eaten anything so far that day. There was no medical evidence to support his assertion of a link between his dizziness and his depression and anxiety.
102. On 24 February 2022, the Claimant raised queries with Ms Bridges about making Tesla payments. Ms Bridges explained to the Claimant that he needed to "journal" each payment entry individually. The Claimant did not accept her advice and that the entries could be done in bulk. On 25 February 2022 Ms Bridges informed Ms Nagelkerke about this and other exchanges she had had with the Claimant, p528. She

said, "He queried that Tesla one, which I explained in the email but on the call he still didn't seem to understand very well and was argumentative and interrupted me or didn't listen to instructions. The Swiss Re one he omitted one of the accounts from collections for the past couple of months...." P528.

103. The Claimant then emailed Ms Nagelkerke, asking if he could journal the Tesla entries in bulk, p524.
104. Ms Nagelkerke responded somewhat tersely to the Claimant saying, "As you know that we have a process to follow and you must not deflect from this process otherwise everything will become messy to unravel. We need to have an audit trail of each individual action. What you asking is not the correct method taught? ... I also covered Tesla payments in the office with both you and Freya recently. It appears we have to keep guiding you this is becoming a problem. It appears that we have had to go on training you several times on information we have already covered. ..."p524.
105. The Claimant replied further, responding in detail to her email and saying that his query on Tesla related to a new scenario that he had not been taught, p532.
106. On 4 March 2022, Ms Bridges told Ms Nagelkerke, who was not in the office, that the Claimant had started his lunch at 12.45 and had left the office and returned at 14.40, p602.
107. Also on 4 March, Mr Noll informed Ms Nagelkerke her that the Claimant had challenged being rostered to do the payment checklist two days in a row, p610. On 8 March 2022, Mr Noll notified her that the Claimant had gone to lunch at 12.10.
108. Ms Nagelkerke told the Tribunal that she was concerned the Claimant was taking longer lunches when she was not in the office.
109. On 8 March 2022, Mercy Geker (Agency Temp HR) sent Ms Nagelkerke a meeting guide for a probation review meeting when an employee had failed their probation, p639.
110. Ms Nagelkerke told the Tribunal that she discussed the Action plan with the Claimant in their weekly meetings during the probation extension period. The Claimant was adamant that she had not.
111. There were no emails from Ms Nagelkerke to the Claimant following their weekly meetings attaching any updated action plans. Ms Nagelkerke contradicted herself about whether she had brought the Action plan on her laptop, or whether she printed it out. Ms Nagelkerke produced a completed Action plan to the Tribunal, which she agreed that she had not shown to the Claimant, p595.
112. The Tribunal did not accept that Ms Nagelkerke discussed the Action plan with the Claimant during their weekly meetings. It found that she did not tell him how he was progressing in with his required actions.
113. The Claimant attended a probation review meeting on 9 March 2022, p690. Ms Nagelkerke told the Claimant that he had not passed his probation. She summarised the reasons in an email to Ms Templar that day, saying that his dismissal had been on the grounds of behaviour and conduct: "1. Walking out of Probation extension meeting,

packed his bags and left the office... 2. When asking questions on queries – Often not listened but preferred to do his way and not following the process he was taught. 3. When asked follow the process – often became confrontational and argumentative. 4. Not following the companies rules on Lunch breaks – often taking longer lunch breaks and again when advised of 1hr he became irritable and argued he was not aware of the rules. 5. Took longer to do the tasks – often not following the deadlines. Progression was slow.”

114. On 10 March 2022 Ms Templar wrote to the Claimant saying, “... The Company has taken the decision to not pass your probationary period and terminate your employment for the following reasons; • Not following procedures and processes aligned to your role • Not meeting work deadlines • Not following company rules regarding lunch breaks.” P659. She said that the Company had not seen an improvement in the Claimant’s performance and behaviour during the extension period.

115. The Action plan which Ms Nagelkerke completed, but did not show the Claimant, recorded that the Claimant had achieved his objectives in the majority of areas. However, she recorded that the Claimant had not achieved his objectives regarding making payments to the checklist according to the team rota. She said that he had caused friction in the Team regarding the Tesla payments, had wasted time and not made the correct payment on the day.

116. The Claimant was paid a week’s salary in lieu of notice and his holiday pay.

117. The Claimant told the Tribunal that he believed that Ms Bridges discriminated against the Claimant because he considered that he behaved in way which is typical for Spanish, being voluble and interrupting people when he speaks.

118. He put this to Ms Bridges in cross examination. Ms Bridges told the Tribunal that she visited Spain regularly because her uncle lived there with his Spanish partner and that his Spanish partner was patient and kind. She said that she has a longstanding schoolfriend who is of Spanish national origin, who is polite and kind and very smart. She told the Tribunal, “I think everyone regardless of race and ethnicity has their own way of speaking.”

119. The Tribunal accepted that Ms Bridges did not apply any stereotype to the Claimant as a Spanish person. On the contrary, she described his behaviour as she experienced it in the workplace.

120. The Claimant told the Tribunal that he did not consider that Ms Nagelkerke treated him negatively because he was Spanish, only Ms Bridges

The Claimant’s Depression and Anxiety

121. The Claimant states that the following things arose from his disability:

122. (a) Difficulties in performing his role under aggressive circumstances, including difficulties in focussing, concentrating and responding to emails;

123. (b) Inability to fully follow instructions under aggressive circumstances.

124. However, in evidence, the Claimant denied that he had failed to follow instructions at any stage of his employment.
125. The Claimant told the Tribunal that he was not experiencing depression and anxiety symptoms when he started employment, in November and December 2020. Nevertheless, the Tribunal found that the Claimant failed to follow instructions from early in his employment, for example, asking for more guidance on payments on 3 January, when this had been explained to him in detail previously. This suggested that his failure to follow instructions was not linked to his disability.
126. On his medical notes, he did not consult his GP about symptoms of anxiety and depression during his employment at all.
127. The Claimant never said to the Respondent that he having difficulty concentrating or following the processes which were explained to him. On a number of occasions, throughout his employment, the Claimant failed to follow processes because he considered that his own method was better and would save time.
128. The Tribunal did not find that the Claimant had worked “under aggressive circumstances” during his employment. He did accuse Ms Bridges of bullying him, but the Tribunal found that this accusation was not warranted. On all the facts, the Respondent’s employees did not behave in an aggressive manner towards the Claimant. At all times, they explained appropriate processes and expectations to him in a dispassionate way.
129. Accordingly, the Tribunal did not find that any difficulties he had in focussing, concentrating and responding to emails arose from his disability. There were no aggressive circumstances and there was no medical evidence to support a link between any difficulties in performing his role and his disability.
130. Likewise, on the balance of probabilities, on all the evidence, the Tribunal did not find that the Claimant’s failure to follow instructions arose from his disability. His failure to follow processes arose on a number of occasions, throughout his employment, including at times when, even on the Claimant’s evidence, he did not have any symptoms of his disability.

Relevant Law

Discrimination

131. By s39(2)(c)&(d) *Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.
132. By s39(4)(d) *Equality Act 2010*, an employer must not victimize an employee by subjecting him to a detriment.
133. By s40(1)(a) *EqA 2010* an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A’s.
134. Direct discrimination is defined in s13 EqA 2010.
135. Harassment is defined in s26 Eq A and victimisation is defined in s27.

Direct Discrimination

136. Direct discrimination is defined in s13(1) EqA 2010:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

137. Disability and race are both protected characteristics, s4 & 9 EqA 2010.

138. In case of direct discrimination, on the comparison made between the employee and others, “there must be no material difference relating to each case,” s23 Eq A 2010.

Victimisation

139. By 27 Eq A 2010,

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—(a) bringing proceedings under this Act;(b) giving evidence or information in connection with proceedings under this A (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act.”

140. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

141. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

Causation

142. The ET must decide whether or not the alleged discriminator’s reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase “by reason that” requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?.” Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

143. However, if the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. “Significant” means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

144. In order for a disadvantage to qualify as a “detriment”, it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to “detriment”. However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Harassment

145. s26 Eq A provides “

(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.”

146. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of s.3A RRA 1976: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race.

147. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences.

148. This guidance is instructive in respect of harassment claims under s26 EqA, albeit under the EqA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race or disability.

Burden of Proof

149. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010*.

150. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

151. In *Madarassy v Nomura International plc. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ* approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where M proves a difference in sex/disability and a

difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Discrimination Arising from Disability

152. s 15 EqA 2010 provides:

“(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability”.

153. Simler P in *Pnaiser v NHS England* [2016] IRLR 170, *EAT*, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15*:

(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 s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(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..

(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 s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of

fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) 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) There is a 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 s.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 s.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 s.13 and a discrimination arising from disability claim under s.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."

154. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

155. A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

Indirect Discrimination, Section 19 EqA

156. By s19 EqA: (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
157. In the case of indirect discrimination the primary issue is whether the groupings of employees and the statistics showing disparate impact based on those groupings are sufficient for the purposes of showing prima facie discrimination, *Haq v Audit Commission* [2013] IRLR 206. Where a PCP is applied; it puts people who share the particular protected characteristic, here the disability of hearing impairment, at a disadvantage to those who do not have that protected characteristic; and it puts the Claimant as a disadvantage then the Respondent can justify it by showing it is a proportionate means of achieving a legitimate aim. Legitimate aim and justification are further addressed in paragraphs 19 and 27 below.
158. In *Essop v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] IRLR 558 Baroness Hale identified the essential features of indirect discrimination as follows:- “The first salient feature is that [... there ...] is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does”. Para [24] A second salient feature is the contrast between the definitions of direct and indirect discrimination. ... Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various [...]. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between “women's jobs” and “men's jobs” or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). Para [26] A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Para [28] A final salient feature is that it is always open to the respondent to show that his PCP is justified – in other words, that there is

a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind..’ Para [29].

Reasonable Adjustments

159. By s39(5) EqA 2010 a duty to make adjustments applies to an employer. By s21 EqA a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.
160. s20(3) EqA 2010 provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
161. Para 20, Sch 8 EqA 2010 provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage

Discussion and Decision

162. The Tribunal took into account all its findings of fact and the relevant law before coming to its decision.
163. It addressed, first, the Claimant’s allegations of direct race discrimination
- (a) At team meetings on 23 November 2021, 30 November 2021, 7 December 2021 and 14 December 2021:*
- a. Freya Bridges avoiding conversation with the Claimant;*
 - b. Ms Bridges avoiding eye contact with the Claimant;*
 - c. Ms Bridges looking bothered when the Claimant had an idea or commented on something.*
164. The Tribunal found that Ms Bridges did not apply any stereotype to the Claimant in relation to him being Spanish. She described his conduct as she experienced it and did not make assumptions about him because he was Spanish.
165. These allegations only related to meetings on 23 and 30 November 2021 because Ms Bridges was either not present at the other meetings or had her camera turned off in virtual meetings.
166. Insofar as Ms Bridges may not have made eye with the Claimant in the November 2021 meetings, this was because she was sitting directly adjacent to him on these dates, so it would have been difficult for her to turn her head sufficiently to

do so. Further, Ms Bridges does not naturally make eye contact with people, nor does she make social conversation in meetings with her colleagues. The Tribunal found that Ms Bridges did not treat the Claimant differently to the way she treated other colleagues in meetings.

167. Ms Bridges' conduct was nothing to do with the Claimant's being Spanish.

(b) Every single day of office environment interaction between 15 November 2021 and 10 March 2022:

a. Ms Bridges avoiding conversation with the Claimant.

b. Ms Bridges avoiding eye contact with the Claimant;

c. Ms Bridges stopping suddenly conversations she would be having with Mr Collis and Mr Cliff when the Claimant came into the room.

168. The Tribunal found that, in work, generally, Ms Bridges wears ear phones and gets on with her work and does not chat. Ms Bridges is a naturally quiet individual. She makes little eye contact, even when speaking. On the days when they were in the office together, Ms Bridges did spend considerable time training the Claimant in person, and answering his questions. She would not speak socially with the Claimant, but that she did not do that with anyone, as she tended to want to focus on work.

169. The reality was that the Claimant, who is naturally outgoing, did not appreciate Ms Bridges' reserved and introverted nature.

170. Ms Bridges did not treat the Claimant differently by not having conversations with him and not having eye contact with him.

171. The Tribunal accepted Ms Bridges' evidence that, on occasion, she did stop her conversations with Mr Collis and Mr Cliff when the Claimant came into the room. because she had been discussing her difficulties with the Claimant.

172. She did not stop her conversations because of the Claimant's race, but because she had been talking about him and she did not want him to hear.

(c) Ms Bridges telling the Claimant during a training on Payments on 3 January 2022 that he had to pick up this process very quickly because she had plans to learn new responsibilities from Credit Control and she would not be able to unless the Claimant was up to speed; that this would be announced shortly; and that he would be doing Payments on his own whilst she would move to Credit control team working with Joe Collis and Cliff Noll [para 18 GoCs].

173. Ms Bridges did tell the Claimant she the training she would give him on 3 January 2022 would be brief. This was entirely because she had already trained him on the relevant processes and she had other work she needed to do. This was nothing to do with race.

(d) Ms Bridges reacting negatively and aggressively towards the Claimant during a training on or around 10 January 2022 when she told him she did not like to be interrupted, appeared annoyed and said to the Claimant it was rude to interrupt

someone when they were talking; and told him that his behaviour was rude [para 19 GoCs].

174. The Tribunal found that Ms Bridges did tell the Claimant that she did not like being interrupted and found it rude. The Tribunal found that she did so entirely because she genuinely considered the Claimant was interrupting her and was disrupting the training she was trying to give him. While the Claimant told her that he behaved in this way because he was Spanish, Ms Bridges herself had been describing his behaviour and not his race when saying he had interrupted her and that this was rude. In Ms Bridge's mind, his conduct was nothing to do with his race. She did not discriminate against him because of race.

175. The Claimant has not brought an indirect race discrimination complaint, relying on alleged behavioural traits common to Spanish people.

(e) Ms Bridges telling the Claimant off and bullying him for asking her some training questions during a training session via Teams on 25 January 2022, during which she complained that he should take notes and that if he would have taken notes he would not have needed to ask her certain questions, and that he should not have waited until 3pm to ask her questions [para 20 GoCs].

176. The Tribunal found that Ms Bridges did ask the Claimant if he had written notes on the relevant process because she had shown him the process on a number of occasions. It accepted her evidence that she also told him that he should have let Ms Bridges know sooner, so that the checklist could be sent out in time. The Tribunal noted that, when the Claimant asked Ms Bridges for help at 3pm, there was only half an hour left to complete the checklist. It was unsurprising that she felt the Claimant had left it late to contact her.

177. The Tribunal found that Ms Bridges' comments were nothing to do with race – the Claimant had not completed his work and had left it late in the day to ask Ms Bridges for help. Ms Bridges was inevitably frustrated with the Claimant and therefore queried his knowledge and his timing.

(f) Ms Bridges complaining to the Second Respondent about the Claimant for not taking notes [para 20 GoCs];

178. Ms Bridges did tell Ms Nagelkerke that the Claimant had not taken notes of the process. The Tribunal found that she did this because she believed that she had already explained the process to him and was frustrated by the fact that he had apparently not heeded her previous advice. This was nothing to do with race.

(g) The Second Respondent changing her behaviour drastically from 25 January 2022 and being a bully, accusing the Claimant of not taking notes and providing him with unjustified and destructive feedback [para 20 GoCs];

179. In evidence, the Claimant made clear that he was not alleging that Ms Nagelkerke had discriminated against him because of race. He therefore did not pursue this allegation.

(h) Ms Bridges making a comment on MS Teams to a colleague on 25 January 2022 saying, "Next time I'll go to Mexico and (blank) can train Sergio" [para 21 GoCs];

180. Ms Bridges said these words, meaning that she would rather be on holiday than training the Claimant. The Tribunal found that this was nothing to do with race. She wasn't enjoying training the Claimant because she was finding it frustrating. The reference to Mexico was because a colleague was on holiday – it was not related to the fact that the Claimant was Spanish.

(i) Ms Bridges sending an email to the Claimant on 3 February 2022 where she complained to the Claimant and accusing him of not responding to her messages right away [para 22 GoCs].

181. On 3 February 2022, Ms Bridges emailed the Claimant and asked that he check his Teams messages, p678. That email was innocuous – it did not complain and did not have an accusatory tone. The Claimant responded in a rather passive aggressive manner, asking why Ms Bridges believed he was not checking them. It was at that point that Ms Bridges replied, saying that she had sent the Claimant two messages that morning which required quick confirmation and that she had had to chase him in the past for responses on Teams, p440.

182. Insofar as Ms Bridges said, in plain terms, that she Claimant had not responded to 2 messages and had failed to respond to messages in the past, the Tribunal was satisfied that she did so because the Claimant had had replied unhelpfully when she asked him to check his messages - and she now needed a response. She did not mince her words in the face of the Claimant's obstructive approach.

183. The Tribunal was satisfied that Ms Bridges would have treated the comparators in the same way, if they had behaved like the Claimant. They did not.

Direct discrimination on grounds of disability

184. *3.1 The Claimant is alleging that he was discriminated on grounds of disability when he was dismissed.*

3.2 In respect of the dismissal:

(a) Was C treated less favourably than a hypothetical comparator?

(b) If so, was any such treatment afforded to the Claimant because he had a disability?

185. It was clear from the evidence that there were issues with the Claimant's performance from early in his employment, which resulted in the extension of the usual 13-week probationary period (as considered in more detail under the harassment allegations below); and that the issues with his performance, along with additional concerns about his behaviour, continued during the extension of his probation.

186. The Tribunal found that the Claimant's other Team members considered that Ms Nagelkerke would not keep him on and that Ms Nagelkerke was, indeed, expressing doubts about the Claimant's probation, before Ms Nagelkerke knew of the Claimant's history of mental illness. On 26 January 2021 Ms Bridges and Mr Noll had discussed this.

187. The Tribunal considered that a comparator in materially similar circumstances would have been in their extended probationary period, would have failed to follow training advice, persisted in their own erroneous methods of carrying out standard procedures, would have taken lunchbreaks and argued publicly with their manager who had given a reasonable instruction about lunchbreaks.
188. There was no evidence that a non-disabled comparator in the same circumstances would not have been dismissed.
189. The Tribunal took into account its findings that Ms Nagelkerke had said that she was “going through the motions” with the Claimant. It also took into account that its finding that she did not show him any updated action plan during their meetings in the extended probation period.
190. Nevertheless, it was a fact that the Claimant continued his pattern of not following established procedures for recording and processing payments. He argued loudly and publicly with Ms Nagelkerke’s quiet advice that he had a one hour lunch break. Ms Bridges continued to advise Ms Nagelkerke of the Claimant’s failure to heed her advice and instructions. There were, therefore, ongoing problems with the Claimant’s performance during the probation extension and worsening problems with his conduct towards Ms Nagelkerke.
191. The Tribunal therefore accepted that Ms Nagelkerke’s contemporaneous email accurately set out the reasons for the Claimant’s dismissal: “When asking questions on queries – Often not listened but preferred to do his way and not following the process he was taught. 3. When asked follow the process – often became confrontational and argumentative. 4. Not following the companies rules on Lunch breaks – often taking longer lunch breaks and again when advised of 1hr he became irritable and argued he was not aware of the rules. 5. Took longer to do the tasks – often not following the deadlines. Progression was slow.”
192. These reasons reflected the facts of the Claimant’s performance during the extended probationary period.
193. Put simply, the Tribunal accepted the Respondent’s evidence that reason the Claimant was dismissed was that he did all these things during his extended probation. It did not dismiss him because of his disability.
194. The Tribunal was satisfied that the Respondent would have dismissed a non-disabled comparator in the same material circumstances.

4. Discrimination arising in consequence of disability

The Claimant states that the following things arose from his disability:

- (a) Difficulties in performing his role under aggressive circumstances, including difficulties in focussing, concentrating and responding to emails;*
- (b) Inability to fully follow instructions under aggressive circumstances.*

195. The Tribunal found that those difficulties, or inability, did not arise from the Claimant's disability. As a result, the Respondent did not treat the Claimant unfavourably because of something arising in consequence of his disability.

5. Victimisation

Protected Acts

5.1 *Did the Claimant make a complaint to the HR Manager and the Second Respondent on 3 February 2022 where he disclosed his mental disability impairment because he felt bullied, discriminated and unfairly treated, and forwarded the chain of correspondence between him and Ms Bridges.*

5.2 *If so, did the said act amount to a "protected act" within the meaning of s27(2) EqA?*

196. The Tribunal found that the Claimant did not do a protected act. He relied upon his email of 3 February 2022 to Ms Nagelkerke, copying in Ms Baker, in which he said,

"... I have a history of mental health issues anxiety and depression because I have suffered bullying and discrimination all my life because of my sexual orientation. ... Bullying is something I have learnt to recognize in others and I would not tolerate no one bullying me in this life. I hope we can resolve things positively and amicably." p445.

197. While the Claimant referred to his disability, he said that it had arisen as a result of bullying he had suffered in the past. He also referred to his sexual orientation, and explained that he would not tolerate bullying, having learnt to recognise it in others.

198. However, he did not say, either expressly nor by implication, that anyone in the Respondent's workplace was treating him unfavourably for a reason which related, either to his disability, or to his sexual orientation.

199. Insofar as the Claimant made a complaint about the Respondents, he complained about "bullying". He specifically did not link that current alleged bullying to his disability or any other protected characteristic.

200. The victimisation complaint therefore fails.

6. Harassment

6.1 *Did the conduct set out at 4.1(a) to 4.1(h) occur?*

6.2 *If so, did it amount to unwanted conduct?*

6.3 *If so, did it have the purpose or effect of violating the Claimant's dignity or creating intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account the factors at s26(4) EA 2010 (C's perception, the other circumstances of the case and whether it was reasonable for that conduct to have that effect)?*

6.4 *If so, was the unwanted conduct related to disability or the Claimant's race?*

201. (a) *From 3 February onwards Ms Bridges provided negative feedback about the Claimant to the Second Respondent when they would engage in private conversations [para 24 GoCs];*

202. The Claimant did not specify the negative feedback he alleges Ms Bridges gave about him to Ms Nagelkerke. However, the Respondent accepted that Ms Bridges provided feedback about the Claimant to Ms Nagelkerke on 25 February 2022, saying that he had been arguing about her with the process for making Tesla payments and would likely raise the same queries with her.

203. There was no evidence that Ms Bridges was aware that the Claimant had a disability. She was not copied into the Claimant's 3 February 2022 email. There was no evidence that her conduct after 3 February was related to the Claimant's disability.

204. Ms Bridges had been providing feedback of a similar nature to Ms Nagelkerke before 3 February 2022. The Tribunal found that Ms Bridges described to Ms Nagelkerke how she genuinely and honestly observed the Claimant to have behaved when she had discussed the Tesla payments with him. On this occasion, as on others, Ms Bridges' description of the Claimant's behaviour was not related to his race, but reflected the Claimant's actions.

205. The Tribunal has not found that that the Claimant's failure to follow instructions, or any difficulties in performing his role, were related to his disability. The Tribunal was satisfied that Ms Bridges' feedback about the Claimant was not related to his disability, or his race. It therefore did not constitute disability or race harassment.

206. *(b) From 3 February 2022 onwards the Second Respondent supported Ms Bridges instead of the Claimant [para 24 GoCs];*

207. On the facts, the Tribunal did not find that Ms Nagelkerke supported Ms Bridges rather than the Claimant. After the Claimant complained about bullying on 3 February 2022, Ms Nagelkerke spoke to them both, met them together and asked them to apologise to each other. That indicated an even-handed approach. She extended the Claimant's probation, rather than dismissing him at that stage.

208. In her emails to others, she described the difficulties between the Claimant and Ms Bridges as an issue between the 2 of them, rather than something caused by the Claimant alone, for example: p451 "I have a situation where two new members of my team are not getting on and there seems to be some friction."; p465, "After listening to both sides I advised them it is little childish behaviour and we have more important issues to deal. We don't have to be best friends but we're paid to do a job and we must be amicable and work as a team."

209. The Tribunal was satisfied that Ms Nagelkerke acted fairly towards the Claimant and addressed the Claimant's conduct and work performance as she experienced it. Her management of him was not related to his disability or his race.

(c) From 3 February 2022 onwards (every day of office environment until the Claimant's dismissal) the Second Respondent stopped talking to the Claimant like she used to previously, changed her behaviour completely towards him (just saying hello or good morning and keeping the conversation to a minimum), kept quiet during the whole day without talking to the Claimant, gave short answers to the Claimant or tried to appear busy, and ignored the Claimant [para 25 GoCs];

(d) From around 3 February 2022 onwards every day of office environment interaction until 10 March 2022, the Second Respondent would stare at the Claimant suspiciously [para 27 GoCs];

210. On all the evidence, the Tribunal did not find that Ms Nagelkerke stopped talking to the Claimant as she had previously done, or stared at him suspiciously. Indeed, she met him weekly during his extended probationary period to discuss his progress. The Tribunal found that the Claimant was rude and challenging to Ms Nagelkerke when she reminded him of his single lunch hour on 21 February. Ms Nagelkerke may not have felt friendly towards the Claimant after that behaviour. That was not related to his disability or his race, but to his rudeness. The Tribunal accepted Ms Nagelkerke's evidence that she was busy in the run up to the First Respondent's year end. Again, the Tribunal found that Ms Nagelkerke's interaction with the Claimant was not related to his disability or his race.

(e) On 3 February 2022 the Second Respondent escalated the matter to senior management by accusing the Claimant of being argumentative and showing support for Ms Bridges over the Claimant [para 28 GoCs];

211. On 3 February 2022, Ms Nagelkerke informed her line manager, Mr Rand, of the Claimant's complaint that Ms Bridges had bullied him p448. The Tribunal considered that the email was balanced and fair - Ms Nagelkerke referred to aspects of both Ms Bridges and the Claimant in explaining why she considered the dispute may have arisen. She gave her personal assessment of the situation as, "looks like they are not getting on" – which did not show support to Ms Bridges over the Claimant. The fact that Ms Nagelkerke had, herself, experienced the Claimant arguing was true. She did not refer to the Claimant's disability or his race. There was no evidence that Ms Nagelkerke would have failed to keep her line manager informed of conflicts in her team if the complainant was not disabled, or had been of a different race. The Tribunal was satisfied that that the email and its contents were not related to the Claimant's disability or his race.

(f) On 14 February 2022 the Second Respondent accused the Claimant of having gaps in his performance at a meeting held to discuss his probation and confirmed that she would extend it for a further month and put the Claimant on a training plan [para 29 GoCs].

212. On 14 February 2022, Ms Nagelkerke extended the Claimant's probation by 4 weeks and placed him on an action plan. She told the Claimant what he was doing well, what he needed to improve upon and where there were gaps in his knowledge. She also told him that she would meet weekly with him, to go through any areas in which he had difficulty. The Tribunal concluded that Ms Nagelkerke gave the Claimant a balanced and accurate assessment of his progress to date. The Tribunal accepted Ms Nagelkerke's evidence that the Claimant's knowledge was not at the level it ought to have reached by the end of the usual probation period and that she extended his probation to give him additional time to develop his skills. On all the evidence, the Claimant had, on a number of occasions, failed to follow processes and/or to carry out tasks as instructed.

213. The extension of probation was not related to disability or race, but reflected the fact that the Claimant needed to improve his performance in order to be confirmed in post.

214. Ms Nagelkerke's advice to the Claimant in the probation extension meeting was accurate and fair and was not related to disability or race.

(g) On or around 23 February 2022 the Second Respondent responded negatively to the Claimant when he told her that he wanted to study some music, telling him sarcastically 'you have already had your lunch break', telling him to continue working, and telling him that he was only allowed to eat breakfast at 9am like everyone else and lunch between 12.30 pm and 1.30pm, not earlier or later [para 32 GoCs].

215. On 21 February 2022, Ms Nagelkerke quietly reminded the Claimant that he had a one-hour lunch break, when she had observed him having a lunchbreak earlier that day. The Tribunal found that the Claimant was argumentative and insistent during the exchange, rather than Ms Nagelkerke. Ms Nagelkerke did not talk to the Claimant sarcastically. The Tribunal found that Ms Nagelkerke's quiet instruction about lunchbreaks was not related to disability or race. It was a routine management instruction to an employee about standards of behaviour in the workplace.

216. *(h) On 25 February 2022 the Second Respondent accused and bullied the Claimant by email for not following procedures before responding to his query [para 33 GoCs].*

217. On 25 February 2022 the Claimant emailed Ms Nagelkerke, asking if he could journal the Tesla entries in bulk, p524, despite having been told by Ms Bridges that he could not. Ms Nagelkerke responded somewhat tersely to the Claimant saying, "As you know that we have a process to follow and you must not deflect from this process otherwise everything will become messy to unravel. We need to have an audit trail of each individual action. It appears we have to keep guiding you this is becoming a problem."

218. Ms Nagelkerke therefore reminded the Claimant not to deviate from the procedures he had been taught for Tesla payments, as the company required an audit trail of each individual action, which would be undermined by his proposed approach. Nothing in her instruction was related to disability or race. Ms Nagelkerke was responding to the Claimant's question and his failure to follow instructions. Her slightly abrupt tone was a reaction to the fact that the Claimant had adopted a similarly incorrect approach on other occasions. As the Tribunal has found, the Claimant's inability to follow instructions was not related to his disability.

219. *(i) On 10 March 2022, the Second Respondent invited the Claimant to an in person meeting, told him to pick up his things before the meeting, and proceeded to terminate his contract at the meeting because he did not follow the procedures and processes aligned to his role, he did not meet deadlines, and he broke company rules regarding lunch breaks [para 34 GoCs].*

220. The Claimant's dismissal was not related to his disability or his race. Ms Nagelkerke terminated his employment because the Claimant's performance

continued to be unsatisfactory, by failing to follow procedures, taking too long to carry out certain tasks and being disruptive when training was offered to him, despite his probation extension and weekly meetings to discuss the action plan, and because the Claimant failed to follow rules relating to the length and timing of lunch breaks.

221. The Tribunal found that Ms Nagelkerke's reasons for the probation extension and dismissal, given to the Claimant at the probation review meeting on 9 March 2022, in her discussions to HR following the meeting and in the dismissal letter itself, were true and accurate and did not relate to race or disability p654-655; 659

222. On the evidence, she had a substantial and justified basis for her concerns about the Claimant: there had been issues with his performance from early in his employment, which resulted in the probation extension; and the issues with his performance, along with additional concerns about his behaviour, continued throughout the extension of his probation.

7. Indirect discrimination on grounds of disability

7.1 Did the Respondents apply the following practices:

(a) The requirement for employee to follow procedures.

(b) The requirement for employees to meet deadlines.

(c) The requirement for employees to follow lunch break times.

7.2 If so, do they each amount to a PCP for the purposes of s19(1) EqA?

7.3 If so, in respect of each PCP: does it put those with the Claimant's disability at a particular disadvantage when compared to those who do not have his disability?

7.4 If so, did that PCP put the Claimant at a particular disadvantage because of his disability?

7.5 The disadvantage(s) relied upon is that the Claimant and others with the same disability comparable to the Claimant are put at a disadvantage because:

(a) The Claimant would have been much less likely to follow procedures because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.

(b) The Claimant would have been much less likely to meet deadlines because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.

(c) The Claimant would have been much less likely to observe normal lunch break times under stressful conditions, distress and exacerbation of symptoms of anxiety and depression as he felt dizzy and could have fainted otherwise when he needed to eat at an earlier time one day as set out at paragraph 32 of his GoCs.

7.6 If so, was the PCP a proportionate means of achieving a legitimate aim?

8. Failure to make reasonable adjustments

8.1 Did the Respondents apply the following practices:

(a) The requirement for employee to follow procedures.

(b) The requirement for employees to meet deadlines.

(c) The requirement for employees to follow lunch break times.

8.2 If so, do they each amount to a PCP for the purposes of s20(3) EqA?

8.3 If so, in respect of each PCP: does it put the Claimant at a substantial disadvantage compared to others who were not disabled?

8.4 The substantial disadvantage(s) relied upon by the Claimant are that:

(a) The Claimant would have been much less likely to follow procedures because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.

(b) The Claimant would have been much less likely to meet deadlines because he was undertaking training and under stressful conditions, distress and exacerbation of symptoms of anxiety and depression.

(c) The Claimant would have been much less likely to observe normal lunch break times under stressful conditions, distress and exacerbation of symptoms of anxiety and depression as he felt dizzy and could have fainted otherwise when he needed to eat at an earlier time one day as set out at paragraph 32 of his GoCs.

8.5 If so, did the Respondents know, or could they reasonably have been expected to know, that the Claimant was likely to be at a substantial disadvantage in comparison to non-disabled persons?

8.6 If so, did the Respondents fail to take such steps as were reasonable to avoid the said substantial disadvantage to the Claimant?

8.7 The Claimant proposes that the following adjustments would have been reasonable:

(a) Providing the claimant with additional mental health support;

(b) Providing the claimant with a positive training environment and encourage him to ask questions rather than being penalised for it;

(c) Discounting the fact that the Claimant needed to eat at an earlier time one day as set out at paragraph 32 of his GoCs.

8.8 If so, was there a prospect that such adjustments which the Respondent failed to make would have removed the substantial disadvantage suffered by the Claimant?

223. The Tribunal considered, for the purposes of both the indirect disability discrimination and the failure to make reasonable adjustment complaints, whether

(a) The requirement for employee to follow procedures.

(b) The requirement for employees to meet deadlines.

(c) The requirement for employees to follow lunch break times.

Put the Claimant at a particular, or a substantial, disadvantage because of his disability.

224. The Tribunal has already found that there was no medical evidence to support a link between any difficulties the Claimant had in performing his role and his disability. The Tribunal has also already found that the Claimant's failure to follow instructions did not arise from his disability. In reality, the Claimant's failure to follow procedures arose because he simply elected not to do so, because he considered his own method was better.

225. Likewise, there was no medical evidence to support a link between his disability and failure to follow deadlines. On the balance of probabilities, the Tribunal concluded that the Claimant was put at any disadvantage by the requirement for employees to meet deadlines.

226. There was no medical evidence to support the Claimant's assertion that his feeling of dizziness was linked to his depression and anxiety. The Tribunal did not accept, simply on the basis of the Claimant's assertion, that his dizziness was caused by depression and anxiety, whether because of irregular meal times or otherwise. On the evidence, on one occasion, the Claimant had had 2 breaks for "lunch" – once at 11.00 and another later in the day. This double lunch appeared to be an isolated incident. It did not support a finding that the Claimant's anxiety and depression led, generally, to dizziness, and a need for repeated breaks.

227. Given that the Claimant was not put at any substantial or particular disadvantage by the alleged PCPs, his claims for indirect disability discrimination and failure to make reasonable adjustments all fail.

Conclusion

228. All the Claimant's claims fail. There will not be a remedy hearing.

Employment Judge **Brown**

Date: 22 May 2023

SENT to the PARTIES ON

22/05/2023

FOR THE TRIBUNAL OFFICE